

## **Civil Disobedience as Public Address: The Limits and Scope of Forceful Appeal**

**Anthony R. Reeves**

Copyright 2007

In *A Theory of Justice*, John Rawls characterizes civil disobedience as an act which “addresses the sense of justice of the majority of the community and declares that in one’s considered opinion the principles of social cooperation among free and equal men are not being respected.”<sup>1</sup> For Rawls, civil disobedience is an appeal to the common sense of justice that is shared by a political community that can only be properly justified in terms of that sense of justice. Acts of conscientious disobedience that are based in other personal moral or religious principles cannot be justified in the same manner as civil disobedience since, Rawls argues, they do not arise out of a conflict of duties to justice.

Although I am sympathetic to characterizing civil disobedience as a form of public address in a basically just society, a view of civil disobedience which limits its justification to the sense of justice already shared by the community neglects, I will argue, a full conception of what constitutes a just political community. More specifically, I will contend that even if a community shares Rawls’ common sense of justice, not all matters salient to the application of the principles of justice can be resolved simply by appealing to the common conception. The content of the political conception is insufficient for determining the scope or nature of its application and requires the supplement of heterogeneous moral judgments in order to regulate a well-ordered society. If this is the case, there is little normative ground for limiting civil disobedience to the existing sense of justice since determining whether there is a conflict of duties to justice often requires resolving independent moral issues.

To defend the above thesis, I will first provide an account of Rawls' conception of the nature and role of civil disobedience. I will then argue that the narrow scope of legitimate civil disobedience Rawls envisions must be significantly broadened once it is recognized that other, more general, moral issues are relevant to the application of basic justice. I will follow this with a consideration of two important objections. Finally, I will consider some implications of the argument for polities, like our own, which at best approximate Rawls' notion of a well-ordered and just society. I now turn to Rawls' account.

### **Rawls on Civil Disobedience**

Rawls' conception of civil disobedience is part of his general theory of just social cooperation, commonly known as justice as fairness. Rawls argues that the political principles of justice, principles of social cooperation that are to serve as a moral basis for evaluating political arrangements, are the principles that free and rational persons would choose as matters of self-interest in an initial position of equality. In this "original position", fair agreement is modeled by placing each representative under a veil of ignorance. The parties do not know their place in society, their natural assets or status, or their comprehensive doctrine.<sup>2</sup> The principles rationally chosen in the original position are to regulate all future decisions concerning what Rawls terms the basic structure, which is "the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time."<sup>3</sup>

Rawls contends that the following two principles would be chosen in the original position. They are:

- (a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society.”<sup>4</sup>

By establishing normative standards for the basic structure, these two principles form a political conception of justice that is to regulate social cooperation. Justice, thus understood, is the primary political virtue of a democratic polity.<sup>5</sup>

Rawls argues that every citizen of a basically just society, i.e. a polity which realizes these principles to a large degree, has a “fundamental natural duty”<sup>6</sup> to justice that directs all citizens to uphold and comply with a just society’s institutions and mandates. Unlike obligations, which apply only to those who freely enter into them, it is incumbent on all members of a just society to act in accordance with the principles of justice and the institutions derived there from regardless of whether any consent has been given on the part of the individual. The natural duty of justice applies to all citizens without their actual consent because those in the original position would agree to such a duty, i.e. any rational person under the constraints of the original position would choose such a duty that applied universally within the society. Such a duty, and its recognition, would be essential to maintaining just social institutions and arrangements.<sup>7</sup> This duty, furthermore, is voluntary in the sense that any rational person would assent to it under normatively ideal conditions.<sup>8</sup>

Rawls recognizes the fact that, even if the basic structure of a society is just, not all the mandates resulting from its institutions will themselves be in accordance with the principles of justice. Injustice, Rawls argues, can arise in two ways, either current policies depart from the accepted principles of justice or the dominant sense of justice departs from a reasonable sense and the society's policies reflect this.<sup>9</sup> If the former is the case, it is still incumbent upon members of that society to obey an unjust mandate or law as long as it does not "exceed certain limits of injustice." It can only be expected that, due to human and institutional imperfection, unjust mandates will arise from institutional procedures that are otherwise just. Thus, out of fidelity to those institutions required by the natural duty of justice, disobedience to even unjust mandates is not legitimate as long as the hardships of injustice are distributed fairly equally throughout society and the injustice is not excessive.<sup>10</sup>

Nonetheless, if unjust laws do result from otherwise just institutions, there does arise a conflict of duties. On the one hand, one has duty to uphold just institutions while on the other, there is a duty to oppose injustice. It is this conflict of duties that gives rise to the possibility of justified civil disobedience for Rawls. Rawls 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."<sup>11</sup> Furthermore, since it is done within the frame of a just society in fidelity to its just institutions, i.e. it is undertaken as a means to prevent an injustice within a generally just social arrangement, it is an act that addresses the sense of justice of the community. It is a testament to the community that one sincerely holds that the principles of justice, *which are the principles upon which the community is framed and are thus the*

*basis for social cooperation*, are being violated, i.e. it is a political act. As a political act, an act which is itself based upon the principles of justice accepted by the community, civil disobedience to the morally binding authority of just institutions is justifiable.<sup>12</sup>

Four other aspects of Rawls' conception of civil disobedience require explication. First, as an address to the community, it must be a public act. Rawls compares it to public speech in that it is a form of address which declares one's convictions to the community. However, unlike public speech, which presumably can be performed by anyone at anytime in a just society, civil disobedience is one of the last resorts of a minority that, due to a perceived injustice, wishes to dissent from the decisions of the political majority. That is, most legal channels of redress have been exhausted and the political majority remains unmoved by the claims of the minority or unwilling to address the perceived injustice. It is in such cases, other conditions being met, that a political minority in a nearly just society, when the duty to oppose injustice outweighs the duty to uphold just institutions, can legitimately engage in civil disobedience to force the majority to reconsider its actions in light of the commonly held sense of justice.<sup>13</sup>

Second, acts of civil disobedience are to be nonviolent. This is not because such acts are pacifist in principle; rather, it follows from the idea that civil disobedience is a rational appeal to a reasonable sense of justice. As Rawls puts it, "To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address."<sup>14</sup> Rawls is willing to admit that if the appeal to the community through non-violent disobedience fails, and the injustice is serious enough, then forceful resistance can be justifiably entertained. However, until these conditions obtain, disobedience should remain as a form of address that demonstrates fidelity to the laws of a just community.

Furthermore, as an additional testament of sincerity and fidelity, participants in such acts must be willing to accept the legal consequences of their disobedience to convince the community of their sincere commitment to the principles of justice. “To be completely open and nonviolent is to give bond of one’s sincerity, for it is not easy to convince another that one’s acts are conscientious, or even to be sure of this before oneself.”<sup>15</sup>

Third, civil disobedience should be limited to substantial and clear violations of the first principle of justice and the most blatant violations of the second. Rawls contends that violations of the second principle will be difficult to ascertain and are likely to work themselves out if the requirements of the first principle are met. “[I]f one views such disobedience as a political act addressed to the sense of justice of the community, then it seems reasonable, other things equal, to limit it to instances of substantial and clear injustice, and preferably to those which obstruct the path to removing other injustices.”<sup>16</sup> Presumably, what Rawls has in mind here is that if the first principle is securely institutionalized, then normal political channels will offer the opportunity to deal appropriately with issues concerning the second principle.

Fourth, since civil disobedience is an act done in fidelity to the law and community, some discretion should be practiced to prevent disobedient acts from destabilizing the community. For example, several large minority groups may be equally justified in engaging in civil disobedience. However, if all of these groups perform such acts simultaneously, it could seriously destabilize the community. Since every member of these groups has a duty to maintain basically just institutions, the groups should avoid any disobedience, including acting simultaneously, that undermines the basis for social life. To deal with this kind of issue in particular, Rawls envisions either some sort of

cooperative political alliance between minority groups that would coordinate the overall level of dissent or simply a more informal understanding amongst the groups that the basic institutions of a just society should remain stable.<sup>17</sup>

To summarize, civil disobedience derives its basic justification from the principles of justice that form the basis of a community's civic life and, as a consequence, is limited to issues of justice. It is an address to the community that these principles, which are imperative on all members and institutions of the community, are being violated. Civil disobedience, as defined, cannot be based on other principles not derived from that of justice because it is itself justified by conflicting duties of justice. This is not to deny the possibility of justifying other forms of unlawful disobedience (e.g. conscientious refusal), it is simply to say that these forms of disobedience would require a different sort of justification.<sup>18</sup>

If kept within proper constraints, Rawls believes that civil disobedience has a legitimate role in a nearly just society. This role is one of stabilization since, as a sincere and forcible appeal to the principles of justice, it can prevent large departures from justice. Again, Rawls admits that unjust mandates will undoubtedly result from otherwise just institutions and if the majority of a nearly just community refuses to address these injustices, then instability may result. Deliberate denial of justice, Rawls asserts, invites either resistance, which will weaken the cohesiveness of the community, or submission, which may provide a sense of vindication to those who perpetuate the injustice. In either case, the basis of social cooperation would become unstable. Though civil disobedience defies the lawful mandates of a just society, it serves the principles of justice on which that society is founded by preventing large departures from them.<sup>19</sup>

## **Justice: Its Scope and Application**

I will here move on to offer a criticism of Rawls' conception of civil disobedience. What must be shown if civil disobedience, justified by a conflict of duties to justice, is to be broadened to other moral issues is that the content of the political conception of justice is insufficient for arbitrating moral issues basic to its application. The consequence of such an insufficiency is that other moral considerations are essential to fundamental public debate about justice, and thus part of the proper scope of legitimate civil disobedience, since these issues must be addressed if political justice is to serve as a basis for social cooperation.

I will take the issue of whether abortion is permissible in a well-ordered society to illustrate justice's insufficiency. Before jumping into this issue, though, I should note that I do not wish to make an argument as to what problems are most fundamental morally speaking. I simply wish to discuss one way abortion can be framed that is pertinent to Rawlsian justice and how this can provide some insight into justice's relation to the issue.

Does justice as fairness have anything to say about the practice of abortion and, if it does not, is that significant given that it is intended to serve merely as a basis for social cooperation and not as a solution to moral problems generally? To answer the former question, we might ask how the issue would be addressed in the original position. How would those free, equal, and rational individuals in the original position address the issue of abortion? Fundamentally, as we have seen, they would choose the greatest amount of liberty that is compatible with equal liberty for all.<sup>20</sup> That is, they would grant to every

person in society the greatest amount of liberty possible so that all would have equal liberty and so that no liberties would infringe upon those liberties granted to others. This being granted, how does this apply to the issue of rights in the case of abortion?

Certainly a right to life would be granted to all persons<sup>21</sup> as well as a certain degree of autonomy, as long as this autonomy does not infringe upon the fundamental liberties of others. However, even if this is granted, it does nothing to resolve the issue, for whether or not the fetus counts as a person (morally speaking), and thus possessing such rights, is left unanswered. That is, whether or not the fetus is deserving of the rights granted to all persons in a just society depends upon whether it is understood as a person. We might also put this problem, equivalently, in terms of whose interests are accounted for by the representatives to the original position – do fetuses have representatives?

Resolving the status of the fetus for the political conception could not be done by another appeal to the original position, for what the representatives would choose in that position would, again, depend upon how they understand the status of the fetus in the first place. If the fetus is assumed to have personhood, and thus it is understood by the individuals in the original position that this is a natural status (much like sex, race or age) they could assume, then it is at least conceivable (though not automatic)<sup>22</sup> that they would limit the right of a woman's control over her body. If the fetus is not understood as a person, then a large degree of autonomy is likely to be granted to women. Thus, an appeal to the common conception of justice in a nearly just society cannot, by itself, resolve this issue.<sup>23</sup>

The overall point is that Rawls' principles of justice are far more formal than is typically noticed. Even when their general content can achieve consensus, the nature of

their proper application will remain ambiguous outside of core cases. This becomes evident when a contentious issue such as abortion is brought before the principles to examine their application to the matter. In the case of abortion, it is not even clear whether the principles of justice are relevant since it depends on prior, and disputed, considerations concerning to what extent a fetus has interests and, if so, to what extent these are morally significant. The original position is of no help here making the principles more determinate for application. Again, whether or not a fetus's interests are to be represented in the original position, i.e. whether or not a fetus deserves justice's protections, depends upon our judgments as to whether, morally speaking, a fetus is a person. Thus, other heterogeneous moral and philosophical reflection is required to resolve the matter. The principles of justice decided upon in the original position do not provide a complete basis upon which to determine their scope and application and thus cannot in themselves provide a sufficient foundation for social cooperation.

The last portion of the above claim may be open for contention. One might be inclined to argue that since the issue of abortion cannot be resolved by an appeal to justice that it is irrelevant to the justice of a community and thus that the communal institutions should have nothing to say about the matter. This, however, is obviously false, for the societal institutions must unavoidably take a stance on whether, from a moral standpoint, the fetus is a person. If the institutions decide not to regulate abortion, it is implicitly claimed that the fetus is not a person and is therefore undeserving of the rights of a person or that the rights of the woman always trump those of the fetus. In other words, a policy of not regulating abortion is equivalent to saying that no injustice is taking place in the act of abortion. On the other hand, creating strict limitations on the

possibility of abortions again is taking a moral stance of justice. It is implicitly claiming that abortion is a violation of the rights of the fetus and is not an unjustifiable violation of the autonomy of a woman. Certainly the institutions can claim that due to epistemic limitations, e.g. limitations concerning what is currently known about the status of a fetus, it will take one stance or the other. However, the institutions of a just society cannot reasonably make the claim that the issue is irrelevant to the proper application of the principles of justice without presupposing an answer to the open question. This being the case, it must be granted that principles of justice depend upon considerations outside of their own derivation for their proper application and thus, in themselves, are insufficient for arbitrating contentious matters essential to their institutional realization.

The implication of this for civil disobedience in a nearly just society is simply that legitimate civil disobedience, as a form of address justified by a conflict of duties, is not limited to appeals to the common conception of justice. If it is admitted that the proper application of this common conception depends upon other moral considerations, then civil disobedience as a form of address must be given the scope to address these issues since whether or not there is, in fact, a conflict of duties may be precisely what is at issue. Civil disobedience is justified by our duty to oppose injustice. Since the existence of an injustice may depend upon the resolution of independent moral questions, this duty encompasses those questions – so long as they are framed as issues that are basic to the application of justice. Civil disobedience is permissible, all other conditions being met, regarding abortion as long as what is at stake is whether a well-ordered society's current policies result in an injustice, e.g. in violating the rights (granted by the first principle) of women or fetuses. In other words, non-violent disobedience is legitimate concerning this

matter when it is framed as an issue salient to the application of the common terms of social cooperation – even though the common conception cannot by itself resolve the issue. This is implied by our fundamental natural duty to justice.<sup>24</sup>

Moreover, it seems correct to suppose that our idealized representatives in the original position would view the legitimate sphere of civil disobedience as wider than the community's given sense of justice if they understood that justice requires answers to independent moral questions to serve as a basis for cooperation. Remember that part of the role Rawls assigns to civil disobedience, and part of the reason those in the original position would regard it as occasionally permissible, is that it will serve justice and stability by preventing large departures from justice. Since identifying injustice may require considerations beyond the common sense of justice, a citizenry will have to address those considerations in preventing and correcting departures from justice. The majority may be unwilling to do this and consequently the responsibility may fall to a minority. Civil disobedience as public address thus has a role here in enabling the minority to correct perceived defects of justice in the existing social arrangements. If Rawls is correct in asserting that injustice weakens the cohesiveness of a community, then widening the scope of permissible disobedience would have a stabilizing effect as well. Justice by itself is insufficient to even be a merely political virtue and, given this, the heterogeneous moral considerations it requires must play a part in the basic, often disobedient, public debate concerning whether justice's demands are being met.

I should emphasize that abortion is an example of this general problem with justice's application, not the extent of it. There are a number of issues, e.g. the status of the severely mentally disabled and that of non-human animals, that fall into this category

and may justify civil disobedience under the right conditions because of their relevance to the proper application of justice. Further, though it is beyond the scope of this paper to fully defend this claim, I would contend that what issues will become important in determining the proper application of justice cannot be determined *a priori*. Our current conception of how the principles of justice are to be applied may rest, unknown to us, on assumptions that cannot be fully vindicated. As Peter Singer points out in a comment critical to Rawls conception of civil disobedience, it was clear to many a hundred years ago that women should not have the right to vote.<sup>25</sup> Given this, civil disobedience must be viewed as having a wide scope of justifiability indeed, for we may not be fully cognizant of what issues are truly relevant to the application of the political conception of justice. Issues which initially appear irrelevant to justice may have serious implications for justice's realization.

### **Two Objections**

At this point, I will consider two objections. The first objection is that Rawls does present a conception of the person sufficient to address the kind of difficulties I raise above. The second objection concerns the kinds of injustices that are candidates for disobedient address. Rawls indicates that it is only clear injustices which can give rise to justified civil disobedience. The types of issues I bring up as problematic for justice's application seem to fail this condition.

Taking the first, one might object that Rawls does in fact provide a conception of the person. A person, on Rawls' account, has two moral powers: (a) the capacity for a sense of justice, and (b) the capacity to have and pursue a conception of the good.<sup>26</sup> If we

take this conception seriously, then we altogether avoid ambiguities concerning the proper scope of justice's application. Justice simply applies to those who possess these powers. Viewing the scope of justice in this way clarifies the nature of the political conception as a theory of just social cooperation, i.e. as a normative framework for regulating interaction amongst persons, rather than a comprehensive moral doctrine. Justice concerns how we treat each other and its scope is consequently limited to those who are capable of engaging in cooperative enterprises in the right way. As Rawls pithily puts it in *A Theory of Justice*, "Those who can give justice are owed justice."<sup>27</sup>

Limiting the relevance of justice to persons who possess the two moral powers avoids the problem of justice's scope in the case of legalizing abortion. Obviously, a fetus does not possess the moral powers and an adult woman does. Thus, a fetus has no representation in the original position and no protection under the first principle of justice while a woman has both of these. A just society's institutions and policies should reflect this fact.

In considering the above objection, we must keep in mind the significance of moral personhood for the theory of justice. Importantly, Rawls emphasizes that this is a normative conception that plays a role in the overall theory and not a metaphysical or psychological conception. Its role is, amongst other things, to identify the morally relevant qualities of citizens for the decision-making of the original position, i.e. to indicate to the representatives how to regard those they represent in developing the principles of justice. Moreover, the source of this conception of personhood is not some philosophical or psychological doctrine, rather it is the public political culture of a democratic society. "[T]he conception of the person is worked up from the way citizens

are regarded in the public political culture of a democratic society, in its basic political texts...and in the historical tradition of the interpretation of those texts.”<sup>28</sup> In other words, the conception of the person operative here is worked up from our considered judgments of moral significance in democratic political relations. This is what Rawls means when he describes the fundamentals of his theory as non-foundationalist.<sup>29</sup>

Since the conception of personhood and sense of moral relevance at work in the theory of justice are the product of our considered judgments, they must be continually responsive to those judgments. In his discussion of justice’s scope in *A Theory of Justice*, Rawls points out that our considered judgments overwhelmingly indicate that young children should receive the protections of justice even though they do not possess the two moral powers and therefore, he concludes, they are to receive its protections.<sup>30</sup> The question of whether a fetus should receive justice’s protections, consequently, remains quite open given our varying judgments on the matter and is not a question in any way resolved by the political conception of justice itself.

A second concern one might have about widening the scope of justifiable civil disobedience to contentious moral issues is that the nature of such disobedience as public address seems to presuppose a general consensus on the evaluative terms relevant for assessing the social situation. Conceiving of civil disobedience as an act of public discourse is only possible if there is a common framework for evaluating the claims being made – otherwise it is simply a shouting match where a minority employs illegal means to increase the volume of its voice. This is why it is so important to limit civil disobedience to clear violations of the existing sense of justice. The sense of justice is the common basis for considering the claims of civilly disobedient acts and thus it

facilitates their nature as public address. The more we complicate, obfuscate, or make ambiguous the terms according to which we are to evaluate claims, the less our acts can be construed as participation in public discourse.<sup>31</sup>

Another related reason we are to avoid civil disobedience where the nature of justice's application is unclear, e.g. as is the case with violations of the second principle and where other controversial moral issues are involved, is that securing liberties of the first principle will create the conditions for effectively addressing other, more contentious, matters. Quoting Rawls at length will be helpful:

The resolution of these [controversial second principle] issues is best left to the political process provided that the requisite equal liberties are secure...The violation of the principle of equality is...the more appropriate object of civil disobedience. This principle defines the common status of equal citizenship in a constitutional regime and lies at the basis of the political order. When it is fully honored the presumption is that other injustices, while possibly persistent and significant, will not get out of hand.<sup>32</sup>

What Rawls seems to be getting at here is that the realization of the equal liberties of the first principle of justice in the social order will allow democratic processes to address the controversial topics of justice appropriately. If citizens are secure in their rights of political participation, public expression and association, and in their liberty of thought and conscience, then we can expect that democratic institutions will be responsive to the citizenry's reflection on the complex permutations of justice. Under these conditions, then, normal political channels will be well-suited to deal with the defects of current policies. Of course, a political order will never be perfectly just, no matter how responsive the majoritarian procedures, and there will always be disagreement about whether and how current arrangements depart from just ones. But this is to be expected given the complexity of instantiating and interpreting the implications of the principles for an actual society with its particular cultural, geographic, economic, historical, and

demographic features. It is hard to see how civil disobedience under the conditions of democracy and equal liberty would improve the justice of a society.<sup>33</sup>

It is not my intention here to draw into question whether the common sense of justice of a well-ordered society must be the primary object of legitimate civil disobedience. Nor do I think that all injustices warrant civil disobedience – injustices must both be clear to those engaged in disobedience and substantial. However, in thinking about the most recent objection to my view, we must keep in mind the central cases of justified civil disobedience conceived of as public address. These are situations in which a minority has employed extensive legal means to change a government policy because of a perceived injustice and yet the majority remains unmoved by the minority's claims. This may be because the majority has some interest in the status quo, but it will often simply be due to the fact that the majority's sense of justice, from the perspective of the minority, departs from a reasonable sense. In other words, in the core cases of legitimate civil disobedience, the minority will often be declaring that the majority's sense of justice does not truly honor the principles of social cooperation.

Consider the following case. A basically just government holds elections once a year on a particular weekend of a certain month for whatever elective offices have to be filled. The polls are kept open for six hours. For most of the population, this is quite convenient since they have the day off. However, for about a fifth of the population, it is quite inconvenient because it turns out to be a working day for them. It is not impossible for the minority to vote, but many must suffer financial loss or other harm in order to do so. A group from the minority, after extensively pursuing normal political channels, decides to engage in civil disobedience in order to press the majority to legislate a

national voting holiday or increase the number of days the polls are open. They regard the current policy as a violation of their voting rights covered by the first principle of justice. Although they are not legally disenfranchised, many are de facto disenfranchised given their real situation. The majority is resistant to this, insofar as they are not simply apathetic about it, because they do not regard inconvenience or minute financial loss in exercising a right to constitute a violation of the right. No one in the minority is being denied the right to vote. Moreover, and this is relevant the majority reasons given that no violation of justice is occurring, enacting either of the reforms would have deleterious economic consequences that outweigh the financial loss of the minority in exercising their right.

The situation in the case above would seem to clearly justify civil disobedience on the part of the minority as long as they employ non-violent means, accept legal sanctions for their actions, and the disobedience is public. What is at stake is obviously substantial - the voting rights of the minority – and the minority understands the violation as evident. For present purposes, what is important to notice about the example is that part of what is at issue is what constitutes a violation of the first principle of justice. The minority is claiming that the majority's sense of how justice applies in the situation is unreasonable.

My point here is that Rawls cannot rely too heavily upon the general clarity of the injustice as a criterion for legitimate civil disobedience since in many of its core cases the injustice will only be apparent to the minority. The minority, in such cases, will be contending that the majority's sense of justice is a misinterpretation of how the political conception of justice applies in the circumstances. Where the injustice is only clear to the

minority, civil disobedience is still an act of public address since what is being appealed to are the common terms of social cooperation and there is no reason to think, unless we consider all moral discussion fundamentally irrational, that public discourse about the proper interpretation of the political conception cannot be conducted reasonably. Thus, mere contentiousness about the nature or existence of an injustice is not enough to disqualify it as an object of civil disobedience. I do not dispute, though, that the injustice must be clear to the minority.

The example above also illuminates what we can expect from a basically just democracy in terms of addressing injustices through normal political channels. Where equal liberty is mostly secure, it may be the case that normal politics will address most pressing questions of justice in an appropriate manner. However, this is not necessarily the case – even under conditions of equal liberty and democracy instances of prolonged substantial injustice are still possible. The case I describe above can be understood to take place under conditions where equal liberty is almost entirely secure – except for the matter of when people can vote in the view of the minority – and yet the political institutions have not adequately addressed it. Whether just institutions properly address an injustice is a contingent matter and consequently civil disobedience, given that all other conditions are met, is permissible whenever normal legal means fail.

To conclude my reply to the two objections discussed in this section, neither the moral conception of the person offered by Rawls or insistence on the general clarity of injustice warrant the conclusion that civil disobedience is illegitimate when it concerns the heterogeneous moral issues relevant to the application of the political conception of justice. The moral conception of the person does not conclusively establish the scope of

justice given that it must be responsive to our considered judgments about scope. The requirement that an injustice be clear generally, if this is one Rawls meant to establish,<sup>34</sup> is too stringent given that in many cases where civil disobedience as public address seems most appropriate, what is at stake is the correct construal of the requirements of justice.

### **Civil Disobedience as Public Address in Actual Democracies**

There remains a question of whether Rawls account of civil disobedience, and thus the consideration of that account offered in this essay, have any practical relevance. Importantly, Rawls develops the theory of civil disobedience for “the special case of a nearly just society, one that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur.”<sup>35</sup> To put it otherwise, it is a theory that attempts to identify the nature and conditions of legitimate civil disobedience in a society that has a shared concept of justice and whose political institutions reflect this concept to a large degree. The “special case” of a nearly just society, however, does not obviously have any real world instances. If this is so, then it is unclear that Rawls conception of civil disobedience offers any guidance to those considering disobedient action in actual democracies.

I do not wish to investigate the empirical question of whether there currently exist any nearly just polities. Given the vast inequalities in wealth in modern democracies, and the corollary effects these inequalities have on political institutions, I am skeptical that there are. In any case, I want to put that question aside here and assume that there are no nearly just governments, but that there are governments who approximate the

requirements of the political conception of justice in important ways. Given this assumption, does civil disobedience as public address have any practical traction?

To answer this question, it is necessary to identify the significant respects by which real world democracies approximate a well-ordered nearly just society. First, many contemporary democracies have individual and political rights enshrined in a constitution or in the institutional culture of the government. The United States Constitution, which contains a bill of rights in addition to demarcating limits on federal power, is a useful example. The rights of political participation and rights which protect the fundamental interests of the individual spelled out in the Constitution appear to accomplish, at least formally, much of what is required by the first principle of justice. Free exercise of religion, freedom of speech, assembly, and the press, due process, protection from cruel and unusual punishment, and enshrinement of voting rights are precisely the kinds of measures that Rawls views as following from the first principle of justice.<sup>36</sup> Moreover, it is arguable that the Constitution does not simply offer an explicit list of rights, but that something like a principle of equal liberty sits in the background and is constitutive of the correct interpretation of the document.<sup>37</sup>

A second salient similarity contemporary liberal democracies share with a nearly just society is a political culture which takes individual rights, distributive justice, and constitutional legitimacy seriously. Most citizens of the United States, for example, regard the Constitution as a legitimate basis for adjudicating fundamental questions of politics. This is a constitution that explicitly spells out many of the requirements of Rawls political conception of justice - even if the principle of equal liberty is not part and parcel of its meaning. Moreover, the public discourse of the United States widely

employs moral categories that are basic to a liberal conception of justice. Talk of individual and civil rights, equality of opportunity, personal liberties, freedom, and fairness is not only common in the political culture, as anyone who is familiar with American media knows, but these moral concepts are seen as the appropriate ones for addressing important political issues. Also of interest is recent analysis of the political morality of citizens of liberal democracies by George Klosko. In a series of focus groups, Klosko discovers that notions of fairness and reciprocity, amongst others, are basic to the way individuals conceive of the moral relationships between citizens.<sup>38</sup>

There are, then, two significant respects by which real world democracies approximate the nearly just state. First, most modern democracies enshrine in a constitution or simply institutionalize much of what is required by the first principle of justice. Second, the public political cultures of these polities are familiar with and regard as appropriate the moral categories basic to a liberal conception of justice. The first of these is important in that, if Rawls is correct that we have duty to promote and comply with just institutions, then we have a duty of justice to uphold existing democratic institutions insofar as they are just. In light of this, a conflict of duties to justice can arise – such a conflict exists whenever an unjust institutional arrangement or policy is enacted. Thus, justifying civil disobedience as a response to a conflict of duties of justice (assuming other conditions are met) is possible in contemporary democracies given that they are substantially just enough to make a natural duty to comply with just arrangements relevant.

Substantial institutional justice is insufficient to ground the propriety of civil disobedience as public address. Conceiving of disobedience as address presupposes at

least some consensus on suitable terms for adjudicating political matters, i.e. there must be some shared sense of justice for public appeals to justice to be significant. The second approximation of existing democracies to a well-ordered society is, therefore, quite important for present purposes. Only to the degree that the political culture of a society encapsulates and affirms as authoritative the moral categories of liberal justice is Rawls's conception of civil disobedience as public address appropriate. It is my sense that actual democratic cultures possess these qualities to a high enough degree to prevent disobedient address from being futile.

I acknowledge that my comments in this section are somewhat schematic. At the very least I hope to have shown what kinds of considerations are important for determining the practical relevance of civil disobedience as public address. Apart from this, I do think contemporary liberal democracies sufficiently approximate (in the relevant ways) a nearly just society for this approach to civil disobedience to serve as *one* model of legitimate unlawful action. Of course, complicating considerations may present themselves in actual states where they would not in one that is ideally or nearly just. For example, Kent Greenawalt points out that those in partially just societies would have to assess whether their society achieves justice to the highest degree that can be expected given its real world circumstances.<sup>39</sup> Such a consideration may complicate matters for one who is considering civilly disobedient action, but it would not change its nature as an act of public address.

## **Conclusion**

I conclude that civil disobedience conceived of as public address is justifiable even its subject falls outside the current sense of the scope of justice. Given that moral concerns heterogeneous to the derivation of the principles of justice are fundamental to the application of those principles, civil disobedience can legitimately address these moral matters. I affirm the other conditions of civil disobedience Rawls outlines, e.g. that it be nonviolent and public, that normal political means have failed, etc. Yet, unlawful modes of addressing the common sense of justice can encompass salient moral questions since these must be answered for justice to be realized. I used the example of abortion policy to illustrate how the principles of justice are by themselves insufficient for determining their scope and application. However, there are other issues, e.g. the status of non-human animals and the severely mentally disabled under justice, that pose the same type of problem. Moreover, given how dependent our moral judgments are to popular prejudices, I suggest that we be somewhat reticent about rejecting claims of injustice as improper subjects of civil disobedience.

### **Endnotes:**

---

<sup>1</sup> John Rawls, *A Theory of Justice*. (Cambridge: Harvard University Press, 1971) 364. All citations of this work are from the first edition. There are no substantial changes in Rawls account of civil disobedience between the first and second editions.

---

<sup>2</sup> John Rawls, *Justice as Fairness: A Restatement*. (Cambridge: Harvard University Press, 2001) 14-18.

<sup>3</sup> *Ibid.*, 10.

<sup>4</sup> *Ibid.*, 42-43.

<sup>5</sup> Rawls, *A Theory of Justice*, 3-6.

<sup>6</sup> *Ibid.*, 115.

<sup>7</sup> *Ibid.*, 333-337.

<sup>8</sup> *Ibid.*, 13.

<sup>9</sup> *Ibid.*, 351-352.

<sup>10</sup> *Ibid.*, 353-355.

<sup>11</sup> *Ibid.*, 364.

<sup>12</sup> *Ibid.*, 364-365.

<sup>13</sup> *Ibid.*, 365-366, 373.

<sup>14</sup> *Ibid.*, 366.

<sup>15</sup> *Ibid.*, 367.

<sup>16</sup> *Ibid.*, 372.

<sup>17</sup> *Ibid.*, 373-376.

<sup>18</sup> *Ibid.*, 384-385.

<sup>19</sup> *Ibid.*, 384-391.

<sup>20</sup> *Ibid.*, 60.

<sup>21</sup> John Rawls, *Political Liberalism*. (New York: Columbia University Press, 1993) 109.

<sup>22</sup> See Judith Jarvis Thompson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (Fall 1971). Thompson argues that even if we grant that a fetus has normal human rights, this does not entail that abortion is unjustifiable.

<sup>23</sup> One could object here that Rawls does provide a conception of the person. A person has two moral powers: (1) a capacity for a sense of justice, and (B) a capacity to have a conception of the good. Importantly, though, Rawls emphasizes that this is a normative conception that plays a role in the overall theory and not a metaphysical or psychological conception. (See *Justice as Fairness*, 14-18.) The significance of this is that the conception of the person must be responsive to wide reflective equilibrium, it must be responsive to our considered judgments. As Rawls points out in *A Theory of Justice* (445-446), our considered judgments overwhelmingly indicate that young children should receive the protections of justice even though they do not possess the two moral powers and thus, he concludes, they are to receive its protections. The question of the fetus' inclusion, therefore, remains quite open given our varying judgments on the matter and it is not a question in any way resolved by the political conception of justice.

---

<sup>24</sup> Rawls, *Political Liberalism*, 273. “[S]ince the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal, duty – the duty of civility – to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonable be made.”

<sup>25</sup> Peter Singer, *Democracy and Disobedience*. (Oxford: Clarendon Press, 1973) 88-90.

<sup>26</sup> Rawls, *Justice as Fairness: A Restatement*, 18-19.

<sup>27</sup> Rawls, *A Theory of Justice*, 510.

<sup>28</sup> Rawls, *Justice as Fairness: A Restatement*, 19.

<sup>29</sup> *Ibid.*, 14-24, 29-32. The relevant sense of considered judgment here is that in wide reflective equilibrium where one weighs various competing ways of understanding a matter under conditions which our capacity for judgment is best exercised.

<sup>30</sup> Rawls, *A Theory of Justice*, 445-446.

<sup>31</sup> *Ibid.*, 371-373.

<sup>32</sup> *Ibid.*, 372-373.

<sup>33</sup> I am grateful to Gerald Doppelt for pressing me on this kind of concern.

<sup>34</sup> It is actually unclear whether Rawls intended the clarity condition to be general or limited to the minority. At one point, he appears to acknowledge that minorities engaged in civil disobedience will often be construing the majority’s actions in ways they do not themselves acknowledge. (See *Theory of Justice*, 366.) At other points where he mentions the necessity of clear injustice, it is opaque whether he intends the injustice to be evident to all reasonable citizens or simply to the minority.

<sup>35</sup> *Ibid.*, 363.

<sup>36</sup> Rawls, *Justice as Fairness: A Restatement*, 44. Significantly, though, Rawls does not intend the liberties granted under the first principle to be merely formal. He insists that the first principle requires that real social conditions which enable the liberties to be properly exercised be established. For his discussion of this matter, see *Political Liberalism*, 324-331.

<sup>37</sup> Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996) 72-116.

<sup>38</sup> George Klosko, *Political Obligations* (Oxford: Oxford University Press, 2005) 181-243. Part of Klosko’s argument in this work is that the empirical evidence works against the idea of a natural duty of justice given that it is rarely cited as a reason to obey the law. I take Klosko’s use of evidence here as inconclusive in this regard – though the analysis is impressive and useful for the project of refining a defensible conception of political obligation.

<sup>39</sup> Kent Greenawalt, *Conflicts of Law and Morality* (Oxford: Oxford University Press, 1987) 164.