Motive Testimony and a Civil Disobedience Justification

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INTRODUCTION

The criminal justice system has responded inadequately to the moral and political significance of civil disobedience in our society. As civil disobedients continue to be prosecuted for crimes which they commit in response to a conflict between binding legal and moral obligation, the enforcement of the law confronts a fundamental tenet of our society: freedom of conscience. In this article, I propose one solution to the problem of how to respond to the difference between civil disobedients and ordinary criminals. By amending the Model Penal Code and the Federal Rules of Evidence we would allow defendants in criminal trials to admit, in some limited circumstances, testimony relevant to the motive for their actions. This amendment
gives the jury or judge the ability to assess the culpability of the defendant in light of those characteristics which distinguish her from an ordinary criminal.

In Part I of this article, I will discuss some of the highlights of the robust history of civil disobedience in this country. Against the backdrop of that history, I will then explore the nature of legal duty and moral obligation in order to arrive at a suitable definition of civil disobedience. Part I will conclude with a discussion of some morally significant distinctions between the civil disobedient and other people who break laws.

In Part II of this article, I will examine various suggestions for how the judiciary ought to respond to civil disobedients. After arguing that none of these proposals are adequate, I will recommend the development of a Civil Disobedience Justification for one class of defendants. Two examples of civil disobedience will demonstrate why motive testimony has not been allowed in the past, and five of the most common problems associated with the use of motive testimony will be explored. In light of these problems, I present a proposed amendment to the Model Penal Code and Federal Rules of Evidence allowing the use of motive testimony and providing the qualifying provisions necessary to accommodate the risks involved. I conclude by responding to those problems and suggest that the admission of motive testimony as part of a Civil Disobedience Justification can be tailored to satisfy these objections.

I. Disobedience—History, Duty and a Definition

A. Disobedience in America

From the Boston Tea Party to the Catonsville Nine, from the Underground Railroad to Operation Rescue, when legal remedies have failed or have been perceived as bound to fail, Americans have voiced their opposition to law through some form of civil disobedience. Despite its long presence within the history of the United States, civil disobedience, as a concept, has eluded definition by the criminal law.

1. See, e.g., the abolitionist clergyman, Theodore Parker, who said in opposition to the Mexican War:

   . . . We are a rebellious nation; our whole history is treason; our blood was attainted before we were born; our creeds are infidelity to the mother church; our constitution treason to our fatherland. What of that? Though all the governors in the world bid us commit treason against man, and set the example, let us never submit. Let God only be a master to control our conscience.

   Quoted in M. Bassiouni, Law of Dissent and Riots 155 (1971).
Because this country was born of open defiance of the law and because principled violation of legal obligations has continued until this day, it should come as some surprise that our criminal justice system lacks a definition of civil disobedience which distinguishes those who engage in such acts from other people who violate the law. In the second part of this section, I will show that there are strong analytical reasons for making such a distinction and for seeing our jurisprudence to date as inadequate to the task. Before analyzing the requirements of obedience and disobedience, I will sketch out, in brief, the history of civil disobedience in this country. That history will describe some of the important contributions civil disobedience has made to the dialectic of American political life by concentrating on seven related but distinct periods of its use in America.

I. Pre-Revolution—Religious Toleration

The history of American civil disobedience begins for all practical purposes with resistance to religious persecution imported from England and the Continent. Later, conscience-based objection to specific laws would become the norm. To establish the rights of individual conscience, minority religious groups first had to gain the foothold of toleration. In the multi-ethnic and multi-religious colonies, toleration did not come easily.

Within each of the new colonies one religious group was generally prominent. As a result, the Tocquevillian conflict between majority and minority groups was born. This conflict informs all the civil disobedience which followed in America. The intimacy of the church-state relationship in the colonial period made predominantly religious confrontations into civil questions.

The colonies can be divided into four types: first, the "free colonies" which never had state churches, Rhode Island, Pennsylvania, Delaware, and New Jersey; second, what Hofstadter calls the "vacant establishments" where the Anglican church was established by law but where Anglicans did not represent a significant enough majority of the population to exercise control, New York, Maryland, the Carolinas, and Georgia; third, Virginia, where the Anglican church held substantial control and acted on it; and finally, Puritan Massachusetts and Con-

3. See, e.g., A. TOCQUEVILLE, DEMOCRACY IN AMERICA 246-76 (J.P. Mayer ed. 1969) (Chapters Seven and Eight).
necticut. Note first that the English, Dutch, French, and Spanish who settled this land did not set out to establish a regime of toleration. The colonies were an export operation. "[P]ower, profits, and internal unity" were priority goals; evangelization was not. Because much of the public protest was against the governments of the fourth group, Massachusetts and Connecticut, I will focus on disobedience in those territories.

Quakers faced stiff opposition in Massachusetts. Quakers objected to restrictions on their right to worship, to hold office, and to preach. They also refused to pay taxes used for military purposes. They, and later Baptists as well, were executed, banished, or subject to corporal punishment. The severe punishments they suffered attracted much public attention and eventually resulted in less repressive laws.

Civil disobedience in America began as the colonists struggled to adapt to religious pluralism and grew to accept the concept of freedom of conscience. From the challenge of the Quakers the colonists learned that it was indeed possible to vindicate the claims of individual conscience without undermining the stability of civil government. The American insistence on the separation of church and state began.

2. Revolution—E Pluribus Unum

The Revolution of 1776 may seem an improper place to discuss the phenomenon of civil disobedience in America. I include it in this brief history because one of the reasons for not accepting the validity of civil disobedience as an expression of social protest has been the fear of revolution or general lawlessness. The Revolution and the protests which preceded it

5. Id. at 189.
6. Id. at 182.
7. See generally S. Lynd, Nonviolence in America: A Documentary History xvi-xiii and 5-6 (1966). See also D. Weber, supra note 2, at 19.
8. R. Hofstadter, supra note 4, at 193.
10. See id. at 20.
11. R. Hofstadter, supra note 4, at 182.
12. A. Fortas, Concerning Dissent and Civil Disobedience 47-61 (1968). This claim has been contested. See, e.g., C. Whittaker & W. Coffin, Law, Order and Civil Disobedience 31 (1967). The difference between civil disobedience and revolution is complicated. The point of my efforts here is not to exhaust the sophisticated distinctions that need to be made but only to introduce what I see as the fundamental difference between the two species of civil protest. For a comprehensive treatment of the subject, see H. Arendt, On Revolution (1963).
provide me with a good opportunity to distinguish civil disobedience from revolution.

The Revolution in America in 1776 found philosophical foundation in the social contract theorists and seventeenth-century English revolutionaries Milton, Sidney, and Locke.\textsuperscript{13} The Colonists looked back on the English Revolution of 1688-89 and the unwritten constitution that followed to find support for their fundamental presupposition: both the ruler and the ruled were subject to the law.\textsuperscript{14} They sought a return, a revolution, to traditional practices of British rule. Only when they knew that the return they sought was impossible did they seek in earnest a complete break. The Stamp Act and other taxation efforts were the catalyst for that break.

The Stamp Act went into effect on March 22, 1765.\textsuperscript{15} Colonial petitions against the Act had been ignored by Parliament. Public frustration grew into public action. The first demonstrations against the Stamp Act occurred in August of 1765. On the fourteenth, Bostonians paraded an effigy of the future stamp distributor around the city before they burned it; they leveled the building that was to be his office; and they attacked his home. The stampman quit the next day. They demonstrated again on the twenty-sixth, but that action was more a riot than a protest. In later weeks and months, the action on the fourteenth would be praised for its restraint and the events of the twenty-sixth would be criticized for their recklessness and damage to personal property. These demonstrators represented oddly wedded social groups in the stratified colonies. The uprisings were started by "a social club of respectable merchants and tradesmen"\textsuperscript{16} and were finished by mobs.

These demonstrations and the similar protests in other colonies which followed became the models for resistance throughout the period that preceded the revolution. Failed constitutional efforts were followed by demonstrations, organization, and boycotts. Eventually the resistance to British efforts

\textsuperscript{13} P. MAIER, FROM RESISTANCE TO REVOLUTION 27 (1973).

\textsuperscript{14} Id. at 29.

\textsuperscript{15} The act placed stamp duties upon "colonial legal documents, papers, almanacs, newspapers, and newspaper advertisements to help finance British military expenses in America. The duties or taxes had to be paid in gold or silver, and violations of the act could be tried in admiralty as well as common law courts." M. JENSEN, THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION, 1763-1776 65 (1968) (\textit{cited in} P. MAIER, supra note 13, at 51).

\textsuperscript{16} Id. at 58.
to restrict American trade, to extract taxes at unbearable levels, and to continue managerial control from afar encouraged the colonists to organize. The Intercolonial Sons of Liberty were formed. The Sons of Liberty began with men from the upper and middle ranks of colonial society but soon broadened to include all social and economic subgroups.¹⁷

The Sons of Liberty took on the Stamp Act and its repeal as their special charge. When it looked as if the British might seek to enforce the Stamp Act with force, the Sons of Liberty promised to oppose force with force.¹⁸ Since force was not widespread at this time, their main action was to encourage people to refuse to pay their Stamp Act dues. Throughout this early period, the Sons of Liberty insisted that they intended to uphold, not overturn, the established government.¹⁹ When the Stamp Act was repealed and the Acts of Trade with America were reconsidered the Sons of Liberty movement dissolved.²⁰

The opposition to the Stamp Act and the Sons of Liberty movement represent the first widespread use in North America of political protest as a means for people without political influence to induce social change. Relations with the British continued to deteriorate. The Townsend Revenue Act, the New York Restraining Act, the Quartering Act, the Boston Massacre, the defeat of the Regulators, and the impotency of petitioning from the Baltimore Committee of Correspondence all exacerbated the colonial feelings of oppression. At some point, probably just after the new English Parliament opened in December of 1774, the protestors of the late sixties and early seventies became interested not only in removing odious tax burdens, but also in liberating the colonies from the despotism of George the Third.

This change marks the difference between civil disobedience and revolution. Even though the disobedience of the colonists had not always been "civil," it had not, previous to 1774 or there about, sought to throw off the existing government. Revolution is concerned with liberation and freedom, not reform.²¹ In the minds of the American Revolutionaries, all the organs of their government, the King, Parliament, and their ministers, had systematically violated the constitution and laws. The social contract was broken and their rulers had forfeited

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¹⁷. P. Maier, supra note 13, at 86-88.
¹⁸. Id. at 94.
¹⁹. Id. at 96. See also H. Arendt, supra note 12, at 13-52.
²⁰. P. Maier, supra note 13, at 111.
their authority. Colonists, oppressed by what they had considered the "freest government in the world," became revolutionaries when they physically demonstrated their freedom by ousting the British occupying troops. The transformation of colonial actions helps to illuminate the important distinction between civil disobedience and revolution. Revolutionaries contest the legitimacy of a government; civil disobedience may be part of a revolutionary campaign, but civil disobedients generally recognize that a legitimate government is acting, albeit illegitimately.

From this point forward my comments will address only civil disobedience. Therefore, when I use this term I, by definition, exclude other forms of social protest which claim as their aim the overthrow of the government. The sections which follow will be more brief and will be used to describe some of the instances of civil disobedience in American history, the theories which supported them, and the benefits gained from them.

3. Slavery—All Men Are Created Equal

Slavery and its residual effects have caused the greatest political rift in American history. No political question has been so divisive and no issue has brought this country as close to dissolution. Though more than one hundred years have passed since slavery was abolished, America is not yet finished with its racial problems. "Slavery was but one aspect of a race and color problem that is still far from solution here, or anywhere."24

Any discussion of civil disobedience in America would be incomplete without including both the resistance to the phenomenon of slavery and the philosophy of Henry Thoreau. Fortunately, the two complement one another. Thoreau provided theoretical expression for the spirit that resisted the slave trade. The Underground Railroad was one of that spirit's overt manifestations. I will address each in turn.

Henry Thoreau, in On the Duty of Civil Disobedience, claimed that, "All men recognize the right of revolution; that is, the right to refuse allegiance to and to resist the government, when its tyranny or its inefficiency are great and unendurable. But

22. P. MAIER, supra note 13, at 269.
23. I will present a formal definition of civil disobedience later. See text accompanying notes 89-94 infra.
almost all say that such is not the case now." Thoreau drew attention to the tension between the majority who want to preserve the status quo and citizens who disobey the law to inspire change. Most people agree that citizens appropriately disobey laws they perceive as unjust. Nonetheless most people also disapprove of the civil disobedience they observe in their time. By definition, civil disobedience, then, cuts against the grain of societal approval.

Thoreau believed that the right, indeed the duty, to disobey unjust laws exists within the relationship between citizens and governments. He emphasized the primacy of the individual conscience and personal freedom as a prerequisite for human flourishing. As a result, he concluded that the individual’s responsibility was first to his own beliefs and then to the requirements of the state. Thoreau is significant because he synthesized two previously separate strands of thought: the Christian emphasis on following the mandates of conscience and the Lockean justification of revolution which undergirded the resistance to and eventual break from England.

Individual citizens, as well as Africans forcibly transported, held, and oppressed here, questioned the legitimacy of the government that made the slave trade possible. Thoreau distinguished himself from “no government men.” He appealed for a better government, one that would command respect. He resisted recognizing “that political organization as my government which is the slave’s government also.” From William Lloyd Garrison, who demanded immediate emancipation or secession of the free states, to Wendell Phillips, who used his oratorical abilities to impress listeners with the shame of slavery, the abolitionists represented a wide swath of the socioeconomic groups of the north. They too joined Thoreau’s cry for a better government.

In time, slaves and sympathetic free people began both open and covert efforts to end the slave system. The most famous of these efforts was called the Underground Railroad. It operated simply enough. Slaves hid in the woods or other

25. H. Thoreau, Walden and Civil Disobedience 225 (1960) (Thoreau’s essay on civil disobedience was first published in 1849).
26. “There are thousands who are in opinion opposed to slavery and to the war, who yet in effect do nothing to put an end to them; who, esteeming themselves children of Washington and Franklin, sit down with their hands in their pockets, and say that they know not what to do, and do nothing....” H. Thoreau, id. at 226 (emphasis in original).
27. Id. at 223 (emphasis in original).
28. Id. at 224 (emphasis in original).
cover near their master's house, and then, when possible, followed the North Star to the free states. There, friendly northerners hid them during the day and transported them undercover or assisted them in getting to another safe house. Quakers sheltered and assisted many runaway slaves, as did former slaves and free blacks.\textsuperscript{29} Slave catchers roamed the north in search of fugitive slaves, making the trip perilous.

This type of covert resistance was not the revolution of one envisioned by Thoreau nor was it a strict form of civil disobedience, but it too captured hold of those two previously separate strands joined by Thoreau—primacy of individual conscience and Lockean rights theory. The Quakers, free blacks, and other northerners who conducted the Underground Railroad assumed the one obligation Thoreau claimed able to accept: to do at any time what they thought right.\textsuperscript{30}

Through the public actions of the abolitionist speakers and politicians, public opinion turned against the atrocity of slavery. Through the quiet action of the Underground Railroad, the legal order which supported slavery gradually degenerated. After a long and bloody conflict, Lincoln's goal of preserving the Union was achieved and slavery ended.

The last two examples I described began in resistance and ended in revolution or civil war. Civil disobedience has always walked a precarious line on the other side of which lies violence. For this reason, some critics of civil disobedience as a form of social protest have decried its utility.\textsuperscript{31} Thoreau responded by asking, "Why does [the government] not cherish its wise minority? ... Why does it not encourage its citizens to be on the alert to point out its faults, and do better than it would have them?"\textsuperscript{32} His question is the genesis for this article. In the remaining sections I will describe some of the significant civil disobedient movements of this century. For the most part, they were conducted without violence. At least, violence was not the focus of the actions and there has never again been a serious threat of civil war in this country.

\textsuperscript{29} Harriet Tubman escaped and returned to the South to help hundreds of slaves find their way to the free north. See 2 S.E. MORISON, \textit{supra} note 24, at 277. She was also not the only black woman involved in emancipating blacks and aiding the North in the war. See H. ZINN, \textit{A People's History of the United States} 188 (1980).

\textsuperscript{30} H. THOREAU, \textit{supra} note 25, at 223.

\textsuperscript{31} See, e.g., A. FORTAS, \textit{supra} note 12.

\textsuperscript{32} H. THOREAU, \textit{supra} note 25, at 229.
4. Women—All People Are Created Equal

Civil Disobedience in the twentieth century has been different from what it was in the eighteenth and nineteenth century. The legitimacy of the form of government and the existing ruling elite has not been seriously questioned by the prototypical civil disobedient. I do not mean to imply that the challenges have been less significant—they have not—but they have been more directly focused on righting injustices in a generally just system.

The struggle for women's rights represents that type of challenge I have been describing. Women have used the full means of political action available to them (running for public office, acquiring increased economic independence, engaging in protest actions, and educating society at large) to try to improve their situation in society. Their efforts to gain independence and political identity began as part of the abolitionist movement. Advocates of freedom for blacks, such as William Garrison, included women in their movement early on. The women's suffrage movement began in the 1840s and ended in 1920 with the passage of the nineteenth amendment.

For the purposes of this article, the suffrage movement for women is significant because it both represents the union of the two traditions Thoreau joined and portended the style of disobedience that has become typical in the twentieth century. Lucretia Mott drew upon her Quaker belief in the equality of the sexes and its tradition of opposition to unjust laws to respond to the oppression she and other women experienced when speaking out on social issues.

In July of 1848 on a trip in upstate New York, Mott and Elizabeth Cady Stanton had the idea of a convention to discuss the subject of women's rights. The resulting "Declaration of Sentiments and Resolutions of the First Women's Rights Con-

33. S. Lynd, supra note 7, at 160. Even Lincoln, known as a moderate conservative, included women in his plans for reelection as an Illinois legislator in 1836. He said, "I go for all sharing the privileges of government who assist in bearing its burdens. Consequently I go for admitting all whites to the right of suffrage who pay taxes or bear arms (by no means excluding females)." See R. Hofstadter, supra note 4, at 128. See also 2 S.E. Morison, supra note 24, at 279.

34. 3 S.E. Morison, The Oxford History of the American People 237 (1965). Women have been, both before and after the nineteenth amendment, active in civil disobedience and political resistance in this country. I do not mean to imply either that their special struggles are over or that they have not been involved. Here I only address suffrage.
"Convention" adopted Jeffersonian natural rights language. The Declaration began by harkening back to common origins: "When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied. . . ." The resolutions which followed adopted plain natural law foundations which would be heard later in the race conflicts of the sixties.

After 1848, the women's movement became more demonstrative. In 1872 Susan B. Anthony organized women to register and vote illegally under the theory that the language of the fourteenth amendment already entitled them to the right to vote. She was convicted but refused to pay the fine assessed her. About the same time, Abbey and Julia Smith resisted paying tax assessments increased against women because they were barred from participating in the decisions against them.

In the early years of this century, women were active also in protests against the First World War. They used traditional methods of persuasion including petitions, lobbying, and writing. They also pressed the new Wilson administration to pass the National Suffrage Amendment. When those efforts failed and Wilson had already been elected for a second term, more militant feminists, led by Alice Paul, took to the streets to begin an extended picket of the White House and the seemingly ambivalent Wilson. When the women were arrested and jailed for "obstructing the traffic," they undertook hunger strikes to draw attention and sympathy to their plight. The news of their detention and subsequent force feedings attracted national

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35. See D. Weber, supra note 2, at 180-84.
36. Id. at 180.
37. Resolved, That such laws as conflict, in any way, with the true and substantial happiness of woman, are contrary to the great precept of nature and of no validity, for this is "superior in obligation to any other."
   Resolved, That all laws which prevent woman from occupying such a station in society as her conscience shall dictate, or which place her in a position inferior to that of man, are contrary to the great precept of nature, and therefore of no force or authority. Id. at 182-83.
38. Her argument appealed to the privileges or immunities clause of the amendment, which provides that "[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." See D. Weber, supra note 2, at 184-85. Her directed verdict in that case may have been the last time such a verdict was rendered in a criminal case. See United States v. Anthony, 24 F.Cas. 829 (N.D. New York 1873).
41. Id. at 198.
attention that ultimately helped the passage of the nineteenth amendment.\textsuperscript{42}

These pioneers were some of the first women leaders in this country. Some of their protests broke the law and some did not, but they merit attention in this history nonetheless. Their style of protest is a style that has been replicated throughout the years that have followed: 1) they tied their claims of oppression to violations of the fundamental concepts of freedom and liberty as well as to claims of moral injustice, 2) they first pursued legal means of voicing their concerns and empowering their voices, and 3) when those methods proved unsuccessful, they violated unjust laws or laws in order to demonstrate the injustice they suffered to the community at large.

5. Labor—Is the Government a Friend or Foe?

The kinds of protests that typified the labor movement in this country are not ordinarily the type of actions that can be classified as civil disobedience.\textsuperscript{43} For one thing, the "labor movement," the goals of which included better working conditions, better wages, child labor regulation, safety and health protection, and uniform working hours, was not a single campaign. Over many years a series of episodic disputes resulted in increased governmental action. America's industrialization after the Civil War meant that machines could more productively and less expensively duplicate the human workforce.\textsuperscript{44} For the next seventy years, until the passage of a long string of government regulations,\textsuperscript{45} American workers struggled to assert standards of human decency within the current of capitalism given free reign.

\begin{footnotesize}
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\item 42. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of sex." U.S. Const. amend. XIX, § 1.
\item 43. In this regard I acknowledge that the violence associated with the labor movement was initiated by both sides. To the extent that workers acted violently, I believe that their actions were less "civilly" disobedient and more revolutionary. The presence of some violence, however, does not in my mind transform a generally non-violent movement into a revolution. This case is special also, because many of the disputes were with owners or managers and not with the state directly. Even so the state that allowed the gross abuse of the rights of workers was also, indirectly, imputed.
\item 44. H. Zinn, supra note 29, at 247-48.
\item 45. The Clayton Act, the Sherman Anti-Trust Act, the La Follette Seaman's Act, the Adamson Act, the National Labor Relations Act, and the creation of the Federal Trade Commission. See R. Hofstadter, The American Political Tradition 334-35 (1973).
\end{itemize}
\end{footnotesize}
Ostensibly, most of those disputes were with private employers and not with the government. What was really at issue, however, was whether the government could or should regulate employee—employer relationships. When employee demonstrations were broken up or when sit-ins were forcibly cleared, the government acted to support property and contract rights against the human dignity claims of labor. In so far as labor was also protesting the governmental protection of a system they saw as oppressive, the actions of the labor movement can in fact be seen as a form of civil disobedience.

Finally, the labor movement initiated the style and organizational structure of the civil rights demonstrations to follow later. Labor protests, such as the sit-in strikes at twenty General Motors plants in 1936 and 1937, involved hundreds of thousands of people and lasted for months. The strikes were highly organized, with the union acting as the source of command. By using the overwhelming force of numbers, combined with a unified voice speaking through one mouthpiece, the workers were successful in forcing management to respond to their complaints. Labor also employed what Big Bill Haywood called “direct action” in the form of the general strike. Workers committed to support the actions of other workers in other unions; broad cross-sections of the workforce protested conditions in one industry. The practice of “filling the jails,” later utilized by the Civil Rights movement began with this cross-spectrum of workers accepting incarceration to demonstrate their resolve.

6. Civil Rights—Equal Not Separate

I will resist the temptation to spend too much time describing the events of the Civil Rights movement of the 1960s. Those days are too recent and the details still too clear for my brief statement of what happened to be of much use.

46. See the Industrial Workers of the World Preamble:

There can be no peace so long as hunger and want are found among millions of the working people, and the few who make up the employing class have all the good things of life.

Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth, and the machinery of production, and abolish the wage system.

Quoted in S. Lynd, supra note 7, at 240-41.

47. For one account of the organization and methods of those strikes, see S. Lynd, supra note 7, at 241-70.
Suffice it to say that the Civil Rights movement built on the protest movements that preceded it.

The Student Nonviolent Coordinating Committee\(^{48}\) adopted the direct action tactics of the Wobblies before them. They filled the jails with people willing to demonstrate publicly and to suffer personally so that they might expose the injustice of the system.\(^{49}\) Sit-ins, hunger strikes, parades, pickets, demonstrations, registration of black voters, public appeals, passive resistance to abusive police forces, and boycotts were all employed in this dramatic effort to make the freedom of the fourteenth amendment real. The names of the events have taken on meaning and significance of their own: *Brown v. Board of Education*,\(^{50}\) the Montgomery bus boycott,\(^{51}\) the lunch counter sit-ins,\(^{52}\) the Freedom Rides,\(^{53}\) the Mississippi Summer,\(^{54}\) the Birmingham Manifesto,\(^{55}\) the Letter from a Birmingham Jail,\(^{56}\) the March on Washington.\(^{57}\) Not all of the events that made up the Civil Rights movement would qualify as civil disobedience; neither the voter registration efforts nor the violence blacks returned to police would satisfy the terms of civil disobedience action. Nevertheless, there can be no doubt that the movement as a whole is a great example of the power of civil disobedience to change unjust social orders.

The Civil Rights movement is also important because it brought forth the most prominent American civil disobedience theorist since Thoreau. Drawing upon the Natural Law tradition of St. Thomas Aquinas and the political philosophy of Mahatma Gandhi (who was in turn influenced by Thoreau), the Reverend Martin Luther King, Jr. based his critique of the American political system upon the nature of unjust laws and the proper response to their mandates. All around him he saw that Black Americans were not treated equally with White Americans. Unjust laws supported that inequality and so rendered themselves illegitimate. On the subject of just disobedien-

\(^{48}\) See their Statement of Purpose, quoted in S. Lynd, *supra* note 7, at 398-99.

\(^{49}\) See Thomas G. Jailer’s *Jailed-In*, in S. Lynd, *supra* note 7, at 399-415.

\(^{50}\) 347 U.S. 483 (1954).

\(^{51}\) Symbolically begun in 1955 by a forty-three year old seamstress, Rosa Parks, who refused to move to the back of the bus. See H. Zinn, *supra* note 29, at 442.

\(^{52}\) Id. at 444.


\(^{55}\) See S. Lynd, *supra* note 7, at 458-60.

\(^{56}\) See id. at 461-81.

ence to those laws, he said, "One who breaks an unjust law must do it openly, lovingly, . . . and with a willingness to accept the penalty."\(^{58}\) A citizen confronted with a law that conflicts with basic standards of human dignity and violates the mandate of conscience, can, indeed should, refuse to obey that law. In organizing a movement of civil disobedience, King called for four basic steps: 1) collecting the facts, 2) negotiation, 3) self-purification, and 4) direct action.\(^{59}\) All were important and necessary steps to validate the violation of the law. Like the other civil disobeidients before him, King sought to draw attention to the injustice of the political system through direct, but non-violent, defiance of or refusal to comply with unjust laws.

7. Anti-Vietnam—The Government Can't Hear Me

Protests to conditions in Vietnam under the United States-established regime of Ngo Dnh Diem began even before the United States entered the war. In June of 1963, a Buddhist monk sat down in the square in Saigon and set himself on fire to dramatize his opposition to the Diem regime.\(^{60}\) Other monks committed suicide as well. After the United States overtly joined the war against communist North Vietnam, Americans Norman Morrison and Alice Herz similarly lit themselves on fire to protest the war.\(^{61}\) The dramatic nature of these protests underscored the depth of their opposition to the United States actions in Southeast Asia.

The civil disobedience associated with the anti-war movement was similar in kind to the disobedience of earlier days. It is noted for the involvement of university students\(^{62}\) and members of the clergy,\(^{63}\) but thousands of other Americans joined in the protests. Black soldiers especially, who represented a disproportionate number of men fighting in Vietnam and who also experienced army racism, grew disenchanted with a war that was not their own and that they increasingly saw as

\(^{58}\) King, Letter from a Birmingham Jail, in S. Lynd, supra note 7, at 469 (emphasis in original).

\(^{59}\) Id. at 463.

\(^{60}\) H. Zinn, supra note 29, at 464. Note that as this article was being completed a similar tragedy occurred in Amherst, Massachusetts as Gregory Levy set himself on fire to protest the war in the Persian Gulf.

\(^{61}\) On the second of November, 1965, Morrison, a father of three, set himself on fire outside Defense Secretary Robert McNamara's window. Later that year, Alice Herz, age eighty-two, committed suicide in Detroit to protest the horrors going on in Indochina. Id. at 476-77.

\(^{62}\) Id. at 481-82.

\(^{63}\) Id. at 479-81.
unjust. In marches, demonstrations, responses to polls, and letters to newspapers Americans voiced their dissatisfaction with a war that many people believed the United States should not be fighting.

The protests against the war in Vietnam did not introduce any radically different tactics into the performance of civil disobedience. They are important because they represent a recent and widespread series of protests, not against a specific unjust law, but against a particular government action. That action directly involved only the executive branch, but insofar as the decisions of the executive branch were supported economically and politically by Congress and legally by the Supreme Court, it involved the whole government. Many citizens perceived themselves as unable to affect the decisions of a "representative" government far removed from their voices. The story of the Vietnam war, for those who used public protest as a means of expressing their horror at the actions of their government, is a story of frustration, but also of action.

I include the anti-war movement at the close of my brief history of civil disobedience in America also because it allows me to introduce two acts of civil disobedience which will be discussed later in this article. The Berrigan brothers, as they are both affectionately and critically know, were two of many members of the Catholic clergy who protested the war in Vietnam. They attracted national attention first in the fall of 1967 when Fr. Philip Berrigan, with three other men, poured blood (including their own) over the draft records of the draft board in Baltimore, Maryland. They waited to be arrested; they were tried, convicted and sentenced to two to six years in prison. In May of 1968, Philip Berrigan, who was out on bail, and his brother Daniel, who was also a priest, entered the office of the draft board in Catonsville Maryland with seven other people. They had previously informed the press about what they intended to do, and in the presence of onlookers, they removed the draft records, doused them with napalm, and lit them on fire. Their act, their conviction, and later efforts by the government to imprison them made them famous. They became known as the Catonsville Nine.

While in prison, Fr. Dan Berrigan wrote the following:

64. Id. at 485-88.
65. See text accompanying notes 124-43 infra.
66. H. Zinn, supra note 29, at 479-80. See also The Berrigans (W.V. Casey & P. Nobile eds. 1971).
Our apologies, good friends, for the fracture of good order, the burning of paper instead of children, the angering of the orderlies in the front parlor of the channel house. We could not, so help us God, do otherwise. . . . We say: killing is disorder, life and gentleness and community and unselfishness is the only order we recognize. For the sake of that order, we risk our liberty, our good name. The time is past when good men can remain silent, when obedience can segregate men from public risk, when the poor can die without defense.67

I conclude this history with the Berrigans because their act of disobedience typifies the type of civil disobedience I would consider justifiable. I worry a bit about the destruction of property, but in these instances it was limited enough and necessary enough to be acceptable. I end their story with this quotation because it gives voice to the conflict that most true civil disobedients experience and the interests that they balance in deciding to go forward with their action. I will return to the legal story of their prosecution because it exemplifies the inadequacies of our current jurisprudence.

8. Conclusions From History

I draw attention to the existence of civil disobedience in this history because those events should inform our response to civil disobedience today. Repeating the stories is important. We must not forget the inequities of the past; they remind us of the suffering endured to create the more just society we enjoy today. Civil disobedience has not ended. Only the people involved and the causes have changed. The Intercolonial Sons of Liberty, the Underground Railroad, and the Wobblies have been replaced today by groups known as Operation Rescue, the Plowshares, Act Up, the Sanctuary Movement, Earth First!, and Greenpeace. Like their predecessors, they and others protest what they perceive to be social injustices. Because civil disobedience has been an important catalyst for righting grave injustices in our past, we should be predisposed to provide an adequate legal response to its use, in the proper circumstances, today.68

Before I can make my amendment to improve the Model Penal Code, I should be clear about what civil disobedience is. I will show that, like the historical uses and punishments of civil disobedience described in the previous pages, the concept of

67. H. Zinn, supra note 29, at 479.
civil disobedience can be described in various ways. Before I venture into a detailed discussion of the definitional requirements for civil disobedience, however, I will describe the moral context in which the question of whether or not civil disobedience is justifiable arises. The definition of civil disobedience and the justification of its use are closely aligned, but must be distinguished. The section which follows will attempt to lay out the moral context in which civil disobedience can be justified; afterwards I will provide a definition of civil disobedience.

B. Duty and Obligation

I will restrict my comments on the conditions of political obligation to what I, echoing Rawls, shall call a nearly just democracy. By "nearly just democracy" I mean a society which, on the whole, attempts to realize the requirements of participatory government and which supports substantially just institutions. A society of this kind rightly requires certain responsibilities of its citizens and guarantees certain rights to them. By contrast, the relationship between citizens and the state, as well as the rights and responsibilities which result from that relationship, in a nonrepresentative or totalitarian state calls for a significantly different analysis of obligation to law (thus altering the nature and significance of civil disobedience). Even in a facially democratic state, such as South Africa, where the institutions of society work substantially to the detriment of a significant portion of the population, the relationship between the individual and the state may become so distorted that the restrictions on civil disobedience, which I will develop later, might become inoperative. Notice, however, that I begin with the rebuttable presupposition that, given the proper conditions, obedience is rightly expected of a citizen in a nearly just democracy.

Citizens engage in civil disobedience when they perceive a conflict between moral and legal obligation. Implicit in this statement is the belief that both moral and legal obligations

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69. Rawls states that "... a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just (or fair), that is, it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests." J. Rawls, A THEORY OF JUSTICE 111-12 (1971). These two conditions define when a citizen is subject to obligations imposed on him by the state. Unless these conditions exist, no duty to obey obtains.

70. Id. at 343.

71. See id. at 333-91.
exist, and that it is possible that these two obligations require contrary actions. Only if moral obligations can in some circumstances trump otherwise legitimate legal obligations is disobedience justifiable. In the section which follows, I focus on the sources and interaction between moral and legal obligation.

Persons incur moral obligation by virtue of being human.\[72\] Moral obligations are predicated upon respect for oneself and for others—for the physical integrity and personal dignity of both self and others, and upon the acceptance of self and others as moral beings. Moral obligations may be usefully broken down into two types.\[73\] Moral obligations of the first order include the prohibition against violating the physical integrity and personal dignity of another person through the use of force or fraud. First-order moral obligations also include those positive actions with respect to other people necessary to recognize and affirm their status as moral beings. Moral obligations of the second order require personal and social support of institutions that make realization of first order moral obligations possible. As a result, the state can generate second order moral obligations that are binding upon its citizens.

Legal obligations are incurred by virtue of participating in and receiving the benefits of a particular legal system.\[74\] Legal theorists have articulated a variety of reasons which support a duty to comply with legal obligations, but two main ideologies prevail today: the Natural Law tradition and the Modern Liberal tradition. Natural Law theorists view positive law as a product of reason devising coercive and facilitative legal regimes against a background of universally valid moral norms derived from human nature.\[75\] The prima facie obligation to

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72. The nature and origin of moral obligation has, of course, been the focus of much serious philosophical and theological reflection. A substantial discussion of the intricacies of that argument would involve resources and space beyond the purview of this article.

73. I am indebted to Dr. John H. Robinson, Associate Professor University of Notre Dame Law School, for making this distinction clear to me.

74. See J. Rawls, supra note 69, at 333-42 (1971). Note that this statement entails an extraordinarily complex discussion that is, again, beyond the scope of this article. To account fully for the nature and origin of this duty, one would have to examine the source of a duty that is, for most naturally-born citizens, not voluntarily chosen. To be meaningful, the duty to obey the law also must overcome some favorable consequences of not obeying. Further, the duty to obey must permit blame to be levied when the duty to obey the law is breached. For a comprehensive and sophisticated analysis of a prima facie obligation to obey the law, see K. Greenawalt, Conflicts of Morality and Law 159-203 (1987).

75. For example, John Finnis describes the "principles of natural law" as follows:
obey the law results from the duty to support institutions which promote human flourishing through cultivation of those norms. By supporting the development of the common good, the individual citizen also participates in the promotion of his own individual good. Modern Liberal jurisprudence, following Rawls, views the duty to obey the law as confluent with the duty "to support and to further just institutions." Combined with the principle of fairness, the duty to support just institutions generates the duties and obligations of citizenship. Thus, the Natural Law theorists and Modern Liberals both conclude that citizens have legitimate legal obligations to obey the law; our analysis of civil disobedience must focus upon the link or interaction between moral obligations and legal obligations. To the relationship between these two obligations I turn next.

Moral obligations differ from legal obligations, not only substantively, but also hierarchically; that is to say that moral obligations are sometimes superior to legal obligations. As a result, conflicts in duty can arise which require a person to choose to do what is morally obligatory in preference to what is legally obligatory. The interaction between obligations of different types requires an ordering of duties.

There is (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness . . . which . . . provide the criteria for distinguishing between . . . ways of acting that are morally right or morally wrong—thus enabling one to formulate (iii) a set of general moral standards.


76. For a more complete exposition of these ideas, see K. Greenawalt, supra note 74, at 161-62. See also C. Cohen, Civil Disobedience 105-20 (1971).

77. J. Rawls, supra note 69, at 334.

78. Rawls defines the principle of fairness as follows: "[A] person is under an obligation to do his part as specified by the rules of an institution whenever he has voluntarily accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests, provided that this institution is just or fair. . . ." Id. at 342-43.

79. Indeed some Natural Law theorists believe the obligatory character of a law ceases to exist when that law conflicts with moral norms. Joseph Raz, in criticizing Natural Law theorists, says that "natural lawyers can only judge a law as morally valid, that is, just, or morally invalid, i.e. wrong. They cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid in the only sense of validity they recognize." Raz, Kelsen's Theory of the Basic Norm, 19 Am. J. Juris. 94, 100 (1974).
When an act that would otherwise be morally permissible is legally proscribed (marginally exceeding the speed limit on a deserted highway, for example), the second-order moral obligation to support institutions which further justice is likely to require acquiescence to the legal demands. In the same way, an act that is legally permissible, but morally proscribed (e.g. revealing legally admissible evidence of the sexual history of a plaintiff that is substantially irrelevant to the issue of guilt in a sexual harassment suit)\(^8\) remains morally proscribed regardless of legal approval. These examples reveal that the permissible is superseded by the obligatory or absolute, whether legal or moral. In order for individuals to make peace with conflicting requirements, the permissible should ordinarily give way to the compulsory.

The true test of the rigor of legal obligation arises when legal obligations create affirmative obligations that conflict with moral prohibitions (e.g. school children are required to salute a flag in direct opposition to a religious mandate),\(^8\)1 or when moral obligations become legally prohibited (e.g. when Peyote-smoking Indians are not allowed to use mind altering drugs in religious ceremonies).\(^8\)2

In the last two instances, in the conflict between opposing obligation and prohibition, citizens rightly consider disobedience to legal duties and obligations. The moral obligations (or prohibitions) at issue must supersede the conflicting legal requirements for the actor to maintain integrity as a moral agent.\(^8\)3 Any disobedience actually undertaken must recognize and affirm the first and second order moral obligations applicable to the situation at hand.\(^8\)4 Notice that it is not enough that

\(^8\)3. “I think that we should be men first and subjects afterward.” Thoreau, Civil Disobedience, in S. LYND, supra note 7, at 60.
\(^8\)4. Robert Hall has said something similar: . . . [A]n act of civil disobedience may be considered justified when three conditions are satisfied: (a) the moral reasons favoring disobedience must outweigh the moral considerations in favor of obedience, (b) the agent must acknowledge and maintain his general moral obligation to obey the law and must view his disobedience as transcending this prima facie duty (civil disobedience is thus distinguished from rebellion and revolution), (c) the agent must acknowledge and maintain his general moral
a citizen consider a particular law obnoxious, or even "bad." For civil disobedience to be justified, a true conflict between opposing obligations must exist. Only when a citizen must opt for one sufficiently weighty obligation over another does the primacy of moral obligations outweigh the moral imperative of obeying the law. The truth of this claim has force whether a citizen is refusing to obey a law or actively violating one to motivate political change.

These types of conflicts are not mere academic theorizing; as I demonstrated previously, they have existed in the past and there is no reason to believe they will not arise again. The Quakers, Seventh Day Adventists, and other groups who were instrumental in developing and supporting the Underground Railroad believed that the legal requirement that they acquiesce in the operation of a legal system which made possible the enslavement of Africans forcibly transplanted here violated their moral duty to fellow beings. The Hungarian Freedom Fighters refused to recognize the validity of laws responsible for great injustice.\(^{85}\) And, the Civil Rights activists of the 1960s who engaged in sit-ins at public facilities from which they were legally barred were driven by moral beliefs that led them to conclude the existing law was fundamentally immoral and therefore invalid.\(^{86}\) As the history of disobedience in this country I laid out earlier showed, the list of groups who acted contrary to legal requirements which conflicted with the obligations of conscience is long.\(^{87}\) Not all of this disobedience to legal authority fit the definition of civil disobedience, but all of it challenged an established law or set of laws.

We have looked briefly into the sources of moral and legal obligation. The potential for their conflict, even in just political orders, is plain. History has demonstrated that conflict has, at times, existed and that some citizens who sought to respect the just aspects of the legal order have resorted to acts that conflicted with what they perceived to be unjust legal obligations in order to realize their more primary moral obligations. Because of the courage and witness to justice shared by civil

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\(^{85}\) See King, Letter from Birmingham City Jail, in S. Lynd, supra note 7, at 470 (1963).

\(^{86}\) For a very brief, but enlightening, description of one such group, see S. Lynd, supra note 7, at xl-xli.

\(^{87}\) See text accompanying notes 1-68 supra.
disobedients, grave acts of injustice were put to an end. Ronald Dworkin, in *Taking Rights Seriously*, summarized the relation between legal and moral duties:

... In a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even though he would like some of them changed. He owes that duty to his fellow citizens, who obey laws that they do not like, to his benefit. But this general duty cannot be an absolute duty, because even a society that is in principle just may produce unjust laws and policies, and a man has duties other than his duties to the State. A man must honour his duties to his God and to his conscience, and if these conflict with his duty to the State, then he is entitled, in the end, to do what he judges to be right.8

In these situations, where moral obligation supersedes existing legal obligation, disobedience can be justified. Indeed, in order to preserve his integrity as a moral being, the citizen may be compelled to disobey. His disobedience affirms his status as a moral agent and the priority of his superseding moral obligation.

The question of how the legal system should respond to those citizens who disobey its laws but do so as a result of overriding moral obligation has not been answered. I have argued that civil disobedience can, under the right conditions, be justified. The rest of this article will focus on disobedience in practice and how it affects the community. After defining "civil" disobedience and distinguishing it from "uncivil" disobedience (or ordinary crime), I will recommend changes in our approach to civil disobedience that should allow us to respond fairly to those citizens who practice it.

C. A Definition and Characteristics

Scholars have adopted a variety of definitions for civil disobedience.89 Gandhi's definition is perhaps the most simple: "Civil Disobedience is civil breach of unmoral statutory enact-

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88. R. Dworkin, *Taking Rights Seriously* 186 (1978). He goes on to say, "If he decides that he must break the law, however, then he must submit to the judgment and punishment that the State imposes, in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral obligation." Id.

89. See Bedau, *On Civil Disobedience*, 58 J. Phil. 653, 661 (1961); A. Fortas, supra note 12, at 49 (1968); C. Cohen, supra note 76, at 39; J. Rawls, supra note 69, at 364 (1971); R. Dworkin, supra note 68, at 104-16.
mens." As far as it goes, this definition would not be strongly contested. It does not, however, resolve the question of perspective. Whose morality is qualified to judge the justness of a law? No definition will answer that question. The answer is different depending on who asks the question. The preceding discussion makes clear that the conflict between moral and legal obligations can be resolved only by the individual. To be sure, it must be informed by other members of the community, but that assessment is ultimately an individual judgment.

The definition designed by John Rawls is helpful. He defines civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government." The elements of this definition are important.

"Public" disobedience means that people who violate the law for reasons of conscience must state or demonstrate the reason for their disobedience. By so doing they distinguish themselves from those who use force or fraud in unjust causes. They affirm their acceptance of the community and its legal order, as well as their disagreement with both. Their disobedience must reflect both the disagreement and their acceptance of the legal order. For this reason, it must be publicly accomplished. This requirement would exclude disobedience like the Underground Railroad, which succeeded because of its covert operation, from a strict definition of civil disobedience.

Nonviolence as a goal has been present in all the examples of civil disobedience presented earlier. That is not to say that all of those acts have been nonviolent, but that the goal of the action was not destruction of life or property. Civil disobedients should seek nonviolence to demonstrate that they assume the responsibility of community membership and act with the best interests of the community in mind.

Civilly disobedient acts are meant to be both conscientious and political. The political aspect of the act plays into the purpose. Civil disobedience is usually done "with the aim of bringing about a change in the law or policies of the government." These acts speak to the body politic. Ballots also speak to that body, but the electoral process rarely poses stark moral choices to the electorate. The majority, furthermore, is quite capable of being as wrong on moral matters as it can be on other issues. As our history has shown, the majority has often

91. J. Rawls, supra note 69, at 364.
been mistaken about what is right or just. Civil disobedience speaks to and past the bureaucracy: it speaks to the people in power, but calls them to reflect upon fundamental values. People who engage in civil disobedience believe that the majority has lost touch, in some way, with the values that bind our society together. Because it is a political act, done with the goal of benefitting the community, civil disobedience legitimizes both the government in power and the primacy of conscience.

Rawls provides several characteristics of civilly disobedient acts within his definition. To his list I would add “limited.” Civil disobedients must be careful to avoid the slippery slope into chaos that so troubled Justice Fortas.92 Their acts must be clearly focused to draw attention to the unjust law they protest, and must do no more. By limiting their disobedience in scope and duration, they achieve their goal and avoid encouraging general disorder. Myriad concerns about civil disobedience in modern democracies have lead writers other than Gandhi and Rawls to suggest characteristics or requirements for an act of disobedience to be considered “civil,” including that the civil disobedient:

1) have exhausted all available constitutional means (to demonstrate that law should be broken only when necessary),
2) be willing to face arrest and punishment (by which the dissenter acknowledges respect for the legal system),
3) have full knowledge of the law broken,
4) engage in only nonviolent expressions of dissent (note that this condition is especially controversial),93 and
5) make her disobedience public to acknowledge her respect for the interests of other people.94

I will keep these characteristics in mind as I continue my discussion and return to specific requirements for someone to fall into the category of civil disobedient.

D. Civil Disobedient or Criminal?

Modern penal codes in the United States contain no definition of civil disobedience. They do not distinguish civil disobedience from ordinary criminal acts. But those citizens who engage in civil disobedience are different from ordinary criminals. If they comply with the requirements listed above

92. A. Fortas, supra note 12.
93. See, e.g., K. Greenawalt, supra note 74, at 244-68.
94. See R. Hall, supra note 84, at 76-99.
for “just” disobedience, they distinguish themselves and their acts from criminals and criminal actions. Part of the difficulty in talking about this distinction is that few acts of disobedience actually meet the requirement of true conflict between opposing obligations; nevertheless, the distinction between civil disobedients and ordinary criminals should be accounted for in our criminal law.

The most significant difference between the civil disobedient and the criminal is that the civil disobedient does what she does not only to resolve the conflict between conflicting moral and legal obligations, but also to right what she perceives as an unjust political order. As a result, her action attempts to “support and to further just institutions.” She seeks to affirm both her first and second order moral obligations, despite conflicting legal obligations. The criminal, on the other hand, standardly does what she does out of self-interest and in violation of the respect citizens are required to show other persons and their interests. So, too, the person who vindicates his moral authority by attacking another, physically or otherwise, violates the respect required toward other human beings. The motives that lead these people to do outwardly similar acts are drastically different. This difference in motive requires different judicial treatment because it speaks directly to culpability. I will return to the significance of this difference shortly.

Civil disobedients tend to be people who demonstrate their respect for the legal system in other areas of their lives. They seek not to overthrown the political system as a whole, but to call it to task for failing to live up to foundational standards of justice. They are, in ideal, civically-minded people from whose participation society as a whole benefits.

Because modern penal codes in the United States fail to distinguish acts of civil disobedience from criminal acts, and because our jurisprudential history has not accounted for the moral context that leads someone to do civil disobedience, the response of the American judicial system to the presence of civil disobedience is inadequate. Those citizens who seek to redress injustices in legal and political structures and who find no recourse in the “legal” means the democratic process offers them, and those who believe that their duties to the state con-

95. See J. Rawls, supra note 69, at 334.
96. See A. Fortas, supra note 12, whose suspicion of civil disobedience and fear of its potentially de-stabilizing effect appear to have won the day.
lict with their duties to conscience, find themselves treated by the judicial system like ordinary criminals. This response is wholly inappropriate.

II. TOWARD A REASONED RESPONSE

A. A Potential Solution

1. Introduction

In the first part of this discussion I drew attention to the fact that the United States history is replete with examples of citizens who, when they felt the democratic process failing them, turned to disobedience of unjust legal obligations to fulfill the dictates of their conscience and their duty to support just institutions. I described some common characteristics of civil disobedience and noted that our judicial treatment of the violation of the penal code by civil disobedients does not reflect the distinctions in motivation between civil disobedients, on the one hand, and ordinary criminals and self-righteous assassins, on the other. In this section of this article, I propose to explore a possible solution to the inability of our judiciary to recognize the differences between the civil disobedient and the ordinary criminal. First, I will address several arguments that have been made for how the legal system should respond to civil disobedience. Those arguments have not been successful, and generally for good reasons.

Legal scholars recommend a variety of potential solutions to the problem of civil disobedience. Professor Ronald Dworkin has suggested that there might be good reasons for not prosecuting civil disobedients at all. Those reasons are not persuasive outside of the academy. Other suggestions have similarly lacked political feasibility. Professor Hugo Bedau has suggested that every law “have a rider to the effect that anyone who violates it on conscientious grounds shall be exempt from prosecution and penalty.”

Bedau fails to account for the prima facie second-order moral obligation to obey even the unjust laws of a nearly just state. He also draws precipitously close to allowing the government to proscribe conduct indirectly through how it defines “conscientious.” By failing to define clearly what types of

98. R. DWORKIN, supra note 88, at 207.
100. Modern conscientious objector laws are good examples of this phenomenon. By defining which conscience-based objections to armed service will be recognized and which will not, the imprimatur of the government for particular objections has come to mean the difference
MOTIVE TESTIMONY
disobedience would qualify as "conscientious," Bedau's suggestion offers little benefit to civil disobedients. Civil disobedients are worse off under a system that could allow for their protests to be prohibited covertly, through shifting definitions, than they are under a penal system such as the one currently existing in the United States.

I will not argue that all civil disobedience should be protected or that civil disobedience should be encouraged by the legal system. Our political system contains some safeguards that act as a check on the effect of an unjust majority. The Constitution is one such check. The Bill of Rights and due process requirements protect minority voices. The doctrine of separation of powers also allows the judiciary to support or condemn majoritarian legislative action. I argue that our legal system should adequately account for the moral significance of civil disobedience. The Constitution and judiciary have failed in the past (as we saw earlier), and during some of those failures acts of civil disobedience have helped to return our political system to the correct path.

Three main arguments have been used to deal with civil disobedience. They are: the Mistake of Law Defense, the Necessity Defense, and Jury Nullification. I will take up each of them in brief detail in the section which follows.

2. Mistake of Law Defense

Some traditional legal theorists have advocated the creation of a civil disobedience wing of a "mistake of law" defense. If the "mistake of law" defense was made available to civil disobedients, a defendant could avoid conviction even if a law met constitutional requirements. Though suggestions vary, one scholar argues that acquittal should result if a defendant could meet the following requirements:

1. That the defendant had the purpose, not of disobeying the law, but of demonstrating its unconstitutional character.

between life and death. I suggest that civil disobedients should not want the government, as an interested party, to make this determination.


102. This defense exonerates a defendant who reasonably believed that her acts were lawful. See Model Penal Code § 2.04(3) ("A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: [the actor] acts in reasonable reliance upon an official statement of the law. . .").
2. That there was legitimate doubt about the constitutionality of the law as perhaps evidenced by expert testimony about the state of professional opinion.

3. That there was no way short of disobedience by which the defendant could have obtained a determination of the validity of the law.

4. That the disobedience was nonviolent.\(^{103}\)

Though rooted in a concern for demonstrating respect for the legal order, this suggestion would not have reached injustices which were constitutionalized (like slavery, previous to 1865) and would also brush up against the reluctance of Federal courts to open themselves up to giving advisory opinions.

3. Necessity Defense

A substantial number of legal thinkers have urged an expansion of the use of the "necessity" defense\(^{104}\) to apply to civil disobedience.\(^{105}\) Courts have generally rejected the necessity defense as it might apply to civil disobedients.\(^{106}\) Judges view acts of disobedience and the defense of necessity offered to exonerate protestors with undue suspicion.\(^{107}\) They fear

\(^{103}\) Hughes, \textit{supra} note 101, at 5-6.

\(^{104}\) "The 'necessity defense' exonerates persons who engage in conduct that ordinarily amounts to a crime under the pressure of circumstances if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant's breach of the law. Successful use of the 'necessity defense' requires (a) that there is no third and legal alternative available, (b) that the harm to be prevented be imminent, and (c) that a direct, causal relationship be reasonably anticipated to exist between defendant's action and the avoidance of the harm." State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973) (emphasis added).


\(^{106}\) See United States v. Seward, 687 F.2d 1270 (10th Cir. 1982); Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); City of St. Louis v. Klocker, 637 S.W.2d 174 (Mo. Ct. App. 1982). See also the trespass conviction of Alex Luce in Morristown, New Jersey Municipal Court (Docket number C1771) reported in \textit{N.Y. Times}, April 30, 1991, § C, at 19.

\(^{107}\) "One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine
that chaos that would result if individual citizens could choose what laws they will follow and what laws they will not. Dworkin, however, argues that it does not follow logically, and there is no evidence that society will collapse if it tolerates not all, but some, disobedience. The fear of allowing limited defenses to civil disobedients is without foundation.

While necessity may be a helpful defense to some citizens who engage in civil disobedience, it lacks universal applicability. The requirements are too strict, the standards too narrow, for a necessity defense to answer to the moral conflict faced by some dissenters of conscience. When citizens protest a policy or law by engaging in demonstrations that violate a trespass statute, they do not expect that their action, by itself, will cause the reform of the law to which they object. They will, therefore, only very rarely meet the requirement that a rational person could have concluded that their disobedient action by itself would result in the change for which they hope.

4. Jury Nullification

Other scholars have recommended giving some backbone to the jury power to "nullify" the defendant's conviction by acquitting contrary to the clear law and facts. Currently, judges do not allow attorneys to inform jurors of their ability to rule contrary to the law and facts. Judges also will not allow policy is superior to democratic decision making. Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate." United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971). See also United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

108. R. DWORKIN, supra note 88, at 206.
109. See, e.g., United States v. Seward, where the court quotes the trial court admissibility "ground rules":
7. Unless the offer of proof meets the very narrow limits of justification defenses, evidence in support of those defenses will not be received. . . . Among other things, the proffered evidence will have to show:
1) A direct causal relationship between the defendant's actions and the avoidance of the perceived harm. This includes a showing that a reasonable man would think that blocking the entry to Rocky Flats for one day would terminate the official policy of the United States government as to nuclear weapons or nuclear power.
687 F.2d 1270, 1273 (1982).
jury instructions to contain any reference to that power. Curiously, they reason that if the jury were informed of their power, chaos would result as juries rendered decision after decision with no principled connection with the penal code. Such recklessness could work to the detriment as well as the benefit of those engaging in civil disobedience. Even advocates of jury nullification have to recognize its limitations: jury nullification is most meaningful if defendants are permitted to introduce evidence of motive, rationale, or moral imperative to justify actions violative of legal obligation. Juries have no basis to rule contrary to the law and in a defendant's behalf if they are not allowed to know why she did what she did. Because defendants cannot now introduce evidence of this type, the right of nullification is impotent.

5. Conclusion

These solutions to the problem of prosecuting civil disobedients have serious flaws. Either they do not respond to the motivations that lead citizens to engage in civil disobedience, or they do not account for the limitations of the legal system. I hope that it is clear by now that the primary difference between civil disobedience and crime lies in the motivation of the actor. Any acceptable solution to the differences between a civil disobedient and a criminal must account for the difference in their motivation.

The admission of motive testimony to justify civilly disobedient action would appropriately distinguish the action of the civil disobedient from criminal activity. Unfortunately, however, motive is currently irrelevant for most offenses. The next section will address the presence of "motive" in the criminal law and how I think it should change. As we saw earlier, it is precisely the issue of motive that distinguishes the civil disobedient from the ordinary criminal. Because of this distinction, civil disobedients should be allowed to admit motive testimony or make "good motive" defense arguments.

114. See Lippman, supra note 105.
B. Motive Testimony

1. Introduction

a. What the Jury Gets to Hear

The current character of the criminal law does not allow the defendant in a criminal case to present evidence describing the motivation for his or her actions. The Model Penal Code defines culpability in terms of a person having satisfied the state of mind requirements relative to each of the elements of an offense. Elements of an offense are those factors which establish culpability for conduct based on state of mind with respect to attendant circumstances, conduct, and results of conduct. The state of mind requirements focus on the "intent," not the motive, of the defendant. The motive of a defendant is the reason for the action; intent is the state of mind of the defendant relative to the elements of an offense. Motive concerns why the defendant did what he did; intent focuses on his level of cognitive commitment to what he did. The distinction has significant legal consequences.

State of mind is broken down into four levels of awareness of what a person is doing. Under the M.P.C. scheme a person must act either negligently, recklessly, knowingly, or purposely with respect to each of the elements of an offense. To prove culpability, the state must prove that a defendant acted with the requisite level of conscious awareness for the conduct, circumstances, and result. Later, when I discuss the cases involving the Berrigan brothers, these abstractions will be made more concrete.

For persons who engage in civil disobedience, this structure causes a conflict. Most civil disobedients will admit all the elements of their offense; they want to argue, however, that they should not be punished for their act because either their moral obligation is sufficiently weighty or their reason for acting as they have justifies what they did. I will argue that civil disobedients should, under certain conditions, be allowed to present their motive to the jury. Because criminal law does not now recognize the relevance of motive, we must amend our criminal law statutes to make this possible. The amendment I

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115. Used here as representative of modern criminal statutes.
116. MODEL PENAL CODE § 2.02 [hereinafter M.P.C.].
118. For an example of common state of mind standards, see M.P.C. Article 2.
propose would operate as a "justification"\textsuperscript{119} for civil disobedience. I will describe it in more detail later.

If it is true that motive is the primary characteristic that distinguishes civil disobedients from criminals, then a bar on admission of motive testimony\textsuperscript{120} precludes civil disobedients from making the very arguments with which the community, represented by the jury, should be concerned. If we allow civil disobedients to make motive arguments to the jury, we then make it possible for the proper representatives of the conscience of the community\textsuperscript{121} to assess whether the defendant's claim of moral obligation is one which the community is prepared to accept.

\textit{b. Problems With Punishing Civil Disobedients}

People prosecuted for acts they would characterize as civil disobedience commonly argue that their good motive should excuse their conduct.\textsuperscript{122} In addition to the difficulties with getting a jury to hear the reason why a defendant did what she did, another problem arises when we try to fit the civil disobedient within one of the three historical theories of punishment: retribution, deterrence, and rehabilitation. Though punishment is not generally an issue within the purview of the trier of fact, the incompatibility between punishment theories and civil disobedients exemplifies yet another failure of judicial reaction to disobedience.

To seek retribution for a trespass against the community standards when the purpose of that trespass is to bring to light the injustice of those standards does not reflect the proper relation between culpability and punishment. A civil disobedient is not a proper candidate for retribution. Retribution models seek to settle the score—to punish an offender in equal weight to the injury they have inflicted. The moral imperative of punishment diminishes when the actor's self-interested pursuit of some personal gain, to the detriment of others in the community, is removed. Not all people who violate laws altruistically

\textsuperscript{119} As defined in M.P.C. Article 3, a justification is a complete defense whereby a defendant's actions are held to be non-culpable even though she has fulfilled all the requisite elements of an offense.

\textsuperscript{120} I use live testimony as my primary example because the majority of evidence offered to support a civil disobedient's justifying motive would necessarily come from \textit{viva voce} testimony offered by the defendant. Documentary evidence or testimony of other witnesses could also be subject to the same analysis.

\textsuperscript{121} Williams v. Florida, 399 U.S. 78, 100 (1969).

\textsuperscript{122} See the \textit{Berrigan} cases which follow.
should avoid punishment, but juries should evaluate civil disobedients in light of the reasons for their action.

The deterrent model of response to criminality is of questionable value also when it comes to civil disobedience. Deterrence theory depends upon a belief that if the punishment is severe enough and sure enough the offense-considering citizen will refrain from violating the law. If, however, citizens feel a sufficiently weighty moral conflict with a community-imposed legal obligation they are not likely, indeed in the ideal they will never, choose to obey the legal obligation over that moral obligation. The threat of severe punishment may not enter into the balance. Before the act, the civil disobedient may balance the importance of the relevant moral and legal obligations, not the nature of the burden she will be required to bear for her choice. At best, deterrence efforts, however severe, may be ineffective because they may not factor into the equation of whether to act or not to act. At worst, the deterrent theory of punishment results in bullying tactics that do not account for the philosophical underpinnings of civil disobedience that we discussed earlier.

The rehabilitative theory of punishment is similarly inadequate to deal with the civil disobedient. The rehabilitative theory of punishment responds to criminal behavior by trying to convert an antisocial member of a society into a contributing member through instruction or persuasion. Civil disobedients, unlike criminals, have not proven themselves to be antisocial or even in need of reform. They engage in the same balancing that leads law-abiding citizens to choose to obey the law; for the civil disobedient, the balance tips toward his perceived moral obligation. In the same way, the judicial system should hesitate to sanction those civically-minded citizens who confront the conflict between moral and legal obligations and follow their moral obligation in hopes of law reform. In the past, some citizens were subjected to psychological internment for expressing political and moral convictions through violations of the law.123 Rehabilitative punishment does not work for civil disobedients because they don’t need to be rehabilitated.

c. Motive Testimony as a Solution

Do I mean to say that we should not punish civil disobedients at all? No, but we must realize that they are different from most people who appear in our courtrooms, and that we

123. See the treatment of activists in the suffrage movement for women in S. Lynd, supra note 7, at 160-71.
should approach punishing them for their violations of the law differently. Not only are civil disobedients inappropriate for most of the recognized justifications for punishment, but they are different from most of the types of people we punish with regularity.

One possible solution to the problem of how to respond to the difference is to allow civil disobedients to do what they all want to do: make arguments to the jury about why they did what they did. As I noted above with jury nullification suggestions, these arguments have been met with judicial suspicion, if not hostility. Though I believe these fears are misplaced and not responsive to the philosophical underpinnings of civil disobedience, there are several problems which this suggestion might precipitate, and I shall address them in turn.

Before I undertake a discussion of the problems that will arise, I will take a look at contemporary judicial treatment of arguments which have been made for a "good motive" defense. After laying out some of the potential objections to the use of motive testimony, I will explore some possible solutions to those problems. Those solutions lead me to propose a rule of evidence and an addition to the Model Penal Code to accommodate the use of motive testimony in the prosecution of civil disobedients.

2. Previous Attempts at the Use of Motive Testimony

The response of the judicial system to the "good motive" defense has been stymied by unnecessary fear and by reasoning which is unresponsive to the philosophical significance of the conflict between moral and legal obligation. I have selected for our attention two cases which are illustrative of the response of courts to testimony regarding motive. In both cases, the defendants sought to make arguments regarding the relation of motive to culpability for the violations with which they were charged.

a. Moylan

In United States v. Moylan,\textsuperscript{124} nine defendants, among them Dan and Philip Berrigan, were charged with willful mutilation of government records,\textsuperscript{125} destruction of government prop-

\begin{footnotesize}
\textsuperscript{124} 417 F.2d 1002 (1969).
\textsuperscript{125} The defendants were charged with violating 18 U.S.C. § 1361, which provides in part:

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency
Motive and interference with the administration of the Selective Service System for their 17 May, 1968 removal and burning of Selective Service records in Catonsville, Maryland. At trial, all defendants were convicted. On appeal the defendants first argued that the trial court erred in not informing the jury that it possessed the power to nullify a conviction. The defendants also argued that the court should apply a "more expansive" definition of "willfully" than was used in the statutes. The defendants argued that "since they acted from good motives, i.e. to protest a war which they sincerely believed was not only illegal but immoral, they could not have 'willfully' violated the statutes and must be acquitted." 

The appellate court correctly distinguished "motive" from "intent" and noted that the intent element of "willfully" is satisfied if the "accused acted intentionally, with knowledge that he was breaching the statute." Despite sloppy use of technical definitions of intent for defining culpability, the appellate court was correct in finding that "whatever motive may have led [the defendants] to do the act is not relevant to the question of the violation of the statute, but is rather an element proper for the judge's consideration in sentencing." 

The restriction on use of evidence related to motive emphasizes the judicial interest in fairness in adjudicating violations of the law. Regardless of substantive differences, materially similar violations require similar response by the

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126. Whereby the jury could have acquitted the defendants even if their act fulfilled all the elements of the offense.

127. See supra note 125.

128. Moylan, supra note 124, at 1004.

129. Id. Note, however, that M.P.C. § 2.02(7) defines "wilfulness" as follows: "A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." The appellate court is not strictly accurate in requiring that the defendant act "intentionally, with knowledge that he was breaching the statute." The intent element for conduct, as specified by the statute, would be "knowingly," not "intentionally" or "purposefully" as defined by the appellate court. For a further discussion of element analysis of statutory provisions see, Robinson and Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 STAN. L. REV. 681 (1983).

130. Moylan, supra note 124, at 1004.

131. See, e.g., the court's discussion in United States v. Kabat, 797 F.2d 580, 584-85 (8th Cir. 1986), where the court looked at previous treatment of people who violated the same statute for different reasons to argue that these well-intentioned defendants should be treated no differently.
judicial system. In other words, courts consider it unfair to punish a person who violates a law out of self-interest and not punish someone who violates the same law for the betterment of the community. Moreover, they consider it unfair not to punish those who do not fulfill their legal obligations when others who could have violated the law did not in recognition of their *prima facie* obligation to obey the law.

Contrary to common belief, it is fair that the people who violate the law because of conflicting moral obligation not be punished. Even though other people choose not to obey the law, the law-abiding person, if aware of any potential conflict, goes through the same analysis as those who disobey. The law-abiding person performs the same balancing of moral and legal obligations as the civil disobedient does. The only significant difference is the outcome. The law-abiding person concludes that his legal obligations outrank his moral obligations. So, too, the action of a criminal and a protester are different from one another. The law should treat them differently, because in this instance motive is an important element of culpability.

A grossly simplified demonstration may help: When Mary knocks her sister down to be mean, her parents appropriately punish her. When she knocks her sister down to shield her from an oncoming car, her parents appropriately applaud her. The two acts, like the violation of the law by the common criminal and the civil disobedient, are materially similar, but substantively different. The law should be equipped to respond to them differently.

b. Berrigan

The second, very similar and factually related example I would like to focus upon began as *United States v. Berrigan*. Several months before the events which precipitated the *Moylan* decision took place the following occurred: Two of the Catonsville defendants and two other men extracted some of their own blood and mixed it with animal blood. They entered a Selective Service office in Baltimore, Maryland in the early morning. They went beyond the counter, opened cabinets containing Selective Service documents, and poured the blood

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132. *See* *United States v. Cullen*, *supra* note 107.
134. 283 F. Supp. 336 (D. Md. 1968). This decision was later upheld as *United States v. Eberhardt*, at 417 F.2d 1009 (4th Cir. 1969)—the companion case to *Moylan*. 
mixture over the documents. They then left the building and waited for police to arrive. At trial, the defendants sought to offer evidence to the jury demonstrating that based on what they knew of the war in Vietnam, the war was illegal and immoral.

The defendants argued that because they acted under the belief that their actions were geared toward prohibiting the United States from engaging in further illegal activity, the requisite **mens rea** for conviction was lacking. The trial court noted that after the elements of a crime are proven by the government, good motive will not save the defendant from conviction. The defendants cited to cases where the accused mistakenly believed that he was acting within the law. The court distinguished those cases by observing that these defendants knew that what they were doing was illegal but acted under a **bona fide** belief that their motives negated criminal intent. The court also made the paradigmatic objection to the use of motive as dispositive of guilt or innocence:

> No civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief. It matters not how worthy his motives may be. It is axiomatic that chaos would exist if an individual were permitted to impose his beliefs upon others and invoke justification in a court to excuse his transgression of a duly-enacted law.

3. Why “Good Motive” Arguments Have Failed

The arguments of the **Berrigan** defendants failed for two reasons. First, the proponents of both arguments suffered from a mistaken understanding of the definitions of “intent” and “motive.” Remember that within the criminal law these terms have a specific meaning that is significant, even if counter-intuitive. “Intent” relates to the required state of mind of the accused as applied to each element of an offense. “Motive” relates to the system of belief or purpose which guided an actor. Moral obligation is a matter of both motive and intent in the standard case; so motive testimony falls under

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136. *Id.* at 339.
137. *Id.* at 340.
138. *Id.* at 339.
139. For further discussion of these two cases see Note, **Civil Disobedience—Protests Beyond the Law**, 14 St. Louis U.L.J. 719 (1970) (written by Kathianne Knaup).
the category of motive not intent. The motive arguments the defendants sought to make had no bearing on the state of mind required by the statute for conviction.

The second failure of the Berrigans was to characterize their arguments in terms of an excuse to culpability, rather than as a justification for their actions. The motive testimony the defendants sought to offer would have served, not to negate one of the elements of the offense, as would an excuse (e.g. insanity or mistake of fact), but to counter the elements of the offense with a reason why the defendant should not be held responsible for violating the statute. Everyone involved knew that the Berrigans violated the statute in question. Whether or not they violated it was not the issue. The issue was whether or not they merited punishment for their violation.

The commonly-accepted justifications for violating the law (self-defense, defense of others, duress, necessity, choice of evils, law enforcement, and so forth) do not include a justification for civil disobedients. As we have seen, some people have sought to fit civil disobedience within the categories of necessity and duress justifications, but with only limited success. Only by creating a separate category of justification, a civil disobedience justification, can we respect the importance of moral obligation as a motivator of a political act of disobedience.

C. Proposed Amendments

This section will define the amendments I propose to both the Model Penal Code and the Federal Rules of Evidence. I address my attention to the Model Penal Code and the Federal Rules because these rules or some variation on them has been adopted in most jurisdictions. The additions to the Model Penal Code are far more important for the purposes of providing a justification for the conduct of some civil disobedients than is the change I recommend to the Federal Rules of Evidence, but the change to the evidentiary rules follows from the penal code reform. Jurisdictions which have adopted the model provisions would have to enact the amendments I propose; those which have not yet adopted the uniform standards

140. See text accompanying notes 115-19 supra.
141. See M.P.C. Article 3.
142. See Levitan, Lippman, and Kessler, supra note 105.
143. See Tierney, supra note 105.
would have to make the appropriate conversions to their own system.

1. The Model Penal Code

a. Justifications in General

Article Three of the Model Penal Code defines the General Principles of Justification. A justification is different from an excuse to culpability, like insanity or mistake of fact. A justification admits the elements of the offense and finds that even when all the elements of the offense are proven a defendant should not be held criminally responsible. The Model Penal Code describes these justifications as “affirmative defense[s].” By that description the drafters mean that the justification does not act to negate one of the elements of the offense, but instead negates culpability of the agent when the elements are proven. A defendant asserting an affirmative defense bears the burden of proving the elements of the defense by a preponderance of the evidence.

b. A Civil Disobedience Justification

The proposed section 3.12 of the Model Penal Code would read as follows:

§ 3.12. CIVIL DISOBEIDENCE JUSTIFICATION
(1) Requirements
The violation of legitimately-enacted criminal standards of conduct is justified when the actor reasonably believes that the legal requirement conflicts with a serious moral obligation and only if:

(a) all reasonable legal alternatives to violation have been pursued,
(b) the violation is nonviolent in character,
(c) the violation is specifically limited and narrowly tailored to suit the character of the conflict, and
(d) the actor can demonstrate the existence of a legitimate moral belief the vindication of which substantially outweighs the governmental interest in prohibiting the conduct at issue.

(2) Admissibility of Evidence

144. See G. Fletcher, Rethinking Criminal Law 759-98 (1978).
145. M.P.C. § 3.01.
146. This requirement would involve evaluations similar to those undertaken in the area of religious practices where the sincerity and seriousness of the belief held by the individual and the governmental interests involved in the regulation are balanced.
Evidence of the motives of the actor claiming the Civil Disobedience Justification is admissible and limited to the testimony of the actor, relevant experts, and documentary evidence, describing:

(a) the legitimacy and substance of the belief at issue, and

(b) the process by which the actor arrived at the decision to violate the law.

2. The Federal Rules of Evidence

Evidence of the motive of the defendant in a criminal case is not generally admissible under the Federal Rules because it is not relevant under Rule 401. Because the motive of the defendant does not tend to make the existence of any of the elements of the crime more likely or unlikely, such evidence is not relevant to any issue of material fact. Under the proposed amendment, evidence related to motive would become relevant, but an addition to the Federal Rules of Evidence is necessary to clarify the scope of the admission of motive evidence in a criminal case. Because the proposed rule addresses relevancy and admissibility, it should be added to the list of rules contained in Article 4.

The Federal Rules of Evidence should be amended to include the following provision:

Rule 413. Admission of Motive Testimony when the Civil Disobedience Justification is raised.
(a) In a criminal trial, in which the person accused of violating a provision of law raises the Civil Disobedience Justification (see Model Penal Code § 3.12), evidence of the motive(s) of the accused for the violation is admissible to show legitimacy and sincerity of belief, serious conflict of conscience, and the balancing of competing obligations that led to the decision to violate the law.
(b) If the accused intends to offer under subdivision (a) evidence pertaining to the motive for the violation, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin.
(c) The motion described in paragraph (b) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in paragraph (a) the court shall order a hearing to determine whether a given act fulfills the requirements
necessary to seek recourse in the justification. At such hearing the parties may call witnesses and offer evidence that would be relevant if the qualifications for the justification were met.

(d) If the court determines on the basis of the hearing described in paragraph (c), that the qualifications for the justification have been met and that the court will permit recourse to the justification, evidence thereby made relevant shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the accused may be examined or cross-examined.

(e) If the court determines on the basis of the hearing described in paragraph (c), that the qualifications for the justification have not been met, the evidence described in paragraph (a) is inadmissible.

D. Potential Problems

Of course, this proposal will be met with disagreement. I have already alluded to some of the pertinent objections. In this section, I will focus on five of those complaints. Following each major objection, I will provide a brief response to the claims it asserts.

1. Chaos

a. Criticism

Judge Northrop, the judge who decided the Berrigan case, offers the paradigmatic objection to the use of motive testimony.\(^\text{147}\) His fear of the chaos that would result from accommodating civil disobedience has been shared by other members of the judiciary. The argument depends on the acceptance of several points. First, civilized societies require laws to maintain order. Second, only when society is ordered can justice be achieved. Third, citizens in democratic societies voluntarily agree to act according to the laws of society, even those that bring personal burdens, by accepting the benefits of the order they bring. Finally, nearly-just societies could not exist if every citizen could select whatever laws he or she would obey.

This problem would not arise if decisions were arrived at by unanimous consent, but since unanimous consent is not a practical objective, occasions will arise where some subset of society will find themselves at odds with the majority. The

\(^{147}\) Supra note 138.
chaos argument claims that if at every occasion where a disagreement of this kind arose citizens were free to obey or not obey on a whim, anarchy would result. Society would collapse. This strain of argument presupposes that violation of the law would increase if the threat of punishment of civil disobedience was removed as a deterrent. I have already discussed the inadequacy of punishment to deter civil disobedience.

As part of the "chaos" claim, courts point to the political chaos that could result from courts intruding upon the province of the legislature. In asking the court to validate her "excuse" for why she did what she did, the civilly disobedient citizen seeks the power of the court to vindicate her claim to moral superiority. Courts should not engage in this sort of variation on the legislative intent. If representative legislatures do fairly speak for the majority of citizens, then the place to vindicate the injustices experienced by the protestor is in the legislature, not in the courts.

b. Response

Judge Northrop's assumption, though popularly supported, is flawed. He is correct in so far as he claims that it is "axiomatic" that civilized society could not survive if every citizen always followed only what laws fit his or her fancy. As pointed out by Dworkin, however, while it is surely true that society cannot endure "if it tolerates all disobedience; it does not follow, nor is there evidence, that it will collapse if it tolerates some" (emphasis added). Carl Cohen says, "As a resident and an observer of a municipality in which civil disobedience has been several times employed in recent years, I would report that so far as I can tell, its practice has had little or no tendency to encourage disrespect for law or to cause a general deterioration of the social order." Even Justice Fortas, an outspoken critic of civil disobedience, warns that "[t]he danger of serious national consequences from massive civil disobedience may easily be exaggerated." Jurisdictions which

148. Justice Fortas echoed these views when he said, "Just as we expect the government to be bound by all laws, so each individual is bound by all of the laws under the Constitution. He cannot pick and choose. He cannot substitute his own judgment or passion, however, noble, for the rules of law." A. Fortas, supra note 12, at 55.
150. R. Dworkin, supra note 88, at 206.
151. C. Cohen, supra note 76, at 152-53. Note, however, that Cohen is specifically referring to a society in which civil disobedience is punished.
152. A. Fortas, supra note 12, at 59.
adopt my proposal will see that admitting the testimony regarding motive of some violators of the law does not mean that those persons will be acquitted. Not everyone who makes a claim of justification predicated upon conscience will find his claim vindicated. A Civil Disobedience Justification only makes it possible for juries to hear the moral evidence relevant to their determination of culpability.

Like the presumption that serious chaos would result from the toleration of some disobedience, the presupposition that more people would be inclined to engage in civil disobedience if they knew that they could be acquitted is unverified. While it is reasonable to assume that some people would be more likely to engage in civil disobedience if they believed that they had a chance of getting their claim vindicated, if we limit the claims we are willing to recognize to those predicated on conscience or moral obligation, the growth in the number of incidents should not be severe.

Also, the fact that juries acquit civil disobedients based on their claim that a particular law is unjust should serve as additional notice to the legislators that their decisions are not supported. I say "additional" notice because appeal to this justification will require that the defendant have used legal means of persuasion unsuccessfully before choosing to disobey the law. Courts would not, contrary to possible fears, be rewriting laws by failing to prosecute individual civil disobedients any more than they rewrite laws when they fail to prosecute individuals who use force to protect themselves, others, or property. Judge Northrop's concerns about coming chaos are unfounded; the history of civil disobedience in this country argues against his worries and the results of a justification would not be as dire as he imagines.

2. Courts Should Not Become Political Platforms

a. Criticism

If testimony and evidence of motive were to become admissible, courts would find their already backlogged dockets delayed even further by defendants who wanted to parade a stream of "experts" before a jury to demonstrate the soundness of their position. Under such circumstances, courtrooms would cease to be forums for the investigation and evaluation of facts applied to relevant law, but would instead dissolve into platforms for any political minority who felt their views underrepresented.
b. Response

This criticism is serious, because it cuts to the core of the integrity of the judicial system. Fortunately, the problems of politicization of the judicial process\textsuperscript{153} can be overcome through discriminate use of the justification I propose. Those defendants who want to claim as a justification for their action the motivation of conscience must satisfy strict requirements. To make my amendment viable, I also propose what I call "qualifying characteristics" for a defendant to be able to avail herself of the justification.\textsuperscript{154} The characteristics I propose require that an act be nonviolent, non-destructive, limited, and narrowly-tailored for the justification to be available.

The defendant would demonstrate to the court that she "qualified" for the exception by providing evidence to show that her act met all the requirements. Robert Hall in arguing for an extension of the jury nullification powers has argued that "[t]o qualify as an act of civil disobedience, an action would have to be appropriate to the agent's stated purpose, and the purpose itself would have to be of a socially responsible nature."	extsuperscript{155} Since these demonstrations could happen during the pretrial stage, they could be handled expeditiously and without undue influence upon the jury.

If the persons seeking to make motive arguments to the jury were limited by factors such as those described above,\textsuperscript{156} the judge could retain some control over the politicization of the trial process. Once a person "qualified" for the exception, the judge could then allow only such evidence as would directly address the motivation of the defendant and could limit the burden on the trial process accordingly.

\begin{footnotes}
\item[153] By this term I mean something different than former Judge Bork does. He uses the phrase "politicization of the law" to refer to the political process and its influence over the judiciary, particularly in the area of constitutional jurisprudence. In short, I mean my use of the term to be less inclusive than does Judge Bork. See R. Bork, The Tempting of America: The Political Seduction of the Law (1990).
\item[154] I am not committed to the factors I list, nor does my argument hinge on the reader accepting them. Those characteristics which would define a "civil disobedient act" under the statute could be negotiated, and in fact could differ from state to state. It is important, however, that certain types of actions "qualify" for the justification and others fail to qualify. This limitation will address most of the chaos concerns that would give a legislature pause in accepting my recommendation.
\item[155] R. Hall, supra note 84, at 146.
\item[156] See text accompanying notes 144-46 supra.
\end{footnotes}
3. Degeneration of the Proper Role of the Jury

a. Criticism

Juries in America have undergone many changes and evolutions from the days of *Georgia v. Brailsford* when they were considered the masters of both law and fact. Today, jurors are expected to listen to the facts as presented by evidence admitted during trial and to apply the law as given to them by the judge. Though the power to rule contrary to the given law and admitted facts still exists, the right to be informed of that power has been denied. The third argument against allowing the admission of motive testimony or evidence in the trial of civil disobedients is that if juries were given the ability to "excuse" the conduct of someone who violated the law, they would be overstepping their powers.

b. Response

Justice White has stated that the "essential feature of a jury lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation that results from that group's determination of guilt or innocence." If the justification I advocate were put into effect, "'conscientious disobedience' would have the effect of allowing the question to be put to the jury in such a way that the demands of conscience and the social responsibility of the agent could be taken into account." Rather than moving the jury into some nebulous field of power where it would have free reign to make decisions outside of the stream of legal authority, giving the jury the power, in limited circumstances, to listen to testimony regarding the motivation of a civil disobedient would lead the jury to the balancing of values appropriate to such action. The jury would evaluate the sincerity of the beliefs of the defendant, the importance of the independent moral autonomy of each citizen, the gravity of the interest or alleged injustice at issue, and the form and content of the act of disobedience. They would then balance those interests against the societal interest in maintaining legal order, the potentially degenerating effect of disobedience, whether or not the defendant pursued all reasonable legal rem-

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161. *Id.* at 147.
edies, and the community’s view of the injustice pointed to by the defendant.

4. Civil Disobedients Will Not Really Be Better Off With This Justification

a. Criticism

Extending the power of the jury to acquit people the legislature clearly intended to be convicted could, as mentioned previously, act to the detriment as well as the benefit of a civil disobedient. Black defendants in the South of the 1960s could have found themselves at the mercy of racist, white juries, who would have been wholly unpersuaded by arguments supporting potentially reasonable violations of unjust laws.

Extending the power of the jury to consider motive testimony might put the civil disobedient in no better position than she had been previously. She, rather than facing a legislature unresponsive to her claims of injustice, would have to face members of a jury who have values similar to those of their representatives. If the legislature has been unresponsive to her claims, she has no reason to assume that she will have any greater luck with a jury. Allowing the admission of motive testimony only presents a false hope.

b. Response

This concern fails to recognize two things. First, the possibility of appeal from criminal prosecutions helps to negate the detrimental effects of a biased jury. If a civil disobedient was presented with a racially, sexually, ethnically, or religiously discriminatory jury, a prosecution under such circumstances would be appealable. The problem caused by racist juries is solved by making juries less racist. Second, many people today, especially those likely to engage in civil disobedience, perceive either themselves or the people they represent to be politically powerless. Allowing appropriate civil disobedients to make claims of injustice which might otherwise go unheard can only work to the advantage of the community. Juries will vindicate claims of substantial injustice and so continue to ensure that legislative actions are in tune with the community’s standards of justice. They will likewise refuse to vindicate

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those claims which do not resonate with the foundations of our political system.

5. Civil Disobedients Depend Upon the Sympathy and Attention Their Punishment Engenders

a. Criticism

Finally, it could be argued that civil disobedience, as a concept, requires that those who engage in it should suffer to draw attention to their claim. The justification I propose would allow some civil disobedients to avoid punishment. This argument would claim that the prima facia benefit they gain by avoiding the undesirable result of punishment would be outweighed by the loss of public sympathy.

Certainly, many people who have engaged in civil disobedience in the past have willingly accepted the punishment they knew would befall them as a result of their action. They did so to affirm publicly their belief in the legitimacy of the political system and to attract publicity. Civil rights activists in the 1960s and women's rights demonstrators knew that they would be punished for refusing to leave the lunch counter and for registering for an election that forbade their vote. They contested their guilt and, in some cases, accepted their punishment. In theory, the cause of justice benefitted from their punishment.

b. Response

To ask a civil disobedient to willingly accept punishment for violating a law he or she considers to be unjust is counter-intuitive. They may accept their punishment for a variety of reasons, but the law currently allows them no choice in this matter. The amendment I propose would give civil disobedients the opportunity to square their account with society, to tell a jury and the court why they did what they did. They could choose not to avail themselves of the justification, and they then might be found guilty. The odds of their conviction would increase dramatically by their refusal. They could also make their plea to the jury, and still be found guilty. The amendment only gives the civil disobedient a choice in whether or not to accept punishment "willingly." It is important to note that this criticism goes to a tactical point that should be left up to the civil disobedient. Some disobedients might believe that their willing acceptance of punishment is an impor-
tant part of their message. Others may not. By making a justification available to them they can make that choice.

6. Summary

The balancing approach used by a jury in assessing individual claims of justification would be similar to the process the civil disobedient underwent in deciding to favor moral obligation over legal obligation. At the very least, this process of allowing motive testimony after successful qualification for a "Civil Disobedience Justification," would demonstrate judicial comprehension of and respect for the importance of moral obligation. The toleration society would be extending to the civil disobedient would be similar in kind to that offered to conscientious objectors.163

Under this proposal "civil disobedience would be no more tolerated than the community wished."164 I am arguing not for the acquittal of all civil disobedients, but for a judicial process that accounts for the distinctions which I have shown between criminals and civil disobedients, addresses the conflict between moral and legal obligations—and the primacy of moral obligations—in a systematic way, and demonstrates an appreciation for the benefits our society has gained by the courage of those who have stood up in the face of perceived injustice.

CONCLUSION

This article has made the case for an amendment to the Model Penal Code and the Federal Rules of Evidence which will permit persons who engage in civil disobedience to have recourse to a Civil Disobedience Justification. The argument supporting this amendment is based on two fundamental claims. The first claim is that civil disobedience has been a significant part of the history of this nation, one from which we have derived significant benefit. The second claim is that the response of the judiciary to the phenomenon of civil disobedience has been inadequate and misguided. From these two claims I conclude that the present situation is not acceptable and that we need to change our understanding of and approach to civil disobedience.

The first section of the article traced the development of disobedience and resistance in the United States since before it was a nation until the present. The pre-Revolutionary strug-

163. R. HALL, supra note 84, at 150.
164. Id.
MOTIVE TESTIMONY

Gles for religious toleration led, in part, to the revolution and break from Britain. Challenges by blacks and women to the white male definition of “equality” resulted in new relationships among citizens. The Labor movement and Civil Rights movement demanded that rights guaranteed in the past be brought to fruition. The Vietnam era and actions of civilly disobedient groups and individuals today show that this problem remains with us. Attention to these events in our history led to a close scrutiny of the origins of the duty to obey the law and to the moral environment in which citizens might justifiably choose to disobey the law. In the final part of the first section I offered a definition of what types of disobedience to law would qualify as civil disobedience.

My second claim began with the conclusion of the first section, that civil disobedience will continue to be practiced and that we must reform our judicial reaction to it. I then focused on several methods of responding to civil disobedience and its distinctions from crime that have been used in the past. Those solutions have failed to account for the moral significance of civil disobedience. One worthy option, which has not received widespread support, is to allow civil disobedients to testify to their motives for violating the law. I described the two Berri-gan cases, where the defendants argued unsuccessfully that a “good motive” justified their actions. I then proposed my amendment to the Model Penal Code and Federal Rules of Evidence as a possible mechanism for making motive testimony admissible in trial and useful to civil disobedients. Finally, I responded to some of the potential criticisms of my suggestion.

Civil disobedience is here to stay. Our jurisprudence to date has not responded to its true significance. Adoption of a justification defense for civil disobedients would be a step in the right direction.