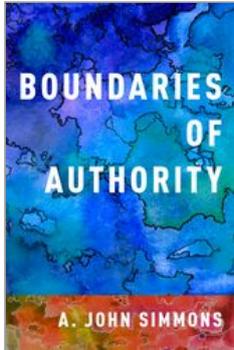


# Disobedience, Nonideal Theory, and Historical Illegitimacy

---

University Press Scholarship Online

Oxford Scholarship Online



## Boundaries of Authority

A. John Simmons

Print publication date: 2016

Print ISBN-13: 9780190603489

Published to Oxford Scholarship Online: August 2016

DOI: 10.1093/acprof:oso/9780190603489.001.0001

## Disobedience, Nonideal Theory, and Historical Illegitimacy

A. John Simmons

DOI:10.1093/acprof:oso/9780190603489.003.0003

### Abstract and Keywords

Chapter 2 examines the justified aims or objects of legal disobedience. It begins with the famous theory of civil disobedience defended by John Rawls. This is contrasted with the approach taken by Henry David Thoreau. The chapter argues that Thoreau's view permits, where Rawls's theory is unable to allow, disobedience due to the historically illegitimate subjection of lands and peoples. The Kantian or Rawlsian approach to disobedience is unable to move beyond structural injustice as the justified object of that disobedience. The chapter also explains the (Rawlsian) distinction between ideal and nonideal theory and the proper place of an account of justified disobedience within that framework.

*Keywords:* Thoreau, Rawls, civil disobedience, nonideal theory, ideal theory, structural injustice, wrongful subjection

# Disobedience, Nonideal Theory, and Historical Illegitimacy

---

Justifying Disobedience

Morally legitimate political authorities have the right to impose morally binding legal duties and directives on all who are rightly subject to their authority. There are, of course, both “internal” and “external” limits to such political authority. Internally, there are moral limits to the kinds of laws or policies that may be legitimately imposed, set by the requirements of minimal justice (however that notion is understood). When laws or policies fail to respect these limits, subjects may be justified in disobeying the law. And when those limits are exceeded systematically or egregiously, the moral authority to impose binding duties may be lost altogether. But there are also, of course, “external” limits to a legitimate state’s authority that are determined by the “boundaries” of that authority. Only a particular set of persons is subject to any particular state’s authority, no matter how just or virtuous that state and its laws may be; outside the boundaries of this group, persons are not “spoken to” by that state’s commands, regardless of the character or force of those commands. As we’ve seen, these external limits to political authority are generally thought to correspond closely, in modern polities, to the state’s acknowledged geographical boundaries. By and large, only those persons within a state’s claimed territories are claimed as subjects of that state’s authority, as bound by its laws.

As we have also seen, due largely to the influence of John Rawls, the preeminent political philosopher of the twentieth century, recent political philosophy has focused primarily on concerns about the internal limits on political authority. Rawls’s regular contributions on the subject of civil disobedience within a near-just society were his only substantial philosophical engagements with the problem of limits to the state’s authority. But this concentration on the internal limits to authority produced in Rawls, I believe, a theoretical orientation that left his view incapable of dealing adequately with questions about the external limits (p.32) to authority. And these same problems—caused by an unremittingly “structuralist” or “functionalist” approach to the problem of political authority<sup>1</sup>—are replicated in the contemporary explosion of broadly Kantian political philosophy that followed in Rawls’s wake. Or so I will argue, looking in

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

this chapter at Rawls's orientation and in the next at that of the "new Kantians" who followed the theoretical trail Rawls blazed.

When Rawls reinvigorated the contemporary philosophical debate about civil disobedience with his 1969 essay, "The Justification of Civil Disobedience,"<sup>2</sup> he also largely set the terms for subsequent discussions of that subject. Rawls, of course, went on to refine and further defend his account of the nature and justification of civil disobedience in chapter 6 of *A Theory of Justice*; but the basics of the account remained the same as in his earlier essay. Rawls's theory of civil disobedience is firmly embedded in his overall theory of justice, and he discusses civil disobedience only as an issue in "near-just" societies—which for Rawls means constitutional democracies whose basic institutional structures<sup>3</sup> are mostly "well ordered" by the correct (Rawlsian) principles of justice, but which still contain some serious injustices.

According to Rawls, the natural duty of justice (along with what he calls the "duty of civility"<sup>4</sup>) requires that we comply with those laws that apply to us in near-just societies.<sup>5</sup> This implication of the duty, he believes, is uncontroversial in the case of just laws.<sup>6</sup> And legal obedience is generally required even if the (p.33) laws in question are unjust, as some laws will inevitably be, even with a nearly just constitution and just legislative procedures. Compliance is here simply part of the cost of making a constitutional democracy work, and all must share this burden—at least, if the injustice in question is not too severe and if the burdens of injustice do not fall too regularly on the same people (e.g., minority groups). This duty to comply, however, appears to conflict with our duty to oppose injustice (along with our right to defend our own liberties). So the central question of Rawls's theory of civil disobedience becomes: when does injustice in a near-just constitutional regime establish a right of (and, further, a justification for) disobedience to unjust law?

Rawls's answer is that one has a *right* to disobey unjust law in a near-just state only when one's disobedience is *civil*—where disobedience takes the form of nonviolent, political, conscientious protest, done openly and addressed to the majority's sense of justice—and only where the injustice in question is clear and substantial, where normal legal appeals have already been made in good faith, and where disobedience

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

will not lead to a breakdown in respect for law. Disobedience so characterized is principled (not merely self-interested) and political (and so a possible part of, rather than antithetical to, ordinary political processes).<sup>7</sup> One is *justified* in acting on this right of civil disobedience only when legal disobedience is conducted reasonably so as to actually assist in achieving the aim of eliminating the injustice in question. Disobedience to law that is limited by these conditions will, Rawls thinks, be consistent with the idea of a constitutional democracy, helping to strengthen the just institutions of society (by making them more just) and focusing public attention on the principles of justice according to which their institutions are structured. Such disobedience cannot endanger the society, for it is undertaken in ways that demonstrate a broader allegiance to law and an acceptance of society's near-just character.<sup>8</sup>

Even operating within the very limited scope of Rawls's account, there are several obvious questions that ought to be raised about it. First, in concentrating solely on the idea of legal disobedience as a way of addressing the public in political terms, Rawls seems to ignore two motives for legal disobedience that seem both perfectly justifiable and to frequently guide the choices of actual practitioners of civil disobedience: namely, the desire to frustrate evil (as in Gandhi's (p.34) campaigns) and the desire to avoid complicity in injustice or wrongdoing (as in Thoreau's disobedience). Is it obvious that "nonpolitical" legal disobedience originating in such concerns, even in a near-just state, will always be morally indefensible? Second, if such reasons for noncompliance are (as I believe them to be) often defensible, it is further unclear why legal disobedience (in a nearly just state) should always be open and public, with "fair notice" given in advance. Our morally respectable desire (or perhaps our moral duty) to avoid complicity in wrongdoing (by, say, refusing to pay a legally prescribed tax that supports an unjust policy) seems adequate by itself to justify legal disobedience. Why should open acceptance of (perhaps quite harsh) legal punishment be necessary to justify it? And the laudable goal of frustrating evil or unjust policies is seldom very effectively advanced by announcing in advance the time, place, and manner of planned legal disobedience.

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

Further, it seems possible to question even the most basic (and perhaps the most widely shared) of Rawls's assumptions—that disobedience in a near-just state must always be nonviolent. Rawls's own commitment to this view is not motivated by any prior commitment to pacifism (like that of Gandhi or King). It is motivated rather by his other requirements that legal disobedience be a political act, addressed to the public. One cannot, Rawls thinks, address the public with violence; violence constitutes an assault, not a conversation. And violent acts, far from being political (that is, "fitting" usefully within a framework of basically just political institutions), in fact are antithetical to and express contempt for law and politics (which are premised on limiting threats and uses of violence to the legal institutions charged with maintaining order).

However, once we question (as we have just done) the Rawlsian requirements that defensible legal disobedience be public and political, we also threaten Rawls's principal rationale for the non-violence clause. But even if we instead accept Rawls's ("public and political") requirements, it is simply not at all clear why violent acts could not be addressed to the public in the right way—as an attempt, say, to get the majority to reconsider its position on the justice of some policy. Indeed, it is not evident (to me at least) why an act of violence must always fail the test of counting as an appropriately political act, by necessarily expressing contempt or diminished respect for law and politics—especially if the violent act is carefully presented to the public as protest, if it is isolated (an unusual act in an otherwise nonviolent life), if it has been preceded by passive political efforts, and if it is followed by nonevasion and acceptance of punishment. Further, it just seems generally implausible to suppose that in the face of significant injustice, even in an otherwise just society, violence—and especially violence against *property* only—could never be morally justified if it were likely to be effective in its aims. Violence against *persons* will obviously always be harder to morally justify. But it again seems far from obvious that some such (p.35) violence—say, kidnaping a public official who is instrumental in administering an unjust policy—could never be both effective and morally justifiable.

All of this can be argued even within the primary Rawlsian terms of the debate over civil disobedience. David Lyons has characterized those terms as follows:

# Disobedience, Nonideal Theory, and Historical

---

## Illegitimacy

True civil disobedients are supposed by theorists to regard the systems under which they live as morally flawed but basically just and requiring modest reform rather than fundamental change. Evidence of this outlook is seen in the disobedients' nonviolent methods and use of moral suasion rather than violent rebellion. Their submitting to arrest and punishment is taken as further evidence of respect for legal authority and recognition of a moral obligation to obey.<sup>9</sup>

But, as Lyons goes on to show, these assumptions about their positions and attitudes were in fact false with respect to the paradigmatic practitioners of civil disobedience, including Thoreau, Gandhi, and King. Since Gandhi was not confronting a constitutional democracy—and since King's position has been ably discussed by Lyons—I will in this chapter use Thoreau's "civil disobedience" as my principal example. But my aim here will not be merely to demonstrate the ways in which Thoreau's stance departs from that of the "true civil disobedient," aptly characterized above by Lyons. Rather, I aim to use the example of Thoreau to demonstrate the broader inadequacy of the Rawlsian conception of nonideal theory within which Rawls's account of civil disobedience is developed.

Accordingly, I discuss Thoreau's position as an illustration in the next section. I then use that illustration to motivate my exploration of the nature and limits of the Rawlsian nonideal theory of justice in the following two sections. To be clear: my intention here is to discuss only deliberate, principled, plainly illegal conduct. I will not be considering cases of lawful protest or resistance, unintentional disobedience, disobedience flowing from confusion or factual error, disobedience to "laws" which have unclear status, or plainly unprincipled (e.g., merely self-interested or malicious) illegal conduct. I shall also leave to one side the more difficult case of "principled" disobedience that is based on plainly invalid principles, such as the white supremacist's legal disobedience aimed at changing racially equitable social policies. I shall ask only: supposing that the disobedient person is correct in her diagnosis of the relevant social ills and is acting in the name of defensible moral or political principles, how should we

# Disobedience, Nonideal Theory, and Historical

---

Illegitimacy understand the possible objects of any justified legal disobedience?

# Disobedience, Nonideal Theory, and Historical Illegitimacy

---

## (p.36) An Example: Thoreau on the State's Authority

Henry David Thoreau, the person generally credited with coining the term “civil disobedience”—and the person whose writings were identified by both Gandhi and King as a significant influence on their own thought—was neither practicing nor trying to justify the kind of “civil disobedience” discussed by Rawls.<sup>10</sup> In Thoreau’s 1849 essay “Civil Disobedience,”<sup>11</sup> he is, of course, protesting injustice—in particular, the injustices done by his nation in its legal recognition of human slavery (and the slave trade), in its treatment of Native Americans, and in its shamelessly acquisitive war on Mexico.<sup>12</sup> But he also makes it quite clear that his were not acts of legal disobedience that were undertaken by one committed to demonstrating his general fidelity to law or his continuing allegiance to his government. On the contrary, Thoreau argues that “his” government and law have no legitimate claim to his obedience or support at all. Far from being the civilly disobedient protester discussed in the literature spawned by Rawls’s treatments,<sup>13</sup> Thoreau held a view of his legal disobedience that may in fact be closer to that of contemporary “philosophical anarchists” like Robert Paul Wolff.<sup>14</sup> While Rawls and those who use or engage his account are, of course, free to use the term “civil disobedience” as they choose, their discussion thus threatens to be irrelevant to any analysis of the arguments of those we think of as the paradigmatic practitioners of civil disobedience.

Thoreau’s radicalism has usually been obscured in philosophical discussions of his thought. There are, I think, two natural—but in the end both at least incomplete—ways in which Thoreau’s stance on civil disobedience has usually been read. First, we might suppose that Thoreau’s view is that legal disobedience (p.37) is morally justified either where the laws disobeyed are themselves intolerably unjust or where obedience to law would (in some reasonably direct fashion) facilitate or support the state’s unjust policies. Otherwise, however, legal obedience is morally required. Tax resistance like Thoreau’s, on this reading, is permissible where those taxes can be reasonably expected to support injustice (as Thoreau believed to be true in his case); but it is impermissible where they cannot be. So this first reading has Thoreau

# Disobedience, Nonideal Theory, and Historical

---

## Illegitimacy

accepting the idea that even in a society with some seriously or deeply unjust laws or policies, there is still a generic moral obligation to obey the law (where doing so does not give direct support to that injustice) and to help to uphold the state's just policies and laws.

The second, more radical (but equally natural) reading of Thoreau takes him to be arguing that the unjust policies and laws of the United States had exceeded morally tolerable limits and that the state had, in enforcing and pursuing such laws and policies, simply rendered itself morally illegitimate. In doing so, the state had deprived itself of the moral authority to impose on its citizens any obligations of obedience or support whatsoever, leaving them all (morally speaking) to their own devices. When a state's injustices exceed reasonable limits, the argument would go (sounding now rather like one of Locke's arguments), governments forfeit the rights with which they were entrusted and no longer have any moral standing beyond that of a powerful bully. This second reading (correctly, in my view) presents Thoreau as denying not just the moral authority of particular American laws, but the moral authority of his government itself. But, I will suggest, even this more radical reading of Thoreau is still insufficiently radical to do full justice to Thoreau's critique of his state and his defense of his legal disobedience.

Because the second reading of Thoreau presents his views as more radical than his popular reputation suggests, the first reading has been more common. For instance, I think the first reading probably lies behind Hugo Bedau's treatment of Thoreau in a well-known article on civil disobedience. Bedau focuses in his discussion of Thoreau on what he calls "Thoreau's principle," that is, on Thoreau's insistence that "what I have to do is to see that I do not lend myself to the wrong which I condemn."<sup>15</sup> Thoreau's refusal to pay his taxes was, Bedau argues, a refusal to participate in the state's injustices against third parties (since Thoreau knew that his tax money would be used by his government to carry out unjust policies), and so constituted a strategy for avoiding partial responsibility for those wrongs. This, Bedau argues, is a justification for the use of "indirect" civil disobedience that offers a plausible defense of such practices—that is, a plausible defense against those who maintain that only

# Disobedience, Nonideal Theory, and Historical

---

Illegitimacy “direct” civil (p.38) disobedience (which violates only the actual unjust law that is being protested), and never indirect disobedience, can be morally justified.

While Bedau has no doubt identified one of Thoreau’s concerns about paying taxes to an unjust government, Thoreau’s position was more complicated than Bedau’s observations suggest. Bedau, for instance, goes on to worry that tax resistance of this sort is in fact an undesirably “blunt” instrument to properly sever the links of our responsibility for unjust government policies, since it also unfairly severs our ties to the *just* policies and practices of our government.<sup>16</sup> But Bedau’s concern on that point clearly misses Thoreau’s aim, which was precisely to deny the authority of United States over him and to deny any duty of allegiance to its government. Thoreau was arguing that he should be understood to have abandoned all ties between him and “his” country, in consequence of which he can be held to bear no responsibility for any of its actions or policies, unjust *or* just.

This, of course, seems to characterize Thoreau’s position in a way that is more consistent with the second, more radical, reading suggested above. But that reading is still not, as I have said, radical enough. According to the second reading, it is the state’s unjust laws and policies that have delegitimated it. To maintain (or regain) its moral authority, that state need only avoid (or rectify) such injustice, leaving its moral standing “in its own hands,” as it were. But Thoreau’s arguments include suggestions that the state’s legitimacy or authority depends less on what the state itself does than on the wills or the independent obligations of the state’s subjects. Thoreau makes two such claims, both of which would make his argument more radical than and clearly logically distinct from any argument that simply ties the state’s moral authority to the presence or absence of intolerable injustice.

The first of these claims makes the state’s authority and the subject’s political obligations a function of individual *consent*. Thoreau insists that *his* political obligations and the authority of the state over *him* can derive only from his own personal consent, a consent which he may never have given in the first place or which may have been withdrawn because of his perception of, or voided by the fact of, severe governmental injustice: “The authority of government, ... to be strictly just, ... must have the sanction and consent of the governed. It can

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

have no pure right over my person and property but what I concede to it.”<sup>17</sup> Given that the injustice of politically sanctioned human slavery (along with the abuse of Native Americans) not only predated Thoreau’s birth but is repeatedly mentioned by him as the source of his refusal of consent (“I cannot for an instant recognize the political organization as *my* government which is the (p.39) *slave’s* government also”<sup>18</sup>), it may be that Thoreau took himself *never* to have consented to the authority of his government over him. Or perhaps he takes himself to have given and then legitimately withdrawn that consent (or to have given only a conditional consent, whose conditions were exceeded by severe societal injustice).<sup>19</sup>

In any event, Thoreau presumably regards the same consent-style argument as applicable to the positions of all of his fellow citizens (the individuals who constitute the “higher and independent power” from which all of the state’s “own power and authority are derived”<sup>20</sup>), which might imply governmental illegitimacy with respect to either many or all of those citizens.

Whether or not Thoreau believed that his fellow citizens had never really consented at all, he was well known for believing at least that his neighbors should withdraw their consent and, when appropriate, disobey as he had done: recall the oft-quoted (but probably apocryphal) exchange between a distressed Emerson and an untroubled Thoreau in the Concord jail: “Henry, why are you here?”; “Waldo, why are you *not* here?” It is less clear (as we will see) where Thoreau stood on the question of whether all United States citizens should withdraw their consent if their doing so would result in the collapse of the United States, rather than merely in its reform.

The second, still more radical, claim made by Thoreau is that political allegiance and state authority conflict with our more fundamental moral obligation to act rightly—that is, to act in accordance with our own, not our society’s (or the majority’s), judgment of where the right lies: “I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume, is to do at any time what I think right.”<sup>21</sup> On this point, Thoreau stands on familiar *anarchist* ground, denying that the state’s demand for *obedience* could ever be legitimate.<sup>22</sup> (p.40) He anticipates Robert Wolff’s virtually identical assertion of an “absolute

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

obligation” of personal “autonomy,”<sup>23</sup> discussed in chapter 1, and he echoes William Godwin’s related concern that any duty of political allegiance would conflict with our fundamental moral duty to promote utility and with each individual’s right to privately judge the actions mandated by the utilitarian calculus. Here the idea is that any sort of generic, content-independent obligation to obey the law—including an obligation to obey all *just* laws, or to obey all laws that are simply within a tolerable distance from the just—is inconsistent with our more fundamental moral obligations.<sup>24</sup> So such an obligation of legal obedience simply cannot exist, however hard we might try to undertake or impose it. Laws *must* be complied with only where the acts (or omissions) they require are independently morally obligatory, and they *may* be complied with only where they require acts that are independently morally permissible. But *obedience* to law, where “obedience” is strictly construed, cannot be morally required at all. This line of argument not only constitutes a defense of anarchism, it makes the truth of anarchism knowable a priori. *No* state, no matter how just it might be, could claim genuine moral authority to impose on its subjects moral obligations of legal obedience.

Like a contemporary philosophical anarchist, Thoreau is not unwilling to acknowledge the obvious virtues of the United States,<sup>25</sup> nor does he deny that the state may be useful in various ways. Indeed, he intends to make good use of his state where doing so advances his purposes. Thoreau, rather dramatically, (p.41) claims “I quietly declare war with the State, after my fashion, though I will make what use and get what advantage of her I can, as is usual in such cases.”<sup>26</sup> He is principally concerned to deny only that the United States has legitimate authority with respect to him and that it may justifiably demand his obedience.<sup>27</sup> He thus declares his intention “to refuse allegiance to the State, to withdraw and stand aloof from it effectually.”<sup>28</sup> Thoreau will comply with law only in a selective fashion, as the right permits, confident that he can discharge his moral obligations as a person (as well as his duties as a neighbor) without accepting either membership in the political society or its demanded obligations of compliance and support.

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

Thoreau's declaring his willingness to quietly "use" the state that illegitimately coerces him, rather than his advocating for or engaging in revolutionary activity against the state, highlights the principal respect in which Thoreau's is a more "philosophical" brand of anarchism (in contrast with the familiar caricature of anarchists as "bomb-throwers"<sup>29</sup>). Thoreau seems to allow both (a) that his obligations to his fellow humans and his duties to his neighbors set limits on permissible strategies of disobedience, and (b) that the state's illegitimacy with respect to him does not require him (or anyone else) to actively oppose or attempt to do away with that state. Less plausibly, perhaps, he also seems to take his obligations and duties to be at least primarily negative—that is, to be requirements only to refrain from directly harming others or from participating in activities that do harm to them. Not only does he not take himself to be obligated to actively oppose the state that illegitimately coerces him, he appears not to take himself to be bound even to try to actively oppose the injustices that led him to withdraw his consent to his government's political authority over him: "It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even the most enormous wrong; he may still properly have other concerns to engage him; but it is his duty, at least, to wash his hands of it, and ... not to give it practically his support."<sup>30</sup> Thoreau was, of course, raised in an abolitionist household (that served as a refuge for fugitive slaves), and he became himself increasingly active in the abolitionist movement in New England in his later years. But he seemed never to regard such positive involvement as each person's moral duty. At the (p.42) very least, though, we should take Thoreau to be subscribing to the Rawlsian view that our natural duty of justice is limited by a cost-qualifier, that we need not "further just arrangements" beyond that point where we can do so "without too much cost to ourselves."<sup>31</sup>

There is one final respect in which the civil disobedience defended and practiced by Thoreau was plainly unlike the kind of civil disobedience discussed by Rawls (and his interlocutors). While Thoreau was, of course, concerned that his conduct toward his neighbors should be suitably "neighborly," it is unlikely that the "civil" in Thoreau's term "civil disobedience" was intended by him to refer to forms of obedience that were appropriately neighborly, peaceful, or

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

otherwise characterized by any special kind of “civility.” Our inclination to regard Thoreau as so motivated seems less a matter of our reading his texts than one of our reading back into those texts the commitments to pacifism and nonviolence with which many of the more recent campaigns of civil disobedience (such as those of Gandhi and King) have been associated. Thoreau’s first title for the published essay was simply “Resistance to Civil Government,” in which the “civil” clearly refers to the sort of institution at which the disobedience was directed, not the kind of disobedience employed. Though Thoreau disobeyed peacefully and went quite contentedly to jail for it, he was by no means obviously committed, at least as any matter of principle, to nonviolence in protesting or combating injustice.<sup>32</sup> Indeed, he strongly praised the “noble” (and, of course, quite violent) actions of John Brown, which in Thoreau’s view “earned immortality” for Brown and finally cast their shared abolitionist cause “in the clearest light that shines on this land.”<sup>33</sup>

## Nonideal Theory and Principles for Individuals

Rawls’s discussion of civil disobedience (and conscientious refusal) in *A Theory of Justice* stands out from the bulk of that work—as well as from Rawls’s entire body of philosophical writings—in two ways. First, most of Rawls’s work concerns the principles of justice for the basic structure of society, those principles that should shape society’s fundamental political, legal, and economic institutions. These are principles that are not directly applicable to the conduct of (p.43) private individuals, including conduct involving individual disobedience to law. Rawls’s treatment of civil disobedience, by contrast, is said by him to be part of his explication of what he calls “principles for individuals.”<sup>34</sup> Second, where Rawls’s philosophical work concentrated throughout on the “ideal theory” of justice, his discussion of civil disobedience was (until *The Law of Peoples*) Rawls’s only serious foray into what he called the “nonideal theory” of justice. As Rawls gradually recast the arguments of *A Theory of Justice*, first to shape them into a more straightforwardly “political conception” of justice and then to extend them to the domain of international relations, the nature of the distinction between ideal and nonideal theory, I think, grew clearer. At the same time,

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

however, the role of the “principles for individuals” in Rawls’s theory of justice grew progressively more obscure.

Rawls introduced the distinction between ideal and nonideal theory in order to structure his ideas about the relationships between philosophical theory and political practice.<sup>35</sup> Like so many of the distinctions he first drew, this one is now widely employed, with the language of ideal and nonideal theory now a commonplace in moral and political philosophy. The basic distinction seems simple and uncontroversial: Rawls proposes to “split the theory of justice into two parts.”<sup>36</sup> The first—ideal—part of the theory identifies and defends the principles of justice according to which a perfectly just society would be ordered. Assuming “strict compliance” with the principles (but otherwise taking full account of the most intractable features of humans’ moral and psychological characters and the facts about the ways in which social institutions must accommodate them), we ask which principles of justice ought to guide the design and operation of the basic structure of a society. This “ideal part presents a conception of a just society that we are to achieve if we can. Existing institutions are to be judged in the light of this conception.”<sup>37</sup> Ideal theory thus specifies the institutional shape of what Rawls later came to call “a realistic utopia.”<sup>38</sup>

Nonideal theory, taking this ideal of social justice as its long-term goal or target, then identifies and defends the principles that should guide our actions (p.44) and policies in our discharging of our “natural duty of justice”—that is, our duty “to support and to comply with just institutions that exist and apply to us” and “to further just arrangements not yet established.”<sup>39</sup> Nonideal theory “looks for courses of action that are morally permissible and politically possible as well as likely to be effective”<sup>40</sup> in advancing us toward a perfectly just social arrangement. Like ideal theory, nonideal theory will thus require both normative and empirical input, including specific empirical facts about the society under consideration as well as more generally applicable social-scientific data. Wherever “here” happens to be, nonideal theory provides philosophical guidance concerning how various agents ought to try to get from “here” to the target ideal of social justice. Nonideal theory is thus a *transitional* theory, consisting of principles to guide the transition from here to there. And because Rawls takes civil disobedience to have as its goal the improvement of near-just social institutions, nonideal theory

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

will include the principles that should guide the actions of civil disobedients. But because societies are not always (or even commonly) nearly just, nonideal theory must also include principles governing actions aimed at more radical or revolutionary social change.

The ideal theory of *A Theory of Justice* is actually more complex than suggested above, for it appears to be divided into three parts, only the first of which is discussed at length in the book. Rawls divides “the concept of right” into three kinds of principles (each set of principles being, in “justice as fairness,” the subject of a separate choice for original position contractors): the principles for “social systems and institutions,” those for “individuals,” and those for “the law of nations.”<sup>41</sup> The two principles of justice, explained and defended at great length by Rawls in *A Theory of Justice*, are the principles for the first (“social systems and institutions”) part of ideal theory. And the principles for the law of nations are eventually described and defended by Rawls (as the choice that would be made in a second kind of original position) in *The Law of Peoples*. But by the time we get to *The Law of Peoples*, we find Rawls saying that ideal theory has only “two parts”:<sup>42</sup> the principles for the basic structure of a perfectly just liberal society and the principles for a just international “society of peoples.” The “principles for individuals”—including those that apparently formed the basis for Rawls’s earlier account of justified civil disobedience and conscientious refusal—seem to have been lost somewhere in the transition.

In *A Theory of Justice*, Rawls describes the principles for individuals as consisting of “the principle of fairness” (under which fall all “obligations”—that is, (p.45) all voluntarily assumed moral requirements arising from special relationships or transactions)<sup>43</sup> and the various principles that define our “natural duties.” These duties importantly include the natural duty of justice (which underlies Rawls’s defense of civil disobedience), but include as well our duties not to injure the innocent and to give mutual aid and respect.<sup>44</sup> What became of this portion of Rawls’s ideal theory? I think the likeliest explanation is that as Rawls developed justice as fairness into a purely “political conception of justice,” he came to think of these principles for individuals as part of the kind of “comprehensive conception” that he wished to reject. The political conception of justice as fairness treats its principles

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

as parts of an autonomous domain of moral philosophy, distinct from and in no way derived from more general moral principles that would be applicable to individuals' private lives. But the "natural" duties to aid and to refrain from injuring others have the look of parts of a moral theory of "natural law" (or of some other kind—perhaps a Kantian kind or a religious kind—of comprehensive moral theory), a theory applicable to persons both in and out of political society, in both their private and their public lives.

Once Rawls had elected (in the papers leading up to *Political Liberalism*) to defend the principles for society's basic structure as only "reasonable" (for a liberal society with a shared liberal political culture), rather than as parts of a "true" comprehensive moral theory, it may have seemed to him that the principles for individuals—and especially the natural duties—ought to be jettisoned as now-unnecessary parts of his abandoned comprehensive moral theory of "rightness as fairness."<sup>45</sup> Thus, by the time of *The Law of Peoples*, the principles for individuals are nowhere in evidence. They do make a kind of brief reappearance in a new guise in *Justice as Fairness: A Restatement*, where Rawls again describes "three levels of justice": "first, local justice (principles applying directly to institutions and associations); second, domestic justice (principles applying to the basic structure of society); and finally, global justice (principles applying to international law)."<sup>46</sup> While Rawls is not entirely clear about what he means by "local justice," he appears to be thinking of special principles of justice that govern our "substructural level" voluntary arrangements and associations. While local associations are, as Rawls explains, constrained and limited by the broader principles of domestic justice—so that we may not associate in ways prohibited by just institutions of the basic structure—there are additional moral constraints (of justice) on how local associations may operate (without which there would, of course, be no "third level" of justice, no third group of principles, at all).

(p.46) Rawls does not tell us what principles of "local justice" might look like, but a natural conjecture is that a central principle would be something like the principle of fairness—the principle that specifies that we must honor our agreements<sup>47</sup> and do our fair shares within cooperative schemes (that is, within voluntary local associations and institutions).<sup>48</sup> If so, then one part of Rawls's earlier

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

“principles for individuals” has reemerged, but only under a heading that appears designed to distance the principle of fairness from any more general (or comprehensive) moral theory that might be taken to apply as well to our more private lives. Rawls now has his theory of justice require fairness only in our more “institutional” interactions with others. Oddly, this way of reintroducing the principles for individuals again appears to commit Rawls to abandoning his efforts to offer theoretical guidance to practitioners of civil disobedience and conscientious refusal. For those activities plainly need not be undertaken through anything that qualifies as a local “association” or “institution,” meaning that they will not necessarily fall within the domain of “local justice,” as Rawls describes it.

Even more oddly, this entire strategy of avoidance in the “progress” of Rawls’s theory of justice seems to me entirely unnecessary. For we can surely accept (though I, myself, do not) Rawls’s insistence on the autonomy of political philosophy—accept his insistence that we sharply separate the theory of social justice from the principles of interpersonal morality<sup>49</sup>—without abandoning the idea of principles for individuals as a (third) part of the ideal theory of justice. All that is necessary is that we construe the principles for individuals not as moral principles for individuals *qua* persons, but only as principles requiring just conduct by individuals in their roles as citizens of just societies. The original position contractors will presumably be interested (just as Rawls argued in *A Theory of Justice*) not only in the ways in which their basic institutions are structured, but also in the ways that individuals behave in their institutional roles or in their public roles as citizens. And the principles for individuals originally defended by (p.47) Rawls seem a particularly likely expression of this latter interest. A just society requires that its citizens acknowledge both special, voluntarily assumed obligations of certain kinds (including those created by the oaths of office of those citizens who become public officials) and various nonvoluntary (“natural”) duties (including the duty to support and comply with the state’s just institutions). Nothing in the acceptance of such principles of justice for individuals seems (to me, at least) in any way at odds with the “political turn” in Rawls’s thought. If so, then we should expect that even a “fully developed” (i.e., “political, not metaphysical”) Rawlsian theory will indeed

# Disobedience, Nonideal Theory, and Historical

Illegitimacy include the kinds of moral principles that Rawls claims are directly at issue in the justifications of various kinds of legal disobedience.

Because Rawls's ideal theory of justice contains multiple parts (either two or, as I have argued, three), so must his nonideal theory, which governs our responses to failures to live up to the relevant ideal principles. The ideal theory of domestic (basic structural) justice, then, will define the "target" for the nonideal theory of domestic justice, the ideal theory of international justice will define the target for nonideal international theory, and so on. That much seems clear. When Rawls initially tries to explain further the structure and content of nonideal theory in *A Theory of Justice*, however, his few remarks are confusing: he tells us that nonideal theory (focusing here, it seems, only on *domestic* nonideal theory) has "two rather different subparts," the first consisting of principles for addressing "natural limitations and historical contingencies" and the second of "principles for meeting injustice."<sup>50</sup> Since nonideal theory in its entirety was originally characterized as telling us how we ought to respond to injustice—that is, to failures to satisfy the ideal principles of justice—having only one of these "subparts" of nonideal theory concern "meeting injustice" remains somewhat mysterious in *A Theory of Justice*. The point of the distinction eventually becomes clearer, however, when Rawls addresses (twenty-eight years later) nonideal theory for *international* relations.<sup>51</sup>

In *The Law of Peoples*, remember, Rawls again describes a two-part nonideal theory, the parts similarly concerned, respectively, with "unfavorable conditions" and "noncompliance." But in the international theory, the "cases" covered in the two parts are two kinds of societies or "peoples." The "unfavorable conditions" cases are what Rawls calls "burdened societies," while the "noncompliance" cases are the so-called outlaw states. Burdened societies are ones that should be helped (to become well ordered); outlaw states should be pressured to change their ways, and their wrongs (both internal and external) should be opposed (p.48) (by force, if necessary).<sup>52</sup> This makes it clear, I think, that Rawls's real intention (in his divisions of nonideal theory) is to distinguish between the nonideal principles governing our dealings with merely unfortunate (or nonblameworthy) failures to comply with ideal principles and the nonideal principles governing our responses to deliberate (or blameworthy)

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

failures. And, of course, Rawls seems correct that the ways we should address those two kinds of failures might be quite different; a morally permissible (and effective) response, for instance, to societal poverty or cultural obstacles to full justice would likely be rather different from the response we ought to make to deliberate human rights violations or international aggression.

Bearing in mind this two-part division of nonideal theory—while recalling that ideal theory itself has multiple parts, each with its own corresponding branch of nonideal theory—we are left with a more complicated picture of the structure of Rawlsian nonideal theory than might have been anticipated. In fact, there would seem to be six separate parts of nonideal theory, comprising, respectively, the principles for dealing with:

- (1) deliberate noncompliance with ideal principles for the basic structure;
- (2) unfortunate noncompliance with ideal principles for the basic structure;
- (3) deliberate noncompliance with ideal principles for international society;
- (4) unfortunate noncompliance with ideal principles for international society;
- (5) deliberate noncompliance with ideal principles for individuals;
- (6) unfortunate noncompliance with ideal principles for individuals.

As we have seen, the principles of part 3 (covering responses to outlaw states) will specify the occasions for and permissible (or obligatory) forms of international intervention and just war. The principles of part 4 (for burdened societies) will cover the requirements of international aid.

Further, Rawls appears to suggest in *A Theory of Justice* that the principles of nonideal theory for *individuals* will divide into those flowing, on the one hand, from the principle of paternalism—for the treatment of unfortunate noncompliance with the principles for individuals (my part 6), as in cases of immaturity or insanity<sup>53</sup>—and, on the other, from principles of retributive and compensatory justice, which will dictate appropriate responses to crimes and other (deliberate or blameworthy) wrongs (in part 5). Finally, nonideal theory for

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

noncompliance with the two principles of justice (the ideal theory for basic structures)—the part of nonideal theory with which Rawls concerned himself in *A Theory of (p.49) Justice*—divides into (a) “temporary adjustments,” guided by “the general conception of justice” and aimed at eventual full compliance, in order to deal with unfortunate societal poverty or historical or cultural limitations (in part 2);<sup>54</sup> and (b) the principles of civil disobedience, conscientious refusal, and noncivil resistance, understood now as responses to deliberate or blameworthy domestic injustice (in part 1).

Rawls’s theory of civil disobedience (and conscientious refusal), then, is part of nonideal theory for the basic structure, because civil disobedience, properly understood, is motivated by and aimed at repairing injustice in the institutions of society’s basic structure. Rawls’s account of civil disobedience is *not*, as I understand it (and contrary to at least the appearance of some of Rawls’s claims about it), a part of the nonideal theory that deals with failures to comply with the principles for individuals.<sup>55</sup> The theory of civil disobedience is connected to Rawls’s “principles for individuals” only in the following sense: the ideal principles of justice for individuals specify the obligations and duties of citizens in just or near-just societies, some of which must be overridden in order to justify legal disobedience, and some of which directly require that we respond to societal injustice. In particular, the individual citizen’s natural duty of justice both requires general compliance with the institutional rules of a just basic structure (a duty that must be overridden in order for legal disobedience to be justified) and requires that we further just arrangements where they do not exist (which imposes a duty to try to remedy injustices in our basic institutions).

# Disobedience, Nonideal Theory, and Historical Illegitimacy

---

## Possible Objects of Disobedience

Rawls's nonideal theory of justified legal disobedience by individuals thus identifies as the object of that disobedience repairing injustice in society's basic structure. If that injustice is limited or anomalous, so that we have a near-just institutional structure, then any justified disobedience must be *civil*. If injustice is more widespread and intransigent, then noncivil forms of disobedience may be justified (which might aim at repairing the injustice by radically changing or (p.50) even by removing the infected institutions). Recall, however, that Thoreau's civil disobedience was a response not only to injustice in his society's core institutions. Thoreau also took his disobedience to be justified by the fact that he owed no obligations of allegiance at all to his state or government. The presence of such obligations establishes (at least) a strong moral presumption in favor of obedience to law. But Thoreau saw no moral presumption at all in favor of legal obedience, no presumption which needed to be overcome or outweighed in order to justify his disobedience. How might a position like Thoreau's be reconciled with the structure of Rawlsian nonideal theory?

We can for current purposes set to one side Thoreau's anarchist pronouncements; Rawls obviously cannot endorse any argument aiming to show that even a perfectly just state would still be morally illegitimate with respect to all of its subjects (because, according to Thoreau, their accepting its authority would be inconsistent with their fundamental obligations to personally decide and do what is right). And Rawls clearly supposes that he has good grounds for rejecting Thoreau's *personal consent-based* standards for governmental legitimacy,<sup>56</sup> so that Thoreau could not reasonably insist that *he himself*, simply in virtue of his personal withdrawal of (or failure to) consent, was freed of duties of allegiance. What cannot be so blithely dismissed by Rawls (or by Rawlsians or Kantians), however, is the more general line of argument suggested by Thoreau's remarks: namely, that *structural* injustice is not the only defensible object of legal disobedience, that *historical* illegitimacy can also poison the state's claims to allegiance and can justify disobedience as a response to (or in order to repair) that wrong.

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

By “structural injustice,” of course, I mean injustice in the institutional rules of society’s basic structure. But by “historical illegitimacy” I mean wrongful conduct in the history of the state’s subjection of persons or territories to its coercive powers.<sup>57</sup> Thoreau’s critique of his United States, I think, involved charging it with *both* of these kinds of defects. Now it might seem that one cannot charge a state with historical illegitimacy except *in consequence* of its great structural injustices, so that while perhaps Thoreau’s critique was defensible in his day, it might not have been in a better, more just day. In the kind of near-just state discussed by Rawls there could only be justified complaints about the remaining imperfections in the basic structure—but no warranted complaints about historical illegitimacy. (p.51)

But any such appearance is clearly mistaken. Societies may have nearly, or even perfectly, just basic structures in Rawls’s sense while still wrongly imposing those structures on persons, in consequence of historical “wrongs of subjection.” Justice for Rawls is perfectly forward-looking; just institutions are simply those that satisfy Rawls’s two principles of justice, neither of which in any way addresses the issue of *to which particular persons* those institutions’ rules are legitimately applied. Consider again the charges Thoreau levels against “his” country. His state’s institutions had *plainly* not been imposed in defensible ways on those who had been kidnaped and brought to his country in chains to live out short, miserable lives in bondage, or on the aboriginal peoples who had been decimated and forcibly relocated, and whose ways of life had been destroyed or deliberately corrupted. Nor were the territories (or their inhabitants) seized from (or “ceded” by) Mexico in a trumped-up war of acquisition subjected to the United States’ institutional rules in a legitimate fashion. Nor (finally) is it in any way obvious that the United States somehow mysteriously acquired legitimate authority over those persons or territories—or over the children of those persons—simply through the passage of time.<sup>58</sup>

Rawls must say of Thoreau’s United States that it was simply too unjust to be able to legitimate its coercive powers. But let us imaginatively strip Thoreau’s United States of human slavery and its program of destroying its aboriginal peoples, alter its constitution and laws to protect the basic rights of its subjects, and deny it its expansionist propensities, and we would then have a state sufficiently just to legitimate its

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

demands for support and compliance. Thoreau's refusal of allegiance would then be indefensible in Rawlsian terms, as would be similar refusals of allegiance by the remnants of and the children of slaughtered aboriginal peoples, by the suddenly freed African slaves and their children, or by newly anointed US citizens in former Mexican territories. The grim and bloody histories of political subjection and their enduring consequences would purportedly be laid to rest by simple institutional reform and modification.

But surely that is to ignore an extremely important dimension of the citizen-state relationship, a dimension regularly appealed to by (or on behalf of) those (p.52) who claim to have been (possibly because of having ancestors who were) wrongly subjected to states' claimed authority. It is a dimension that is quite distinct from the dimension of structural justice. To take an obvious contemporary example (but also a deeply complicated one, to only one aspect of which I attend here): consider the stated position of some Palestinians. Their principal charge is *not* that Israel's basic structure is in itself deeply unjust or that its government is (for that or for any other reason) illegitimate with respect to *all* who live in Israel's claimed territories. It is rather that the subjection specifically of Palestinians and their homeland to Israeli rule was historically (and in consequence continues to be) illegitimate.<sup>59</sup>

Many groups around the world that are seeking independence or greater autonomy make similar claims. The numerous suits by Native Americans tribes all around the United States aimed at recovering lands (or the value of lands) stolen or fraudulently acquired from them constitute similar appeals to the historical illegitimacy of state subjection, *not* appeals to any structural injustice.<sup>60</sup> When we assess the *plausibility* of such group demands for reparations or for political autonomy, I think the kinds of historical standards for legitimacy which we are discussing are precisely the ones we are normally inclined to employ. Whether or not persons are legitimately subject to political power—whether or not a government has morally justified political authority over them—is a question most naturally addressed by considering whether or not they were (or have since become) *willingly* subjected. Whether or not a geographical territory is legitimately subject to state

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

control is a question most naturally addressed by considering whether or not that land has been lived on or used by the state's willing subjects and whether or not those subjects wrongly forced others from the land.<sup>61</sup>

My point here is only that many of the objects of legal disobedience in actual political affairs concern neither some simple structural injustice nor some particularly deep structural injustice that is thought to have delegitimated the state with respect to all of its claimed subjects (or territories). Rather, the claim is often one of *partial* state illegitimacy with respect to certain wronged peoples, and the object of their disobedience is precisely to defy or to repair that wrong.

(p.53) Rawls's theory of domestic justice appears to have no place for such complaints of *partial* illegitimacy, for considering the moral positions of *subsets* of the society's members who have been wrongfully subjected to state power.<sup>62</sup> Rawls begins with the idea of domestic societies or nations ("peoples") as having fixed sets of members and fixed geographical boundaries. The moral question for Rawls is simply whether the basic structure of the society is sufficiently just that its coercive powers can be justified to all reasonable persons within its claimed (or acknowledged) boundaries.

There is, then, no place in Rawls's theory of *domestic* justice where it can acknowledge the legitimate grievances of—and the special moral justifications for legal disobedience by—persons who have been wrongfully subjected to state coercion, except in cases where *all* subjects can be so described. States, for Rawls, are either sufficiently just that all of their claimed subjects are legitimately subject to their authority (with all being equally entitled only to limited forms of disobedience to particular unjust laws)—because the states' basic structures could be expected to be endorsed by all reasonable persons and are thus fully legitimate<sup>63</sup>—or they are sufficiently unjust that they have no authority whatsoever, leaving all of their claimed subjects morally at liberty (that is, bound only by whatever morality they are subject to simply as persons). Rawls's nonideal theory is not, then, inadequate merely because its account of civil disobedience fails to apply to the paradigm practitioners of civil disobedience (like Thoreau). It is more deeply inadequate in precluding without argument even the possible justifiability of legal disobedience for the

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

sorts of reasons (and with the sorts of objects) that characterize not only some of Thoreau's concerns, but those of many others, both historical and contemporary.

Now it might seem that the place to look for Rawls's acknowledgment of the justifiability of disobedience on grounds of "partial illegitimacy" or "wrongful subjection" is not in his theory of *domestic* justice at all, but rather in his theory of *international* justice. The principles of "the law of peoples," after all, include (p.54) the prohibition of aggressive war and require that human rights be honored;<sup>64</sup> so wrongful subjection of persons (though perhaps not always of territories) might appear to be prohibited by Rawls's ideal "law of nations." But notice that the law of peoples requires these things only *going forward*. None of the principles of the law of peoples require that *past* wrongs be corrected or rectified, even if those past wrongs are identical in all but temporal location to wrongs that would *now* justify intervention or defensive war with the objective of restoring the status quo ante.<sup>65</sup> Rawls's reasoning about the law of peoples, like his reasoning about domestic justice, simply presumes the current legitimacy of generally recognized territories and claimed subject groups.

Rawls does comment (very) briefly in passing on the fact that societies' boundaries may be viewed as "historically arbitrary":

It does not follow from the fact that boundaries are historically arbitrary that their role in the Law of Peoples cannot be justified. On the contrary, to fix on their arbitrariness is to fix on the wrong thing. In the absence of a world-state, there *must* be boundaries of some kind, which when viewed in isolation will seem arbitrary, and depend to some degree on historical circumstances.<sup>66</sup>

But, of course, the kind of complaint about "historical illegitimacy" with which I am here concerned is not just the complaint that a society's boundaries (and thus the individual [and groups of] persons and useful resources that are subject to its coercive control) are "arbitrary" in the sense that they could easily have been otherwise, given different historical events—that they could just as easily have been drawn there as here, or that there was no obvious moral barrier to drawing them there rather than here. The problem is that the

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

boundaries have been and continue to be drawn and redrawn in ways that involve straightforward moral wrongs by states and their agents to innocent individuals and groups (a fact that many who join Rawls in defending broadly Kantian views appear to regard as morally uninteresting<sup>67</sup>). And these are wrongs not only according (p.55) to widely shared understandings of the basic moral rights of those who are illegitimately subjected to political coercion, but also according to the very same conventional and legal rules that purport to establish the authority of states over their other, less controversially claimed subjects.

As far as I can see, Rawls's only argument for disregarding such wrongs (and for taking "presently accepted" boundaries as morally "fixed") is the following:

An important role of a people's government, however arbitrary a society's boundaries may appear from a historical point of view, is to be the representative and effective agent of a people as they take responsibility for their territory and its environmental integrity, as well as for the size of their population. . . . [U]nless a definite agent is given responsibility for maintaining an asset and bears the loss for not doing so, that asset tends to deteriorate. In this case the asset is the people's territory and its capacity to support them *in perpetuity* . . .<sup>68</sup>

But this kind of "stewardship argument" (and the potential for "commons tragedies" to which it refers)—even if we were to accept it without qualification—cannot help Rawls deal with the problem of "partial illegitimacy" to which Thoreau's arguments have pointed us. At most this argument shows that *some state or other* should control useful land and material assets (and the people who depend on them), not that any *particular* state should control any particular assets—and certainly not that all "currently established" boundaries (according to whatever "consensus" the "community of nations" might have managed to achieve) are morally unchallengeable.<sup>69</sup> For Rawls to think otherwise seems to (p.56) me to amount to his committing himself to one or the other of two indefensible views: (a) that wrongs that occurred *yesterday* are in principle morally different from the same kinds of wrongs occurring tomorrow; or (b) that all cases of "historical illegitimacy"—that is, all past wrongful subjections

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

by states of persons and territories—are in principle irremediable and so morally uninteresting. Both views seem to me to be self-evidently false. And non-Rawlsian explanations for such moral conservatism about “historically arbitrary” boundaries—such as utilitarian worries about the transition costs of territorial adjustments—seem to me also inadequate to justify that conservatism. While we may indeed need to “start somewhere” in political philosophy, the particular place where we find ourselves now need not be that place.

The focus in Rawls’s theory of *domestic* justice is on the structural features of just political, legal, or economic institutions (just as the focus of his theory of *international* justice is on the structural features of a just society of peoples, and of its participating liberal [and other “decent”] peoples). But *structurally* just arrangements, no matter how admirable they may be in themselves, may not be justifiably imposed on all and sundry, without regard for whether this imposition is defensible *as a process*. Simply in virtue of (let us say, *arguendo*) the near-justice of the basic structure of the United States, the United States surely could not be *justified* in annexing a portion of Mexico and coercively imposing US law on Mexican citizens (even if that were accompanied by the granting of US *rights*)—as we tried to do, after a fashion, with a portion of Mexico in Thoreau’s day.

And if we cannot do this now, then we may not reasonably assume that all existing states’ currently accepted *claims* with regard to subject populations or geographical territories are simply to be given a free pass, subjected to no moral scrutiny—*regardless* of how fine or just those states’ legal, political, and economic institutions may have been (or have become). The legitimacy of state coercion requires more than its being in accordance with near-just institutions. It requires that those institutions be (and have been) imposed on persons and territories in morally defensible ways.<sup>70</sup> These points highlight inadequacies not only in Rawls’s particular political philosophy. As we will see in the next chapter, much of contemporary, broadly Kantian, democratic theory suffers from the same problems. In trying to explain “democratic authority,” philosophers (p.57) often proceed as if the problem of legitimate subjection for democratic states has already been resolved. Our only concern need be, then, how to explain the peculiar authority of the resolutions of disagreements accomplished by democratic institutions in action. But

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

democratic decision procedures could plausibly be thought to be authoritative with respect to all members of a group of persons only if all of those persons had been *previously* determined to be legitimately subject to *one and the same* collective decision procedure. And that determination requires consideration of *historical*, not merely (democratic) *structural*, factors. It requires that we *assess*, not that we *accept*, the claims of even democratic states to authority over particular persons and territories.

In my view, then, nonideal theory for political philosophy must take as its target not simple structural or functional justice—that is, not simply achieving an institutional structure that effectively administers justice going forward—but rather full, including historical, legitimacy with respect to the uses of political coercion in controlling subjects and territories. Legal disobedience may be justified either simply in response to historically illegitimate subjection (by demonstrating the absence of political authority) or by showing how disobedience can justifiably advance the cause of full political legitimacy—which we can here take to include full structural justice. Nonideal theory will then recommend the most effective and feasible, morally permissible path to that end. And determinations of moral permissibility will in part involve balancing the progress that legal disobedience can stimulate against any harms done to others and their associations by acts of legal disobedience, along with any negative effects that disobedience might have on the provision of goods that even bad states often accomplish (such as the deterrence and disabling of ordinary criminals). Whether and when legal disobedience must be *civil* (in Rawls’s sense of that term) will be determined by this same set of factors.

In the end then, I think, Thoreau is correct in stressing the importance of historical considerations in the analysis of state authority and legitimacy—in implying that an account like Rawls’s is importantly truncated, that true moral legitimacy requires more of political societies than that they produce adequately just institutions while wearing forward-looking blinders. It requires options and rectifications for those indefensibly subjected to societies’ coercive powers.<sup>71</sup> (p.58) Perhaps it requires even that states eventually become the kind of state that Thoreau “pleases himself” to imagine: “a State at last which can afford to be just to all men, and to treat the individual with respect as a neighbor; which even would

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

not think it inconsistent with its own repose, if a few were to live aloof from it, not meddling with it, nor embraced by it, who fulfilled all the duties of neighbors and fellow men.”<sup>72</sup>

### Notes:

(1) While my meaning in using these terms will become clear as we proceed, I understand them as follows: functionalist theories aspire to ground the state’s political authority (its rights) solely in its successful performance of its morally mandated functions. Structuralist theories attempt to ground political authority in the moral character of the structure of the state’s basic political and legal institutions. In Kantian (and neo-Kantian) political philosophy, the two views come together: the state’s moral mandate is to do justice (or to make justice possible) by imposing a just basic structure of political, legal, and economic institutions. “Functionalist” is the name given to such theories by Annie Stiliz in Stiliz (2011), 576.

(2) Rawls (1999b), 176–89.

(3) A society’s “basic structure” is its “major social institutions,” that is its “political constitution and the principal economic and social arrangements” (Rawls [1971], 7).

(4) *Ibid.*, 355.

(5) Exactly when a society counts as being “nearly just” is left extremely vague by Rawls; and that vagueness is accentuated by Rawls’s further qualifications, such as “making due allowance for what it is reasonable to expect in the circumstances” and “reasonably just, as estimated by what the current state of things allows” (*ibid.*, 351). Another complication is that a society can be “nearly just” in either of two ways: by having institutions and laws that fall slightly short of a defensible shared public sense of justice (say, a Rawlsian one), or by having institutions and laws that conform perfectly to a defective public sense of justice (352). Rawls focuses on the former case. Of the latter case—where one cannot hope to repair injustice by appealing to the public’s sense of justice—Rawls says that we must consider exactly *how* unreasonable the defective sense of justice is; and if it is not *too* unreasonable, we may in fact have a duty to live with our society’s injustices and do the best we can.

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

(6) I challenge even this initial claim in Simmons and Wellman (2009), 158-9, 168-70.

(7) Rawls contrasts “civil disobedience,” so understood, with what he calls “conscientious refusal”—that is, “noncompliance with a more or less direct legal injunction or administrative order,” where the noncompliance is “not necessarily based on political principles” and is not “a form of address appealing to the sense of justice of the majority” (Rawls [1971], 368-9).

(8) The paragraph above summarizes (with nearly unconscionable brevity) the arguments of *A Theory of Justice*, sections 55, 57, and 59.

(9) Lyons (1998), 39.

(10) Rawls acknowledges that Thoreau’s (“traditional”) understanding of “civil disobedience” encompasses both what Rawls calls “civil disobedience” and what Rawls calls “conscientious refusal” (Rawls [1971], 368). I focus here on deeper disagreements between Thoreau and Rawls.

(11) The essay was originally published in 1849 under the title “Resistance to Civil Government” and only later renamed “Civil Disobedience”—by the editor of a posthumous collection of Thoreau’s writings (who claimed, however, that Thoreau had himself renamed the essay before his death). The written essay was based on Thoreau’s 1848 public lecture in Concord, which was titled “The Rights and Duties of the Individual in Relation to Government” and was designed to explain to his neighbors his reasons for refusing to pay his legally required poll tax (which had gone unpaid for six consecutive years at the time of his arrest). As a result of that refusal, Thoreau was arrested and spent one night in jail—a night which was, by his own account, a happy and interesting one. His edifying incarceration was cut disagreeably short when an “interfering” aunt paid his taxes for him.

(12) “Have [all these soldiers] been trained merely to rob Mexico and carry back fugitive slaves to their masters?” (Thoreau (2000), “Slavery in Massachusetts”).

(13) See Rosenblum (1996), xxiv.

(14) On the possible forms of and justifying arguments for “philosophical anarchism,” see Simmons (2001b).

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

(15) Thoreau (1996), 9 (“Civil Disobedience”); Bedau (1991), 53.

(16) Bedau (1991), 65–6.

(17) Thoreau (1996), 20 (“Civil Disobedience”): “I, Henry Thoreau, do not wish to be regarded as a member of any incorporated society which I have never joined” (13).

(18) Ibid., 4. Of the governor of his state, Thoreau writes “He was no Governor of mine. He did not govern me” (Thoreau [2000], 699 [“Slavery in Massachusetts”]).

(19) “Let each inhabitant of the State dissolve his union with her, as long as she delays to do her duty” (Thoreau [2000], 709 [“Slavery in Massachusetts”]).

(20) Thoreau (1996), 21 (“Civil Disobedience”).

(21) Ibid., 2. “I would remind my countrymen that they are to be men first, and Americans only at a late and convenient hour” (Thoreau [2000], 707 [“Slavery in Massachusetts”]). “What right have *you* to enter into a compact with yourself that *you will* do thus or so, against the light within you? Is it for *you* to *make up* your mind ... and not accept the convictions that are forced upon you ...?” (Thoreau [1996], 156 [“A Plea for Captain John Brown”]).

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

(22) Thoreau's relationship to anarchism is a subject of some controversy. He is often mentioned as one of the American fathers of "individualist anarchism" (along with the so-called Boston anarchists, including Tucker and Spooner). But it is just as frequently denied that Thoreau was any sort of anarchist: see, e.g., Rosenblum (1996), xix; and Simon (1984). In the opening paragraphs of "Civil Disobedience," Thoreau is plainly distancing himself from *one sort* of anarchism—namely, the Christian anarchism of Garrison and his abolitionist followers, who were pacifist "non-resisters" (because of God's prohibitions on violence) and "no-government men" (rejecting the state because of the superiority of God's claims to control over man to those made by government). But Thoreau *is*, I believe, defending another, more "philosophical" sort of anarchism—one that acknowledges the potential usefulness of the state ("government is at best but an expedient" [Thoreau {1996}, 1]) and that denies any moral imperative to do away with states ("I ask for, not at once no government, but *at once* a better government" [2]), but that maintains nonetheless the moral *illegitimacy* of the state's demand for obedience (as I argue in the text below). We may not yet be ready to live without government. But: "That government is best which governs not at all'; and when men are prepared for it, that will be the kind of government which they will have" (1).

(23) Wolff (1998). Wolff says, as we saw in chapter 1, that "the primary obligation of man is autonomy" (18), which obligation he characterizes in terms of "taking responsibility for one's actions," refusing "to be subject to the will of another," and never neglecting the task "of attempting to ascertain what is right" (13-14). Compare Thoreau: "What is it to be born free and not to live free? What is the value of any political freedom, but as a means to moral freedom?" (Thoreau [1996], 117 ["Life without Principle"]).

(24) And these obligations are ubiquitous: "Our whole life is startlingly moral" (Thoreau [2000], 206). "It is not for a man to put himself in such an attitude to society, but to maintain himself in whatever attitude he find himself through obedience to the laws of his being" (302).

(25) "The Constitution, with all its faults, is very good; the law and the courts are very respectable; even this State and this American government are, in many respects, very admirable

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

and rare things, to be thankful for ..." (Thoreau [1996], 18 ["Civil Disobedience"]).

(26) Ibid., 17.

(27) In *Walden*, Thoreau says that he was arrested because he "did not ... recognize the authority of ... the state which buys and sells men, women, and children, like cattle at the door of its senate-house" (Thoreau [2000], 162).

(28) Thoreau (1996), 17 ("Civil Disobedience").

(29) Of his jailing and his possible responses to it, Thoreau says "It is true, I might have resisted forcibly with more or less effect, might have run 'amok' against society; but I preferred that society should run 'amok' against me, it being the desperate party" (Thoreau [2000], 162).

(30) Thoreau (1996), 7 ("Civil Disobedience").

(31) Rawls (1971), 115.

(32) "Show me a free state, and a court truly of justice, and I will fight for them, if need be" (Thoreau [2000]), 711 ["Slavery in Massachusetts"]); "I do not wish to kill nor be killed, but I can foresee circumstances in which both these things would be by me unavoidable" (Thoreau [2000]), 153 ["A Plea for Captain John Brown"].

(33) Thoreau (1996), 169 ("The Last Days of John Brown").

(34) Rawls (1971), 333.

(35) Some of the following summarizes the much more detailed treatment of Rawls's ideal and nonideal theories in Simmons (2010), 5–36. I should note that I there (and in this book) accept and defend Rawls's view of the basic nature of and the relationship between ideal and nonideal theory in political philosophy. It is only with the specific content or substance of Rawls's ideal and nonideal theories that I quarrel here. I argue later (in parts II and III) for a Lockean version of ideal and nonideal theory, but it is a version that accepts both Rawls's "target" characterization of ideal theory and his "transitional" version of nonideal theory (which are explained below).

(36) Rawls (1971), 245.

# Disobedience, Nonideal Theory, and Historical

---

## Illegitimacy

(37) Ibid., 246.

(38) Rawls (1999a), 7.

(39) Rawls (1971), 115.

(40) Ibid., 89.

(41) Ibid., 109.

(42) Rawls (1999a), 4-5 (my emphasis).

(43) Rawls (1971), 111.

(44) Ibid., 109.

(45) Ibid., 17.

(46) Rawls (2001), 11.

(47) In *A Theory of Justice*, Rawls argues that “the principle of fidelity [which requires the keeping of promises] is but a special case of the principle of fairness applied to the social practice of promising” (Rawls [1971], 344).

(48) The kinds of local institutions or associations Rawls has in mind would presumably have to be voluntary ones, since justified use of coercion is the special province of the political or legal institutions at the level of the basic structure.

(49) This separation is, of course, a result of Rawls’s worries that a defensible conception of justice must be *stable* (and “stable for the right reasons”). If we defend justice as fairness as a *true* conception of justice, derived from more comprehensive true moral principles (say, principles defining the natural rights of persons), those who embrace competing comprehensive principles (say, utilitarian ones or those of some religious ethic) must reject justice as fairness. That conception cannot then serve as a *public* conception of justice which we can expect to be endorsed and supported by all reasonable members of the society. It can at best generate its own support as the subject of a shared *modus vivendi*, rather than being regarded by all as the *best* conception of justice for their society.

(50) Rawls (1971), 246.

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

(51) Most of the following interpretive points in this section are argued for in much more detail and at much greater length in Simmons (2010), 12–18.

(52) Rawls (1999a), 5.

(53) Rawls (1971), 244, 249.

(54) *Ibid.*, 152, 62.

(55) Each of the three general categories of nonideal theory will specify secondary principles for addressing noncompliance with the primary principles of its corresponding part of ideal theory. And the agents bound by the principles of nonideal theory need not be of only one kind. So, for instance, for noncompliance by the institutions of society's basic structure, nonideal theory may specify different principles to direct the actions of individual citizens, of government officials, of foreign nationals, and so on. Rawls's theory of civil disobedience is (part of) the content of nonideal theory for the basic structure; but it is the part addressed to ordinary citizens of the particular society whose basic structure has failed the test of ideal justice.

(56) On Rawls's objections to consent theory and my replies to them) see Simmons (2005), 345–6.

(57) My subsequent focus in this chapter (and later in this book) on questions of historical legitimacy should not be taken to indicate that I think state legitimacy is the only important dimension of the moral assessments of states (and their conduct). But I do think that it is a dimension importantly distinct from those factors that bear on states' *justifications*. My remarks here should be read in light of the distinction between state legitimacy and the justification of the state, as I present it in "Justification and Legitimacy" (Simmons [2001a]).

(58) I address questions about the (alleged) gradual "supersession" of historical wrongs later in the book, principally in chapter 7. The passage of time can, of course, complicate questions about *membership* in illegitimately subjected groups (because of intermarriage, etc.), as Susanne Sreedhar observed in her comments on an early version of this chapter (Sreedhar [2010], 1836–7). Such complications, however, seem to me only complications, not in any way

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

*nullifications* of the relevant moral facts. Those facts may be easiest to sort out—as they were in Thoreau’s case—when they are addressed soon after the historical wrongs at issue.

(59) Such claims, of course, are meant to deny or trump similar historical claims to this same territory by Israeli citizens. That is just one of the many complexities of the case that I do not even begin to address here.

(60) This is not to say, of course, that the relative *urgency* of demands for reparation would not be likely to be reduced by instead simply moving closer to or bringing about full structural justice. It is to say, rather, that Rawls’s theory seems unable to account for a significant moral “vector” in our commonsense analysis of such cases.

(61) These are, of course, precisely the central standards of the Lockean theory of territorial rights that I will defend in parts II and III of the present work.

(62) Rawls does, of course, allow that the duty to obey unjust laws is limited or absent in the case of minorities that have been disproportionately disadvantaged by such laws. But such minorities are still taken by Rawls to be legitimately subject to the (near-just) state’s authority (e.g., in the case of just law). I in fact subscribe to the kind of philosophical anarchism to which some of Thoreau’s remarks point. On that view, of course, the “partial state legitimacy” to which I refer here is actually pretty complete. Most of us are illegitimately subjected to state coercion. My purpose here is to *grant* Rawls his denial of the anarchist view to see whether his position could *then* yield a plausible account of justified legal disobedience. My argument here is that the answer to that question is “no.”

(63) “Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy” (Rawls [1993], 137).

(64) Rawls (1999a), 37.

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

(65) Nor would violations of the principles of the law of peoples justify responses by individuals or substate groups who were victims of such wrongs. Nonideal international theory for Rawls governs the justified responses by *peoples* or *nations* (or “societies”) to violations by other societies of the ideal principles for “international society” (*ibid.*, 5). The justified responses to injustice by individuals or substate groups appear to be thought by Rawls to be the province of the theory of *domestic* justice. But, as we have seen, they are in fact not adequately addressed there either.

(66) *Ibid.*, 39.

(67) For instance: “in many cases these common worlds were forged by the use of force and fraud. But however one thinks of how these common worlds are formed, the fact of a common world is a morally relevant fact now. Arbitrariness of origins does not imply the moral unimportance of the phenomenon that has been formed” (Christiano [2008], 83). This apparent attempt to dismiss the problem of historical illegitimacy is puzzling. We can certainly allow with Christiano that force and fraud can create situations in which new obligations arise for the wronged parties. That I was purchased as a slave to care for the master’s children may, of course, put me in a situation where it would be wrong for me to abandon the children (for instance, when doing so would put them in great danger). But it surely does not follow from that that I should not be freed from slavery (and compensated for the wrongs done me); the master (and his agents) can acquire no moral authority over me by forcibly “intertwining” my interests with those of the master’s children. Annie Stiliz similarly claimed “one thing a liberal theory of citizenship cannot do, however, is tell us why we should have separate states in the world at all, or why borders happen to fall where they do.... But in my view this is in no way problematic” (Stiliz [2009a], 211). Stiliz’s more recent work, as we will see in chapter 6, suggests that her views on this point may have changed.

(68) Rawls (1999a), 38–9.

(69) I also do not believe that Rawls’s points actually show (or even argue for) political control of *all* of the world’s (or the solar system’s, or the universe’s) usable assets. As I will argue later, the value of self-government seems to me to argue (in the opposite direction) for leaving (or making) some usable

# Disobedience, Nonideal Theory, and Historical

## Illegitimacy

territory and resources available to those individuals and groups who seek political independence or new forms of political association.

(70) Rawls's only reference to more historical—or “pedigree-based”—standards for legitimacy concerns simply the nonmoral, *internal* (primarily legal) criteria for governmental legitimacy (or for the legitimacy of specific rulers or specific laws) within a *structurally* just or legitimate state. Rawls does not consider the sorts of *nonstructural*, historical moral standards for the legitimate subjection of persons or territories to state coercion with which we are here concerned. On such internal “pedigree” requirements for legitimacy, see Rawls (1995), 175.

(71) Societies owe rectifications to those they have illegitimately subjected to their political and legal institutions. In my view, this group includes not only the obvious cases of subjugated peoples, but most of the rest of us as well. May we then justifiably disobey the law with the object of doing away with the state altogether? Because many innocent people rely on and want to preserve their states, legal disobedience may in practice now be justified in pursuing only quite gradualist aims, with the achievement of structural justice within the familiar sovereign state as its most imperative “short-term” goal. Thoreau's dream of free political association—and free political disassociation—may be an ideal that can only defensibly be approached very slowly.

(72) Thoreau (1996), 21 (“Civil Disobedience”).

