

Article

John Rawls on Civil Disobedience-The Embryo and Mature Development

Hung-Ju Chen*

ABSTRACT

In A Theory of Justice John Rawls the famous political philosopher in the 20th century devotes almost 30 pages to civil disobedience and conscientious refusal. Rarely discussed is a short article published two years before A Theory of Justice named The Justification of Civil Disobedience. Comparing these two texts contributes to a comprehensive understanding of the evolution of Rawls's theory. The differences or changes between the two texts have been out of sight and ignorance about the previous text hinders the main function of civil disobedience in Rawls's theory, that is, the communicative function. The purpose of this article is to give those two texts a close reading, find how Rawls evolves his arguments, demonstrate the essential function of disobedience in Rawls's theory, and explicate implications. Through reading those two texts we can understand how the principle of nonviolence becomes essential to civil disobedience and why Rawls relaxes some justificatory requirements to initiate disobedience but meanwhile he finds the potentiality of disobedience to de-stabilize the basic structure of society.

Keywords: *Civil Disobedience, John Rawls, Nonviolence, Two Principles of Justice, Public Reason, Communicative Disobedience*

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* Assistant Professor at General Education Center, National Tsing Hua University, Taiwan. I owe thanks to Lawrence Solum, Ser-Min Shei, Chueh-An Yen for comments and discussions. I owe special thanks to two reviewers. Their succinct and suggestive comments on the structure and substantive content make this article more focus.

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I. JOHN RAWLS'S TWO TEXTS ON CIVIL DISOBEDIENCE

Voices of dissent have different forms that members of democratic society can adopt to address their points of view. Legal means is used mostly in such a society but actions contrary to law are also taken into account by members nonetheless. Civil disobedience, a term coined by Henry David Thoreau in his 1849's article¹, became famous since 1950's when the civil rights movement in the United States reached its peak for social justice. This term refers to actions taken by those who intentionally break a law to address their points of view to others.

In order to understand salient features of civil disobedience and the role it plays in a democratic society political philosopher, John Rawls devoted almost 30 pages to civil disobedience and conscientious refusal in *A Theory of Justice*. (Hereafter: TJ)² Undoubtedly Rawls's theory is a point of entry into any philosophical discussion about this topic. Therefore, researches usually take Rawls's explications in *A Theory of Justice* as the major source of civil disobedience.

Unfortunately, studies on Rawls's civil disobedience miss the fact that before *A Theory of Justice* was published, Rawls had written an earlier text, entitled "The Justification of Civil Disobedience." (Hereafter: TJCD)³ This short article was originally published in *Civil Disobedience: Theory and Practice* edited by Hugo Bedau, later collected in *Collected Papers* edited by Samuel Freeman⁴, and contains the embryo for Rawls's later argument in *A Theory of Justice*.

The fact that John Rawls was a careful writer and deep thinker gives us no reason to separate these two texts and to isolate his earlier writing from his later well-developed ideas. However, giving these two texts a comparative study has not been achieved yet in the past study. When TJCD is out of sight it will be not only a failure to give John Rawls's development of ideas a comprehensive understanding but also a loss of understanding implications in his mature development of ideas.

The primary purpose of this article aims at giving Rawls's two texts a close reading and reconstructing his conception of disobedience by giving it a speech-act-styled account of disobedience.⁵ Giving the two texts a

1. HENRY DAVID THOREAU, CIVIL DISOBEDIENCE AND OTHER ESSAYS 1-18 (1993).

2. JOHN RAWLS, A THEORY OF JUSTICE 363-92 (1971).

3. KIMBERLEY BROWNLEE, CONSCIENCE AND CONVICTION: THE CASE FOR CIVIL DISOBEDIENCE 260 (2012); Andrew Sabl, *Looking Forward to Justice: Rawlsian Civil Disobedience and Its Non-Rawlsian Lessons*, 9 J. POL. PHIL. 307-30 (2001).

4. JOHN RAWLS, *The Justification of Civil Disobedience*, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 240, 240-55 (Hugo A. Bedau ed., 1969); See also JOHN RAWLS, *The Justification of Civil Disobedience*, in COLLECTED PAPERS 176-89 (Samuel Freeman ed., 1999). [hereinafter RAWLS, COLLECTED PAPERS].

5. The term, a speech-act-styled account, is coined by the author and this term focuses on

close reading satisfies the need of building a clear conceptual framework of theory that discerns what significant features civil disobedience must have. And reconstructing Rawls's theory helps readers to situate his theory in an appropriate position that can furthermore be compared with other alternatives.

Why should John Rawls's two texts deserve the attention? Cannot a researcher just skip over Rawls's previous text, directly demonstrate the core ideas in *A Theory of Justice*, and develop her own account of civil disobedience? In some senses she can solely focus on Rawls's mature articulations with paying the cost of overlooking some significant implications in Rawls's slight changes between these two texts. John Rawls being a careful writer has evolved his theory of justice gradually and this fact constitutes a reason for a researcher to take his changes seriously. Past studies on Rawls's civil disobedience ignore the importance of comparison so that they criticize Rawls's theory of civil disobedience either from a different perspective of political philosophy⁶ or under the spotlights of individual questions.⁷ But when a close reading and comparison is given, not only that Rawls's attitude towards civil disobedience become clearer we will see but also that the communicative function of disobedience plays an essential role in his theory in conjunction with the principle of nonviolence that makes his argument distinct.⁸ But this article does not make an ambitious claim that all questions relevant to civil disobedience will be discussed here. This

how Rawls's theory of disobedience can be viewed from the perspective of speech act theory, especially the idea of illocutionary force, which was developed by John Austin. I demonstrate the importance of communicative function of disobedience in Rawls's theory in Section IV.B. The speech-act-styled account not only leads us to think about how disobedience is communicative but also to what extent disobedience might reach beyond its scope of communication. Once a conception of disobedience can be reconstructed from the perspective of illocutionary force, the next question is what relationship between the disobedient and the majority (or public official) might be. This article has not investigated a conception of disobedience. Nonetheless Rawls's communicative function of disobedience indicates this possible development.

6. Richard Marshall, *Conscience and Conviction*, <https://316am.site123.me/articles/conscience-and-conviction?c=end-times-archive> (last visited July 21, 2019).

7. For example, the question of whether civil disobedience is necessary nonviolent is most often mentioned. Kimberley Brownlee criticizes Rawls's definition from the perspective of semantic content of civility and Joseph Raz argues that nonviolence can be accepted on an instrumental reason that it advances disobedients' aim to change a law. However, this question cannot be solved without constructing a conception of civil disobedience first, for the reason that whether nonviolence is a necessary element depends on the disobedients aim at creating upon those who perceive disobedience. See BROWNLEE, *supra* note 3, at 20; JOSEPH RAZ, *THE AUTHORITY OF LAW* 267 (2nd ed. 2009).

8. Andrew Sabl's article, *Looking Forward to Justice: Rawlsian Civil Disobedience and its Non-Rawlsian Lessons* has touched upon a similar question. He mentions the problem of nonviolence. This problem challenges the assumption of civility of disobedients and Sabl uses the idea of forward-looking justice to justify why nonviolence is preferable. See Sabl, *supra* note 3.

article focuses on Rawls's two texts in the context of what civil disobedience is and how it can be justified. It leaves several questions aside as to the existence of the duty to obey the law and the function of civil disobedience in a liberal democracy.⁹

This article is divided into three main parts. The first part demonstrates John Rawls's earlier article, "The Justification of Civil Disobedience" and explicates what civil disobedience is and the conditions of its justification in Rawls's earlier version. The second part focuses on Rawls's mature theory of civil disobedience in *A Theory of Justice*. The third part discusses the implications in Rawlsian conception of disobedience. This article takes Rawls's theory of civil disobedience as an idea-developed theory that his two texts constitutes a completely expression of his ideas.¹⁰ My purpose is to explicate how his theory evolves and how a best interpretation of these changes between the two texts can be. Once this purpose is achieved through this article it can shed a new light on Rawls's theory of civil disobedience.

II. JOHN RAWLS'S PREVIOUS DEMONSTRATION OF CIVIL DISOBEDIENCE IN 1969

A. *The Definition of Civil Disobedience in "The Justification of Civil Disobedience"*

In TJCD¹¹ Rawls defines disobedience as "a public, nonviolent, and conscientious act contrary to law usually done with the intent to bring a

9. There is a close relationship between Rawls's theory of justice and of civil disobedience. However, this relationship will not be discussed in this article. The following is a short sketch of how Rawls situates civil disobedience in his theory of justice. Before explicating the concept of civil disobedience, Rawls articulates how individuals might be normatively bound to a nearly just society and what grounds underlie political obligations and natural duties. Therefore, for Rawls, civil disobedience presumes the existence of an obligation to obey the law and the natural duty of justice. Discussions of obligations and natural duties go beyond the scope of this article. This article has to leave them aside but urges the readers not to forget this relationship.

10. The expression of idea-developed theory should be distinguished from Rawls's idea of ideal theory. Although this article mentions the critique of how Rawls distances himself from evaluating actual events, the term of idea-developed theory used here has nothing to do with this critique. The point here is to treat the two texts, "The Justification of Civil Disobedience" and *A Theory of Justice*, as the complete sources for investigating John Rawls's theory of civil disobedience in the sense that Rawls's development of this idea (civil disobedience) can be understood within the understanding of these two texts. A related point is that this article leaves real-world examples aside. While real-world examples can further the understanding of what Rawls means but provides less help in determining if Rawls's argument is correct and consistent. Understanding what Rawls means is the primary goal in this article and based on that reason this article has to postpone studying real-world examples. Thank the reviewer for reminding the importance of real-world examples.

11. RAWLS, COLLECTED PAPERS, *supra* note 4.

change in the policies or laws of the government.”¹² I will briefly explain the two features, being public and nonviolent in the following.¹³

In TJCD civil disobedience has a public nature because it can be “understood as addressing the sense of justice of the majority in order to urge reconsideration of the measures protested and to warn that, in the sincere opinion of the dissenters, the conditions of social cooperation are not being honored.”¹⁴ This explanation of the public nature of civil disobedience is unclear because in distinguishing between the majority and the minority as the addressees of civil disobedience, Rawls does not track the distinction between public and nonpublic civil disobedience. In TJCD he indicates that disobedience addresses the majority, but in TJ he does not mention “the majority” in his explanation of the public component of disobedience. However, in TJ his discussion of how disobedience is public due to where it is performed is clearer than in TJCD.

There are two reasons for believing that Rawls’s explanation in TJ is better than that offered in TJCD with respect to the requirement that civil disobedience be public. The first reason is that in TJCD Rawls does not explicate the connection between being public and addressing to the majority. The second reason is that Rawls strengthens his argument by emphasizing the role of civil disobedience as *fair notice* in TJ. One common element in TJ and TJCD is that disobedience can be considered to be an expressive action that is addressed to the public (the majority in TJCD); the expressive action of civil disobedience sends fair notice that conditions of social cooperation have been violated. The interpretation of the expressive function of disobedience makes Rawls’s explanation persuasive in a way that disobedience expresses a certain view held by the minority that they wish to be heard by the public. Fair notice carries out the task of getting the public focused on the disobedients’ message. As Rawls explains with significance and clarity, “We are appealing to others

12. *Id.* at 181.

13. While Rawls mentions “conscientious act contrary to law”, he does not explicate what a conscientious act is, *see Id.* at 181-82. In TJCD he explained the meaning of civil disobedience being political and nonviolent but did not provide a straightforward explanation for actions being conscientious. Several ideas might explain conscientious conviction like “a sincere conviction” and “it [civil disobedience] is intended to address the sense of justice of the majority”, *see Id.* at 182. But TJCD does not have a particular explanation about conscientious act. Therefore, this article does not mention this element in Part Two. However, things are different when reading *A Theory of Justice*. After giving the definitional sentence of civil disobedience in TJ, John Rawls immediately says, “By acting in this way one addresses the sense of justice of the majority of the community and declares that on one’s considered opinion the principles of social cooperation among free and equal men are not being respected.”, *see RAWLS, supra* note 2, at 364. We can see that Rawls emphasizes what content that disobedients need to have in TJ. Therefore, I differentiate the dimension of agent in Rawls’s mature theory instead of in TJCD.

14. RAWLS, COLLECTED PAPERS, *supra* note 4, at 181.

to reconsider, to put themselves in our position, and to recognize that they cannot expect us to acquiesce indefinitely in the terms they impose upon us.”¹⁵

The second feature of civil disobedience is nonviolence. In TJCD, Rawls bases his explanation of nonviolence on two reasons. First, he notes that civil disobedience is “a form of speech, an expression of conviction.”¹⁶ Disobedience is expressive because it provides notice that the majority of the disobedients believe that the terms of fair social cooperation have not been respected under the current circumstance. This picture of disobedience presumes an audience that receives the notice. The relationship is unilateral, not bilateral; Rawls does not specifically mention an audience. Nor does Rawls maintain in TJCD that disobedience is a kind of speech act that engages others in thinking or performing disobedience.

The second “reason” for the feature of nonviolence is the disobedients’ acceptance of a legal penalty and their non-resistance to law enforcement agencies.¹⁷ Rawls did not mention the sincere attitude in TJCD. TJCD explicitly argues that disobedients’ acceptance of a legal penalty is the reason why disobedience is nonviolent. But in TJ the acceptance of a legal penalty is not necessary because a disobedient’s expression of willingness to accept legal consequences is sufficient to establish that disobedience is nonviolent.¹⁸ In a nutshell in TJCD nonviolence is a method or mechanism by which the disobedients demonstrate a sincere attitude.

Now we turn to a feature that is not explicitly included into the definition of civil disobedience in TJCD, the feature of being political. In TJCD, Rawls did not mention “being political” in the definition of civil disobedience. But he did discuss about the meaning of being political in the sense that civil disobedience is justified by “*moral principles* which define a conception of civil society and the public good.”¹⁹ The fact that

15. RAWLS, *supra* note 2, at 382.

16. RAWLS, COLLECTED PAPERS, *supra* note 4, at 182.

17. Rawls mentions nonresistance in two passages in TJCD. Both of the passages are situated in the context of explaining the role of nonviolence. For him, civil disobedience is nonviolent when it is done in a situation where arrest and punishment are accepted without resistance. Civil disobedience is also nonviolent in the sense that resistance is not contemplated. Thus, Rawls writes, “. . . civil disobedience is also civil in another sense. Not only is it the outcome of a sincere conviction based on principles which regulate civil life, but it is public and nonviolent, that is, it is done in a situation where arrest and punishment are expected and accepted without resistance.” He also states, “Civil disobedience is nonviolent in the further sense that the legal penalty for one’s action is accepted and that resistance is not (at least for the moment) contemplated.” See RAWLS, COLLECTED PAPERS, *supra* note 4, at 182.

18. RAWLS, *supra* note 2, at 366.

19. RAWLS, COLLECTED PAPERS, *supra* note 4, at 181.

he failed to specifically mention the political component in the earlier definition does not mean that he excluded it from his substantive analysis of civil disobedience. In fact, his discussion of civil disobedience covers its political aspect, but we do not know why he failed to mention it in his definition.

One possible interpretation is that in TJCD, Rawls views “being political” as normative. Civil disobedience is an act justified by principles. If the requirement of justification is a necessary component in Rawls’s theory of disobedience the next question is what principles can be used for justifying actions of disobedience. In TJCD, what justifies disobedience is not purely grounded on political principles but on moral principles that “define the public good.” This interpretation offers a broader justification for being political because a moral principle can be political or non-political. And what makes actions political is the fact that a disobedient has a “political conviction” that is not based on self-interest or group interests. This conviction is political because it “involves the conception of justice.”²⁰ In TJCD Rawls did not explicitly specify that disobedience can only be justified by political principles. For this reason, there is a possibility in TJCD that a set of moral principles can justify civil disobedience once members of society have the same conception of justice.²¹

Comparing Rawls’s explanation in TJ with that in TJCD, we find two differences with respect to the political nature of civil disobedience. The first difference is that TJCD offers a broader range of justifications for disobedience because it includes moral principles among the sources of justification. There is no need to appeal to the political principles *directly* to justify acts of civil disobedience. The feature of being political in TJCD is best characterized as being non-self-interested. Justification via moral principles opens the possibility that disobedience can be justified by normative reasons that have no political meaning. The second difference is that in TJCD, Rawls did not discuss or identify the intended audience for disobedience. In TJ, on the other hand, he explicitly identifies persons who hold political power as disobedients’ intended audience.²²

20. *Id.*

21. One possible interpretation is that, at the time of writing TJCD, Rawls did not believe that the quality of being political was a necessary feature for disobedience and instead thought that this feature could be a corresponding feature when disobedients disobey laws based on reasons other than those of self-interest. This interpretation implies that civil disobedience might be justified by moral principles or by a comprehensive doctrine of the good that is not politically distinctive.

22. “It should also be noted that civil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution

So far I have explained Rawls's definition of civil disobedience in TJCD. The view offered there is not fully satisfactory for the reasons outlined above. Therefore, a fair evaluation of Rawls's account of civil disobedience requires that we address his arguments in TJ. That topic will be taken up below. At this point, we turn to consider Rawls's arguments for justifying civil disobedience in TJCD.

B. *Rawls's Arguments for Justified Civil Disobedience in TJCD*

Before addressing the question of under what conditions disobedience is justified, we need to consider a preliminary question about the kind or type of justification that Rawls provides. What Rawls has in mind is not whether a particular action of disobedience is justified or which kinds of disobedience are justified in a well-ordered society. Instead, his focus is on the conditions that must be satisfied for *disobedience to be justified*. In other words, what are the justificatory conditions for disobeying a law? He clearly distinguishes the question of justification from the question of whether particular agents ought to perform acts of civil disobedience on particular occasions.²³ Whether disobedience should be performed depends on contingent conditions and dynamic relationships among social activists.²⁴ The fact that the justification of civil disobedience is general does not tell us whether disobedience should be initiated nor indicates what actions ought to be performed by disobedients.

The first justificatory condition is concerned with what I call *the failure of normal political appeal*, referring to a fact that dissenters have tried the usual (normal) means to request (appeal) redress for grievances via democratic processes and these normal appeals have failed, either because the majority intentionally ignores dissenters' appeals or because

and social institutions generally." See RAWLS, *supra* note 2, at 365.

23. RAWLS, COLLECTED PAPERS, *supra* note 4, at 183.

24. A common circumstance in the dynamic situation of disobedience is that two groups, recognizing that a law is unjust and that disobedience is the last resort to address the sense of justice to the public, disagree over which particular method of disobedience can advance their goal. The Sunflower Movement in Taiwan 2014 is a good example of this circumstance. The Sunflower Movement in Taiwan involved the occupation of the Legislative Yuan (the national legislature) by activists (mostly students). After they occupied the Legislative Yuan, the government's response was passive and apathetic. There was a proposal within the core group of activists to escalate the intensity of their occupation by taking the Executive Yuan. Most of the activists were opposed to this proposal and asked the occupants to wait until the Government responded. The dynamic relationship within this core group of the Sunflower Movement appeared in the interaction between the radical and moderate disobedients regarding whether to escalate the intensity by initiating another course of occupation. The radical disobedients were intentionally or subconsciously marginalized by the moderate disobedients. Those who were marginalized finally led the crowds to occupy the Executive Yuan; this escalation resulted in a brutal physical response by law enforcement at the behest of the government.

the majority denies the appeal's moral weight. Dissenters need to try normal political appeals first because civil disobedience is performed within the limits of general fidelity to law. Thus, disobedience is a last resort after the exhaustion of democratic remedies for injustice. Rawls says, "we may suppose that the normal political appeals to the majority have already been made in good faith and have been rejected, and that the standard means of redress have been tried."²⁵

Rawls does not explicitly define ineffectiveness, but from his explanation in TJCD this condition does not require that dissenters should *exhaust* every possible avenue of democratic change. The ineffectiveness of democratic remedies is established once the majority refuses to fairly consider the minority's appeal using the procedures provided by democratic institutions. For example, the majority could provide fair consideration by giving the minority an institutional role via public hearings to debate whether a given policy is consistent with the principles of justice shared by the community. Or the majority could provide reasons for their refusal to accept the minority's concerns. The best possible avenue for ensuring fair consideration would be for the majority to hold hearings followed by a legislative debate where the minority can voice their views. Such a debate could serve as a mechanism to overturn a given policy (or legislation) that the minority opposes. The second-best possibility is that there is no such mechanism but only institutional arrangements for the minority to share their views. For example there might be no procedural rule for the minority to hold hearings, but the minority might be able to circulate their ideas and arguments with a political authority's permission, e.g. the permission of assembly. The worst possibility is that institutional arrangements block the minority from expressing their views in a way that could have any significant influence. In TJCD and TJ Rawls treats civil disobedience as a *last resort*, but in TJCD, he does not identify disobedience as a *necessary resort*.²⁶ In TJ he says, "Since civil disobedience is a last resort, we should be sure it is necessary."²⁷ This addendum is interesting because being necessary seems not a virtue of justifying disobedience but a virtue of constraining actions of disobedience. In terms of being necessary, disobedients need to be certain that disobedience is a necessary means to achieve their goal (whatever it might be). However, this is a kind of logic of action within

25. RAWLS, COLLECTED PAPERS, *supra* note 4, at 183.

26. "While civil disobedience should be recognized, I think, as a form of political action within the limits of fidelity to the rule of law, at the same time it is a rather desperate act just within these limits, and therefore it should, in general, be undertaken as a last resort when standard democratic processes have failed." *See id.*

27. RAWLS, *supra* note 2, at 373.

the course of disobedience. Disobedients should make sure that the means they adopt would be the effective means. Being a necessary resort is not a condition to provide a reason of why disobedience is justified but a condition to initiate disobedience.

In TJCD the second condition for justifying civil disobedience requires *substantial and clear violations of justice*. Rawls distinguishes two types of injustice of laws or policies; both types are connected to the two principles of justice that Rawls articulates and defends in TJ.²⁸

In order to make Rawls's position clear we need to examine the two principles of justice briefly. My aim is not to provide a full explication of the two principles, but rather to provide a brief summary to pave the way for the understanding of how he treats a violation of justice as one justificatory element to initiate disobedience. I only articulate the two principles as stated in the original edition of TJ in order to clarify what Rawls means by violations of justice. For this limited purpose, I will disregard the refined articulations of the two principles in the revised edition of TJ because these revisions do not affect my exposition of Rawls's views about civil disobedience in a significant way.²⁹

The two principles of justice are first articulated in Section 11 of TJ.³⁰ The first principle is called *the Equal Liberty Principle* which regulates how social arrangements distribute rights and duties. Liberties included in the first principle are "political liberties (the right to vote and to be eligible for public office) together with freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person along with the right to hold (personal) property, and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law."³¹ The second principle has two parts. The first part of the second principle is called the Difference Principle and the second part is the Principle of Equal (Fair) Opportunity. Different from the first principle the second principle applies to "the distribution of income and wealth and to the design of organizations that make use of differences in authority and

28. *Id.* at 60-65.

29. A brief explanation of Rawls's revision of the two principles in the revised edition could be seen in FRANK LOVETT, *RAWLS'S A THEORY OF JUSTICE* 44-65 (2013).

30. His final version of the two principles in the original edition can be seen within RAWLS, *supra* note 2, at 61.

31. *See id.* According to Samuel Freeman, the idea of equal liberties here is that basic liberties can be divided into five sets: 1). Liberty of conscience and freedom of thought, 2). Freedom of association, 3). Equal political liberties, 4). The rights and liberties that protect the integrity and freedom of the person, and 5). The rights and liberties covered by the rule of law. Freeman demonstrates the five sets by referring to *Political Liberalism*. SAMUEL FREEMAN, RAWLS 46 (2007). Rawls's demonstration in TJ is similar to his articulation in *Political Liberalism* and I intentionally ignore the difference between these two texts.

responsibility, or chains of command.”³² The Difference Principle (the first part) regulates the distribution of wealth and income while the Principle of Equal Opportunity (the second part) holds that “citizens with the same talents and willingness to use them have the same educational and economic opportunities regardless of whether they were born rich or poor.”³³ The following is Rawls’s first statement of the two principles of justice in TJ.

- First Principle: Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
- Second Principle: Social and economic inequalities are to be arranged so that they are both: (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.³⁴

For the purposes of this article only a few points need to be discussed. The first point is that these two principles primarily apply to the basic structure of society referring to “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.”³⁵ The second point is that the two principles are ranked in lexical order where the first principle is prior to the second one. We can see that the priority of the first principle also influences the question of what wrongs are preferable to being protested through civil disobedience. The third point is that while a variety of means can distribute rights and duties (criminal law, torts, or contract law etc.), use of tax usually is the main avenue for distributing income and wealth. But for Rawls the question of how to distribute income and wealth usually is dependent on the process of democratic deliberation which can provide more concrete information for the Difference Principle being satisfied.

Now the brief demonstration of the two principles has established the cornerstone of what kinds of violations of justice constitute the justificatory element for Rawls’s conception of disobedience.

The first type of wrongs that justify disobedience consists of laws violating the (basic) equal liberties that Rawls identifies in the first principle of justice.³⁶ In order to trigger disobedience, the content of laws

32. RAWLS, *supra* note 2, at 61.

33. Leif Wenar, *John Rawls*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), <http://plato.stanford.edu/archives/win2013/entries/rawls/>.

34. RAWLS, *supra* note 2, at 60.

35. *Id.* at 7.

36. *Id.* at 61.

or policies should contradict the first principle. But violations are not limited to written laws or policies. They might include “recognized practice” too.³⁷ It is not clear what Rawls means by “substantial and clear”; he did not define this standard in TJCD. However, according to the articulations in TJCD a violation of the Equal Liberty Principle is more appropriate for initiating civil disobedience because “the equal liberties are defined by the visible structure of social institutions.”³⁸ Because of this feature, it is less likely that the existence of violations of the equal liberty principle will be in dispute.

The second type of violations of justice concerns the second principle of justice, in particular, violations of the Principle of Equal Opportunity.³⁹ When a law violates the Principle of Equal Opportunity, civil disobedience aiming at the law is justified. A close reading of Rawls’s explication makes it clear that violations of the Equal Liberty Principle and the Principle of Equal Opportunity are appropriate targets for initiating civil disobedience. This is especially obvious when Rawls mentions “the clear and substantial violations of justice” referring to the Equal Liberty Principle (the first principle) and the Principle of Equal Opportunity (the second part of the second principle). But where is the Difference Principle (the first part of the second principle) and what is its role in the justification of civil disobedience?

With regard to the question of whether a violation of the Difference Principle can be protested via civil disobedience, Rawls’s answer is “no” because of several problems. According to Rawls, determining the meaning of the Difference Principle is difficult. But even if there is a consensus on its meaning, there can be reasonable disagreement about whether the Difference Principle has been satisfied. In addition to the problem of disagreement, another reason for excluding the Difference Principle from serving as the basis for disobedience is that disagreement about the implementation of the Difference Principle should be resolved via the political process. Therefore, for instance, a tax law, the primary means of distributing income and wealth, should not become the target of disobedience. In TJCD the only possible situation in which disobedience of taxation laws can be justified is when such a law is designed to attack equal liberties.⁴⁰

Rawls’s explication of the second justificatory element is complex but concise. The following Table is a summary of his arguments.

37. RAWLS, COLLECTED PAPERS, *supra* note 4, at 184.

38. *Id.*

39. RAWLS, *supra* note 2, at 83-90.

40. RAWLS, COLLECTED PAPERS, *supra* note 4, at 184.

Table 1: A Typology of Violations of the Two Principles for Initiating Disobedience

Principles of Justice	Substantial and Clear Standard	Priority of Being Protested	Self-Standing for Being Protested
Equal Liberty (The first principle)	Applied	Highest	YES
Difference Principle (The first part of the second principle)	Unknown	Lowest	NO (needed to be designed to attack the equal liberties)
Equal Opportunity (The second part of the second principle)	Applied	Intermediate	YES

Compared to the position in TJ, this second condition in TJCD is more restricted in the sense that *while* the requirement of substantial and clear violations of justice applies to the Equality Liberty Principle and the Principle of Equal Opportunity, such a requirement does not apply to the Difference Principle. Protests against social and economic policies through civil disobedience are difficult to justify because the justification will be adequate only if it can be shown that the policy in question was designed to attack equal liberties. Rawls modifies this position in TJ by allowing that a taxation law can be an appropriate target of civil disobedience when either it is designed to attack or to abridge equal liberty.

The third condition is the mutual recognition of a right to disobey. This condition requires dissenters to recognize the fact that other people also have a right to perform disobedience in a similar situation. We can put aside the meaning of a right to disobey and focus on the content of this condition. Rawls clearly sees this condition from the first-person standpoint. This condition is not about justifying the act of disobedience itself but about a disobedient's attitude towards others' reasons for disobeying laws. I call this condition *the mutual recognition of disobedients*.

The following Table shows Rawls's preliminary conception of disobedience in "The Justification of Civil Disobedience."

Table 2: Rawls's Preliminary Conception of Civil Disobedience

Elements	Concepts	Explanations
Definitional Elements	Political Act	Disobedience is an act justified by moral principle and rests on political conviction. ⁴¹
	Public Act	Disobedience is a way of addressing the majority's sense of justice.
	Nonviolent Acts	Disobedience is a form of speech, an expression of conviction.
Justificatory Elements	Failure of Normal Political Appeal	It is a last resort when standard democratic processes have failed.
	Substantial and Clear Violations of Justice	Violations of equal liberties are an appropriate justification for disobedience.
	Mutual Recognition of a Right to Disobey	Disobedience should be limited to cases in which dissenters are willing to affirm that others have the grounds to also engage in disobedience.

III. JOHN RAWLS'S MATURE THEORY OF CIVIL DISOBEDIENCE IN A THEORY OF JUSTICE

I have illustrated Rawls's initial idea of civil disobedience in his article, "The Justification of Civil Disobedience." This article was published in 1969. Later in 1971 John Rawls published *A Theory of Justice* in which he discussed topics of civil disobedience in greater detail. The theory of civil disobedience in TJ is more comprehensive and coherent than the one he sets forth in TJCD.

Now we turn to how Rawls structures his arguments for civil disobedience in TJ. His theory is divided into three parts: the definition of civil disobedience, the justification of disobedience, and its role in a constitutional democracy.⁴² The first part illustrates what civil disobedience is and the salient features of this concept. The second part

41. The reviewer points out the difference between Table 2 and Table 4 in terms of the feature of being political. Table 2 situates this feature in the context of a disobedient's subjective conviction (See the explanation in the column) but Table 4 places it under the dimension of action. This is not an unintentional discrimination. In TJCD Rawls seems to rest the feature of being political on a political conviction while in TJ he emphasizes whom disobedients address and to what ground disobedience can be justified. In TJ the dimension of agent is less important than in TJCD. The analysis of being political in TJ can be found in III.A.1.(a).

42. RAWLS, *supra* note 2, at 363.

demonstrates the grounds for disobedience and justificatory conditions of exercising disobedience. The third part explains the role of disobedience within a constitutional system and how civil disobedience is compatible with a constitutional democracy.

I use the phrase *the constitutive element of disobedience* to designate Rawls's discussion on what civil disobedience is and the *justificatory element of disobedience* to refer to Rawls' discussion of the conditions under which civil disobedience is justified. The constitutive element is concerned with what features civil disobedience should have and the subjective intention of disobedients. The justificatory element is concerned with the question of the threshold of initiating "justified" disobedience.

When thinking about the justificatory elements of civil disobedience, it is worth noting that the term "justificatory" means the conditions that can justify actions of disobedience from the first-person standpoint. It is a different question to think about whether such an action should be protected by rights--that is, whether there is a right to engage in civil disobedience.

This section is divided into two parts. The first part (III.A) focuses on the constitutive element by distinguishing two dimensions: the dimension of actions and the dimension of agents. I also demonstrate how Rawls argues in TJ for the use of nonviolence in disobedience. The second part discusses (III.B) Rawls's illustration of the justificatory elements.

A. *The Constitutive Elements of Rawlsian Civil Disobedience*

John Rawls has provided a sophisticated definition of civil disobedience. He defines civil disobedience in TJ in the following passage:

[Civil disobedience is] a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law and policy of the government. By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principle of social cooperation among free and equal men are not being respected.⁴³

43. See *id.* at 364. When Rawls defines the concept of civil disobedience, he mentions "law" twice. There is a question of whether these two laws are the same laws or different ones. Rawls adopts the distinction between direct and indirect disobedience, see *id.* at 364-65. Therefore, it can be a case that disobedients breach a law, which its content is just, to protest an unjust law. Following the distinction of direct and indirect disobedience, for Rawls it could be a case that

This definition can be analyzed from two perspectives. The first perspective focuses on the features that actions must have to be considered civil disobedience and the second is what features agents should have for performing civil disobedience. The first perspective investigates the features of the action itself which I call the *dimension of action*. This dimension of action reveals the features of disobedience that make such actions distinguishable from other types of conduct. The second perspective investigates the features of people who perform disobedience, what I call the *dimension of agents*. The dimension of agents focuses on the subjective elements that an agent must have in order to engage in civil disobedience.

1. *Three Characteristics of Civil Disobedience: Political, Public, and Nonviolent*

(a) Civil disobedience is a political action with sociological and normative components

The first feature of action of disobedience is that disobedience is a political action. This is a familiar idea, but what does Rawls mean by being political? Two components of the idea that disobedience is political can be found in Rawls's illustrations. The first component of being political is sociological and the second component is prescriptive. The sociological component of being political refers to the persons targeted by civil disobedience. For Rawls actions of disobedience are *addressed* to those (usually the majority in democratic societies) who hold political power. This sense of being political is sociological because disobedience aims to have an impact on those who exercise power. In addition to this sociological component, Rawls posits a prescriptive component of disobedience. The prescriptive component requires that disobedients' actions be *guided* and *justified* by political principles that regulate the basic structure in a nearly just society.

This prescriptive component of being political requires elaboration. Agents (the disobedients) not only have to find out the guiding principle for their actions but also justify their actions under the current

disobedients disobey a traffic rule to challenge a foreign policy issued by a President. The question of justification is another thing. In that scenario, it is a case of indirect disobedience. An important question follows, that is the question of the balance of reasons. It seems like that a breach of a just law requires a higher standard of justification. Another point is that Rawls does not think that merely "making a test case for a constitutional decision" could be considered as a case of civil disobedience. This is important because it implies that an action is indeed thought by disobedients the one "contrary to law". See *id.* at 365.

circumstances by appealing to existing political principles. An implication of the prescriptive component is that *disobedience is never to be a rebellion, revolution, or a coup d'état*. These three radical forms of dissent aim to change basic political principles outside the scope of the existing constitutional structure but civil disobedience does not.

Table 3: The Two Components of Being Political

	The Sociological Component	The Prescriptive Component
Core Content	Disobedience addresses people who hold political power.	Disobedience should be guided and justified by political principles.
Implication	Disobedience does not target those who do not hold political power.	Rebellion, revolution, and coup d'état are excluded from Rawlsian disobedience.

The reason that Rawls conceptualizes disobedience as political is that he treats political principles as the most important source of justification for actions in the public sphere. In TJ civil disobedience cannot be justified by personal morality or religious principles. (Also, see Section 2 in this Article.) Personal morality and religious principles can support disobedience but they do not provide sufficient reasons--they cannot be complete justifications. Therefore he thinks disobedients must provide *political principles* and not personal morality as their primary justifications for civil disobedience.⁴⁴

Rawls's insistence on this prescriptive component of being political ties into the idea of public reason which he later developed in *Political Liberalism*.⁴⁵ To be sure, when he wrote TJ, he had not clearly articulated the idea of public reason.⁴⁶ As he continues to develop his theory of justice in *Political Liberalism*, he develops the idea of public reason as a distinctive idea that clarifies the relationship between a political conception of justice and comprehensive conceptions of the good, such as those provided by the religious and moral beliefs of individuals.

The introduction of the idea of public reason and the distinction between political conceptions of justice and comprehensive conceptions

44. If we compare this position to his preliminary argument in "The Justification of Civil Disobedience," we find a narrower idea of disobedience, one not found in conventional thinking about civil disobedience. Henry Thoreau's case, for Rawls, is not a case of civil disobedience. See RAWLS, *supra* note 2, at 365, 368-71.

45. JOHN RAWLS, *POLITICAL LIBERALISM* 212-54 (expended ed. 2005).

46. The idea of political conception of justice is an idea Rawls offers to distinguish this idea from other comprehensive doctrine. In *Political Liberalism* Rawls develops a freestanding theory of justice without grounding it in any comprehensive doctrine of morality, goods, and religion.

of the good raise the following question: How does Rawls's theory deal with a case of disobedience that is primarily motivated by the disobedients' personal morality or religious beliefs? This question is important, because Rawls believes that disobedience must be justified by political principles that are supported by public reason. The answer to this question requires a basic discussion of the idea of public reason and the difference between public reason and comprehensive doctrines. I shall deal with these questions in Section 4, The Implication of Rawlsian Civil Disobedience.

- (b) Civil disobedience is a public action that is done in the public sphere and provides fair notice to the public

The public dimension of civil disobedience is the second feature of Rawls's definition, that is, disobedience must be conducted in the public sphere. As Rawls says, "A further point is that civil disobedience is a public act. Not only is it addressed to public principles, it is done in public. It is engaged in openly with fair notice; it is not covert or secretive."⁴⁷

The location of disobedience is a critical factor. Rawls compares civil disobedience to a public speech taking place in a public forum. However, we should not exaggerate the implications of this feature. Appearing in public does not mean that disobedients need to reveal all information relevant to disobedience. Neither does it mean that disobedients need to reveal their identities. When we consider the requirement of fair notice, the meaning of the public dimension becomes clearer. Rawls mentions fair notice twice in TJ. First, he mentions it in the context of the requirement that disobedience be public. Then, later in the book, he mentions the role of civil disobedience in a constitutional democracy. He says, "by engaging in civil disobedience one intends, then, to address the sense of justice and to serve fair notice that in one's sincere and considered opinion the conditions of free cooperation are being violated."⁴⁸

If we take these two paragraphs mentioning "fair notice" together, they shed light on the requirement that disobedience occur in public. Disobedience is an action contrary to law that "carries" certain messages that disobedients want to project to the majority. What messages are carried by disobedience? The explicit one is a warning to the majority that conditions of social cooperation have been violated and the implicit one is a warning that disobedience will be done in a specific place so that people

47. RAWLS, *supra* note 2, at 366.

48. *Id.* at 382.

who might be harmed by civil disobedience can take steps to avoid injury. Therefore, disobedients are required to announce when and where such actions will be performed.

I believe that this understanding illuminates another core feature of civil disobedience in Rawls's conception, the requirement of nonviolence. It is important to note that Rawls says, "One may compare it to a public speech, and being a form of address, an expression of profound and conscientious political conviction, it takes place in the public forum. For this reason, among others, civil disobedience is nonviolent."⁴⁹ To understand the connection between the requirement that disobedience be public and the requirement that it be nonviolent, we need to examine the nature of a public speech.

- (c) Civil disobedience is nonviolent in terms of its purpose of getting people engaged in a course of action

Rawls's explanation of why civil disobedience must be nonviolent has several theoretical implications. He provides two arguments for requiring nonviolence without positively defining what nonviolence is. The failure to define nonviolence raises important questions: how can Rawls justify nonviolence without specifying its nature? Rawls aims to show that nonviolence is an internal constitutive element for the concept of civil disobedience and the reason why this is so. I shall discuss how he makes this argument via a close review of the relevant passages.

The transition from Rawls's discussion of the requirement to operate in the public sphere to the requirement of nonviolence occurs when he says, "For this reason, among others, civil disobedience is nonviolent."⁵⁰ What is "this reason"? Rawls is referring to his comparison of civil disobedience and public speech. At this point, we need to focus on the "speech" element of the notion of "public speech"--that focus will unpack Rawls's understanding of the justification for the requirement that civil disobedience be nonviolent.

For Rawls, civil disobedience is *a mode of address*.⁵¹ Disobedients try to communicate to the majority by performing actions contrary to law. Civil disobedience is a way to dramatize certain issues that some members in a given society consider unjust. Its performance not only delivers the message to the public that some cases of injustice exist but also addresses *the persuasive force* to the majority. Disobedients try to persuade the public to accept their point of view. The *action* of breaking a particular

49. *Id.* at 366.

50. *Id.*

51. *Id.*

law *itself* is a mode of address insofar as it communicates a message to the majority. Disobedient actions are consistent with the conditions for communication to the extent that disobedients put themselves in a status that is equal to that of the majority for the purpose of communicating with them. To distinguish disobedience as communicative is important because it helps us understand how the communicative function incorporates the requirement of nonviolence into the concept of civil disobedience. *Actions of civil disobedience can affect the attitudes and beliefs of others by moving them towards the beliefs and attitudes that are desired by the disobedient.* In a nutshell, civil disobedience is an act conveying a message. The act says something by doing something.

Civil disobedience as public speech is a mode of address to the public that aims to persuade them to accept the speaker's point of view. However, a speaker does not use physical force to make an audience accept the message; rather, speakers seek to put the audience in a position where they share the speakers' basis for belief in their message. In the scenario of public speech, the audience not only receives the meaning of sentences which are constituted in words, structured by syntax, and vocalized by the speaker; in addition, the audience acquires a *feeling* about a speaker's sincerity. The perception that a speaker creates of his sincerity may vary but the purpose is always to make the audience believe that the speaker *truly believes* that what he communicates to his audience is true or correct and that what the speaker does is consistent with what he has said.

A good speech is not only a speech in which a speaker articulates his arguments comprehensively but also one in which the speaker *appropriately invites the audience to think the way the speaker thinks*. A good speech invites the audience to engage in thinking about issues and arguments addressed by the speaker. And a good speech persuades audiences in an appropriate way, by allowing the audience to make the final decision on the issues in question. Therefore, the persuasive force of the speech does not deprive an audience of their power to make an independent judgment but invites them to engage in the same reasoning as the speaker while leaving them to decide what they think on the basis of their independent judgment.

Civil disobedience is like a good public speech in the manner that dissenters address issues and invite their audience to reconsider beliefs and attitudes challenged by the act of disobedience. And, most importantly, disobedients leave room for the majority to make a final judgment on the issues addressed by their acts. Like a speaker, disobedients want audiences to form their own beliefs and to take the issues in question seriously. This is why Rawls says, "[Disobedience] tries

to avoid the use of violence, especially against persons, not from the abhorrence of the use of violence in principle, but because it is a final expression of one's case."⁵²

The fact that civil disobedience and a public speech are comparable does not necessarily mean that nonviolence is a constitutive element. Rather, *nonviolence is a necessary background condition for making communications successful*. Successful communication is one important purpose of civil disobedience and this purpose can only be achieved by making nonviolence a constitutive element; communication in a violent environment is not true communication. In this context, it is useful to think of Habermas's idea of the "unforced force of the better argument."⁵³ Violence would deprive civil disobedience of the key feature of persuasion through reason and replace persuasion with the "forced force of violence."

Rawls has provided two substantial arguments for the use of nonviolence in civil disobedience. The first argument is called the "speech act argument" and the second the "sincerity argument." I have explicated these two arguments in elsewhere.⁵⁴ Therefore, the following is a brief of these two arguments.

The speech act argument focuses on why actions of disobedience have the power to influence and persuade the majority's attitudes towards issues of injustice. The first argument provided by John Rawls in support of nonviolence is called the speech act argument. This argument refers to the fact that civil disobedience itself is a mode of address. Disobedients express their dissatisfaction with certain policies or laws by acting contrary to the law. Disobedients not only express their dissatisfaction but also address the reason why they are dissatisfied with certain issues about basic structure and social cooperation. More importantly disobedience is a way for disobedients to persuade the majority to "accept" their point of view. Disobedience is not only expressive but also communicative--it aims to engage the majority in thought and action.

For Rawls, civil disobedience is a sort of speech act because disobedient actions express illocutionary force with the aim of gaining uptake from the majority. However, there is a slight difference between Rawls's texts. In "The Justification of Civil Disobedience," he treats civil disobedience as a form of *speech* and in *A Theory of Justice* he substitutes the term "address" for "speech." This substitution can be interpreted as a

52. *Id.*

53. Amy Allen, *The Unforced Force of the Better Argument: Reason and Power in Habermas' Political Theory*, 19 CONSTELLATIONS 353, 353-68 (2012).

54. Hung-Ju Chen, *The Rawlsian Civil Disobedience and the Principle of Nonviolence*, 3 ASIAN LEGAL PHIL. 5, 5-31 (2016)

recognition that an utterance (oral use of language) is the ordinary form of “speech,” but civil disobedience can be a sort of speech act that communicates meaningful content without explicit utterances or verbal communications. Rawls uses the term “address” to express the idea that disobedience can communicate without utterance. Even without explicit linguistic content, the performance of civil disobedience can transmit a message from disobedients to audiences.

The second argument for nonviolence is based on the idea of sincerity. In TJCD, Rawls has provided a primary explanation for this argument. He says, “civil disobedience is nonviolent in the further sense that the legal penalty for one’s action is accepted and that resistance is not (at least for the moment) contemplated.”⁵⁵ He later refines this argument in TJ by connecting disobedients’ attitudes to the idea of the fidelity to law.

In TJ, Rawls further develops his argument for sincerity and explicitly articulates the idea that fidelity to the law is an internal element of civil disobedience. He notes that one significant expression of fidelity to the law is evidenced by disobedients’ acceptance of *legal consequences*, not “*legal penalty*” as he states in his earlier formulation. Since civil disobedience is supposed to be performed in a public sphere, disobedients’ acceptance of legal consequences sends a message to the public that civil disobedience does not aim to totally negate the legitimacy of a legal system. Disobedients’ acceptance of legal consequences also shows their conduct to be both “politically conscientious and sincere.” Thus “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.”⁵⁶

But how can the disobedients, on the one hand, disobey a law intentionally and, on the other hand, prove their sincere attitude? Their insistence upon nonviolence is the answer because it demonstrates to the majority the fact that civil disobedience is undertaken conscientiously and sincerely in good faith. Thus, there is an instrumental reason for the principle of nonviolence. The insistence on nonviolence is not because nonviolence itself has intrinsic value--although it might. Nonviolence is essential because it makes disobedients’ sincere attitudes and their fidelity to law explicit and thereby enhances the effectiveness of their communication to the majority.

2. *The Constitutive Elements-The Dimension of Agent*

55. RAWLS, COLLECTED PAPERS, *supra* note 4, at 182.

56. RAWLS, *supra* note 2, at 367.

The previous discussion focuses on the *action* of civil disobedience. However, disobedience is performed by disobedients. There is no disobedience without assuming an *agent* who performs the action. Rawls did not distinguish the subjective elements of disobedients clearly but looking at his definition of civil disobedience in detail reveals another dimension in its constitutive elements, that is, the subjective characteristics of the agents (“disobedients”).

Disobedience is performed by agents who have three subjective characteristics. First they need to have an intention to change a law or policy. Secondly, they must feel loyalty to the law. And third they must have a conscientious conviction that a law is unjust.

First, because the purpose of disobedience is to bring about a change in law or policy, this purpose must be part of the subjective intention of disobedients. Rawls connects the purpose of changing a law with the feature of being political: the purpose must be justified by political principles accepted in a nearly just society. In terms of the purpose of bringing a change in law, disobedients must *subjectively believe* that their disobedience is justified under the political principles shared by members of society. If they have no such belief, then it is difficult to call them civil disobedients. This requirement of subjective belief invites a critical question in the context of a mistaken belief. The question is, if disobedients make an honest mistake concerning justification, is disobedience still justified? In other words, is justification subjective or objective? Rawls does not answer this question. And one plausible interpretation is that Rawls believes justification needs to be objective in the sense that the political principles justifying the disobedients’ purpose must *be shared* by members of society.⁵⁷

Second, disobedients need to have a particular attitude towards law; that is, the agents of disobedience must have an attitude of fidelity to law. If members lack this attitude, their action cannot be categorized as civil disobedience as a conceptual matter. The attitude of fidelity to law performs an important function: the internal constraint function. This attitude leads disobedients to adopt nonviolent methods to express their dissent. This attitude also draws the line between disobedience within a democratic constitution and unlawful actions that aim to overthrow a

57. One reason to support this interpretation is that Rawls has committed to the ideas of public reason and a political conception of justice. He also discusses the limit of public reason and how the disobedients who hold a comprehensive conception of justice can propose their argument in the public forum. Therefore, disobedients must hold a reason which can be shared with other members of society. It needs not be accepted but at least shared among members of society for being deliberated in the public forum.

democratic constitution peacefully. The former category is civil disobedience, but the latter category is nonviolent revolution.

Third, the most essential characteristic for agents of civil disobedience is conscientious conviction. This element seems uncontroversial because most people would agree that what a copycat does is not civil disobedience although their actions might appear to be similar. For direct disobedience, a conscientious conviction requires agents to hold a certain normative belief that compliance with a law is unacceptable to them based on their moral judgments. For indirect disobedience a conviction requires the disobedients to not obey a just law in order to highlight the moral impermissibility of an unjust law. In both cases, conscientious conviction is required.

Interestingly, John Rawls did not explicitly define “conscientious conviction.” He uses the phrase “act conscientiously.”⁵⁸ Explication of what “conscientiousness” is and what role it plays would clarify Rawls’s notion of civil disobedience. Substantial work on this topic has been done by Kimberley Brownlee.⁵⁹

There are good reasons to doubt the proposition that conscientious conviction is a requirement for *each and every* individual participant in a given collective act of civil disobedience. Civil disobedience (as opposed to conscientious refusal) is usually the action of a group—that is, “collective action.” It seems likely as an empirical matter that the individual members of the group will have different attitudes towards the law. Even if there are some individuals who oppose the law for self-interested reasons or who are merely “going along” with other members of their social group, the absence of unanimous conscientious conviction should not be viewed as changing the status of the collective action from “civil disobedience” to “not civil disobedience.”

3. *A Summary of the Constitutive Elements in the Rawlsian Conception of Civil Disobedience*

The explication of Rawls’s theory on the nature of civil disobedience is now complete. I have just clarified his definition of civil disobedience by differentiating between the dimension of actions and the dimension of agents. The following chart illustrates these constitutive elements.

Table 4: The Constitutive Elements in the Rawlsian Conception of

58. RAWLS, *supra* note 2, at 389.

59. BROWNLEE, *supra* note 3, at 15-50.

Disobedience

The Dimension of Actions

- PUBLIC
 - Disobedience is done in public.
 - Disobedience is an openly fair notice to the public and similar to a public speech.
- POLITICAL
 - The Sociological Meaning: Disobedience is addressed to people who hold political power.
 - The Normative Meaning: Disobedience should be guided and justified by political principle.
- NONVIOLENT
 - The Argument of Speech Act: Disobedience is a speech act that gets the majority involved in actions.
 - The Argument of Sincerity: Nonviolent disobedience is a way of helping the majority to understand disobedients' sincere attitudes.

The Dimension of Agents

- An intention of changing a law or a policy
- The attitude towards the fidelity of law
- A conscientious conviction

B. *The Justificatory Elements of Rawlsian Civil Disobedience*

There are three justificatory elements in the Rawlsian conception of civil disobedience in TJ: (1) the applicable object of disobedience, (2) ineffectiveness of normal appeals through the ordinary political process, and (3) the extensiveness of disobedience. In summary, the first two elements have been lightly modified in TJ as compared to his prior formulation (TJCD). But the third element is substantially different from his previous articulation. I shall examine this change in Section 4 below.

1. *Justificatory Element 1: The Applicable Object of Civil Disobedience*

In terms of the applicable object of disobedience Rawls discusses what wrongs can be considered as appropriate objects for disobedience. His illustration can be divided into two parts: the formal part and the substantial part. The formal part qualifies what objects can be targeted by disobedients and the substantial is about to what degree wrongs are sufficient to initiate disobedience.

Not every object whose content contradicts the principle of justice constitutes an appropriate object of disobedience. Rawls limits

disobedience to two types of objects: laws and policies. The idea of law refers to statutes, ordinances, and positive laws written on the books and the idea of policy refers to the normative commitment that has been recognized officially by the government. The content of the normative commitment is not passed through the democratic procedure but is recognized by the government to be the guidance about the exercise of political powers. For example, a foreign policy is not a law that has been debated, articulated, and passed by a legislative branch but a normative commitment recognized by the government providing a basic direction of guidance in foreign affairs. Rawls did not explicitly state that laws and policies are two distinct types of objects of disobedience. Nonetheless these two types can be inferred from his articulation of the definition of disobedience and his position on when civil disobedience is appropriate.⁶⁰

So, if there is no law or policy, there is no appropriate object of disobedience. For example, in a well-ordered society people might have different views of what justice is and some public officials might articulate ideas that are offensive to the minority and display the officials' total ignorance of the just terms of social cooperation. Even if the content of the officials' speech is contrary to some group's sense of justice, the officials' speech itself is not an appropriate object of civil disobedience--although such speech could appropriately be the object of lawful dissent in the form of demonstrations or protests conducted within the bounds of law. This formal part of the applicable object of disobedience plays a basic filtering function that ensures that the target of disobedience is a product of the political process, that is, a law or policy.

In many cases, it will not be difficult to satisfy this formal requirement--for example, in cases in which there is a positive law that does not comply with the disobedients' sense of justice. But as formulated by Rawls, this requirement seems unnecessarily stringent. In addition to laws and policies, there are a variety of official actions that might be appropriate targets of civil disobedience. One example is a coercive legal order such as an injunction. Another example might be an informal official practice or custom that is not embodied in a formal law or policy.

The requirement that the object of disobedience be a law or policy is sometimes articulated by contrasting civil disobedience with

60. In the context of analyzing the duty to comply with an unjust law, Rawls recognizes that one circumstance in which civil disobedience can be considered is when laws and policies contradict with the principles of justice shared by members of society. "When laws and policies deviate from publicly recognized standards, an appeal to the society's sense of justice is presumably possible to some extent. I argue below that this condition is presupposed in undertaking civil disobedience." And in the context of defining civil disobedience, Rawls explicitly states that the disobedients have the intention of bringing about a change in "the law or policies of the government." See RAWLS, *supra* note 2 at 352, 364.

conscientious refusal. There may be cases where a coercive order or informal official practices would trigger justified conscientious refusal, but this does not entail that these actions may not also be appropriate objects of civil disobedience.

In addition to the formal part of Rawls's account of the objects of disobedience, there is a substantive part. This component of his account is in many ways more interesting and important than the formal part. Rawls takes the position that violations of justice must be *substantial and clear* in order to serve as a justification for civil disobedience. Rawls differentiates the Equal Liberty Principle from the Principle of Fair Opportunity in terms of the degrees of violations of justice. For the Equal Liberty Principle, violations should be *serious infringements* of such liberties. For the Principle of Fair Opportunity, they should be *blatant violations*.

The required degree of violation is higher for the Principle of Fair Opportunity than for the Equal Liberty Principle. The reason is that when equal liberties are not honored by a legal system, violations are likely to be clear. Rawls does not exclude a taxation law from being the object of disobedience but he thinks unless such a law is designed to attack or to abridge the Equal Liberty Principle such a law cannot be an appropriate object of disobedience.⁶¹

For Rawls determining infringements of equal liberties is not difficult because the Equal Liberty Principle imposes "strict requirements that must be visibly expressed in institutions."⁶² It is usually relatively simple to decide whether a law violates these strict requirements. Rawls uses several examples to illustrate why infringements of equal liberties are obvious. He mentions the right to vote, the right to move, the right of religion, and the right to own property.⁶³

But Rawls seems to make a slight modification when he discusses equal opportunity. His position in TJCD was limited to economic opportunities, but he does not include this limitation in TJ. The following Table shows the difference between TJCD and TJ.

Table 5: The Comparison of the Violation of Equal Opportunity

61. *Id.* at 372-73.

62. *Id.* at 372.

63. *Id.*

Between TJCD and TJ

The Justification of Civil Disobedience	A Theory of Justice
When minorities are denied the right to vote or to hold certain political offices, when certain religious groups are repressed and others denied equality of opportunity in the economy , this is often obvious and there is no doubt that justice is not being given.	Thus when certain minorities are denied the right to vote or to hold office, or <u>to own property and to move from place to place</u> , or when certain religious groups are repressed and others denied <u>various opportunities</u> , these injustices may be obvious to all.
<p>*. Strikethrough= cannot be found in <i>A Theory of Justice</i>. **. Underline= added in <i>A Theory of Justice</i>.</p>	

It is not clear why Rawls made this change, deleting the phrase of “in the economy.” He offered no explanation. One possible interpretation is that he expanded the applicable object of equal opportunity from the economy to non-economic spheres of social life. This possibility is suggested by his use of the phrase “various opportunities” in TJ. Therefore, political opportunities, economic opportunities, and social opportunities would be included.

With respect to the Difference Principle, taxation legislation is not an appropriate object for disobedience. In other words, claims that a tax law violates the Difference Principle do not justify disobedience. If disobedients want to make taxation law the target of their disobedience, they not only have to argue for violation of the Difference Principle but also connect this violation with the Equal Liberty Principle. Rawls says, “Thus unless tax laws, for example, are clearly designed to attack or to abridge a basic liberty, they should not normally be protested by civil disobedience.”⁶⁴ The violation of the Difference Principle should be clearly connected with the intention of attacking or abridging equal liberties. Rawls insists on this connection as a precondition of initiating disobedience targeting tax laws.

Finally, let me summarize Rawls’s explanation of the first justificatory element of civil disobedience.

The first justificatory element can be called the applicable object of disobedience and this element consists of two parts. The first part, the formal one, considers what exactly constitutes an appropriate object of disobedience. Rawls mentions two types of objects: laws and policies. This formal part plays a basic filtering function that ensures that the target

64. *Id.*

of disobedience be either a product of the democratic process (statutes and positive laws) or a normative commitment recognized by a government for guiding their actions. Therefore, an official's speech does not constitute an appropriate object of disobedience.

The second part considers whether the laws or policies violate the principles of justice. Rawls articulates the following standard for this part: the violation of justice must be both substantial and clear. He also differentiates the Equal Liberty Principle from the Principle of Fair Opportunity by articulating different degrees of violations as predicates for disobedience. For the Equal Liberty Principle, a serious infringement of freedom is sufficient to be deemed a violation and for the Principle of Fair Opportunity a violation should be blatant. *Importantly a violation of the Difference Principle cannot be a self-standing reason to initiate disobedience.*

Based on two observations I believe that *Rawls makes the applicable object of disobedience more inclusive in TJ than he had previously articulated in TJCD*. The first reason is that he does not limit a violation of fair opportunity to the economic field but emphasizes various fields of opportunity in TJ. Second, with respect to how injustice can be established, Rawls says, "They [unjust cases of violating basic liberties] are public, incorporated into the recognized practice, if not the letter, of social arrangements. *The establishment of these wrongs does not presuppose an informed examination of institutional effects.*"⁶⁵ The last sentence did not appear in TJCD and explicitly lowers the burden for establishing a violation of basic liberties.

2. *Justificatory Element 2-The Ineffectiveness of Normal Political Appeals*

The second justificatory element is the ineffectiveness of normal political appeals. This element does not require disobedients to exhaust *all actual* opportunities in order to initiate disobedience. The central idea is that disobedients *have tried normal political appeals in good faith* and that *experience shows that further normal appeal is unlikely to be effective*. So ineffectiveness does not mean that no actual means is available; rather, the requirement is that disobedients first make a sincere effort to achieve their aims through normal political appeals and that the failure of such efforts provides good evidence that conventional methods are unavailing.

The second justificatory element should be seen as a rebuttable

65. *Id.*

presumption. In an emergency, where extreme injustice requires an immediate response, disobedients would be justified in forgoing normal political appeals--so long as they sincerely believe that such appeals would not provide an adequate response to exigent circumstances of injustice.

One point that should be noted is that Rawls adds one concept that he did not mention in TJCD. He says, "Since civil disobedience is a last resort, we should be sure that it is necessary. Note that it has not been said, however, that legal means have been exhausted."⁶⁶ Rawls's introduction of the concept of necessity introduces an element of ambiguity into his view because he did not provide further explanation of the meaning of "necessity." This raises the question of whether the necessity requirement implies that civil disobedience must be a last resort.

My view is that the notion of "necessity" should be understood as an element of the internal relationship within disobedience as means to an end. For their disobedience to be justified, actors must have good reasons to believe that acts of disobedience are rational means to appropriate ends. But this requirement of means-ends rationality should not be seen as requiring that disobedients believe that acts of civil disobedience are the only possible means to achieve their ends. On this understanding, Rawls was mistaken to introduce the notion of necessity into the discussion of normal political appeals.

3. *Justificatory Element 3-The Extensiveness of Civil Disobedience*

The third condition arises from the concern that the previous two conditions might be too permissive, with the result that the extensiveness of civil disobedience would generate substantial social disorder. Such social disorder would undermine the efficacy of a just or partially just constitution and hence undermine the ultimate goal of disobedience itself.⁶⁷ In order to prevent the performance of disobedience from destroying a well-ordered society, there is a third justificatory element. I will call this element *the extensiveness of civil disobedience*.

With regard to the extensiveness of disobedience Rawls says, "I assume here that there is a limit on the extent to which civil disobedience can be engaged in without leading to a breakdown in the respect for law and the constitution, thereby setting in motion consequences unfortunate for all."⁶⁸ It is worth noting that the third element does not restrict when

66. *Id.* at 373.

67. *Id.* at 374.

68. *Id.* at 373.

disobedience should be performed but rather is *a limitation on the number of agents who are entitled to perform civil disobedience and the number of occasions upon which disobedience can be performed*. In other words, extensiveness is a function of both the number of disobedient acts, which in turn is a product of the number of agents and the frequency with which each agent engages in disobedience. The extensiveness of justified disobedience must be consistent with the goal of maintaining a well-ordered society. This third element requires equally entitled disobedients to coordinate their actions such that the overall level of disobedience communicates their opinions effectively but does not interfere with civic order in a way that would undermine the efficacy of a just or partially just constitution. Such coordination may not be easy but is not impossible.

The articulation of the third justificatory element in TJ is substantially different than that in TJCD. In TJCD Rawls does not articulate the scope of disobedience as a primary feature of the third element. Rather, what concerned Rawls in his earlier work was the mutual recognition of disobedients. He says, “. . . civil disobedience should be restricted to those cases where the dissenter is willing to affirm that everyone else similarly subjected to the same degree of injustice has the right to protest in a similar way.”⁶⁹ Thus, Rawls maintained that disobedients *should be prepared* to authorize others to perform disobedience and articulated *an optimistic view about the stability of disobedience*. He says, “legitimate civil disobedience properly exercised is a stabilizing device in a constitutional regime, tending to make it more firmly just.”⁷⁰

In TJ, his view is less optimistic. He says, “The third and last condition I shall discuss can be rather complicated. It arises from the fact that while two preceding conditions are often sufficient to justify civil disobedience, this is not always the case.”⁷¹ After explaining why two or more groups could be entitled to perform civil disobedience at any given time, Rawls mentions *the problem* with which he is concerned: civil disobedience can undermine the efficacy of a just or partially just constitution.⁷² Instead of the earlier emphasis on disobedients being “willing to affirm the right to protest,” Rawls discusses “the limit on the extent to which civil disobedience can be engaged in.” In fact in TJ Rawls no longer affirms the idea that civil disobedience is a stabilizing device and instead focuses on limits on the extensiveness of disobedience.⁷³

69. RAWLS, COLLECTED PAPERS, *supra* note 4, at 184.

70. *Id.* at 185.

71. RAWLS, *supra* note 2, at 373.

72. *Id.* at 374.

73. This is not to say that Rawls gives up the idea of disobedience as a stabilizing device

It is not clear why Rawls changed his position in this way. But surely he is less optimistic than before with respect to the effect of civil disobedience on the stability of the constitutional order.

IV. FROM THE EMBRYO TO THE MATURE-IMPLICATIONS IN RAWLS'S DISOBEDIENCE

The previous two sections discuss Rawls's analysis of civil disobedience. In contrast to his arguments in TJCD, Rawls's argument in TJ is both more structured and provides greater depth of analysis. This section makes a comparison of his two texts and then shows how his core ideas make his theory salient and distinctive from other theories.⁷⁴

This section is divided into two parts. The first part draws out the difference between Rawls's arguments in TJ and in TJCD. There are several differences. Rawls's later version is *more constrained* in conjunction with his definition but *more inclusive* in the context of justification of disobedience. Rawls excludes types of disobedience based on non-political principles like personal morality or religious principles. Therefore, his definition of civil disobedience is more constrained at the conceptual level but this entails that there is less work to do at the justificatory level.

I also argue that the communicative function of disobedience becomes an essential element of his mature theory. This role of the communicative function is apparent in Rawls's argument that civil disobedience must be nonviolent on the basis that it is a kind of speech act. The idea of communicative function of disobedience has been demonstrated in my other writing and therefore I will give a concise

because Rawls mentions this stabilizing function in a latter discussion when considering the role of disobedience in a democratic constitution. See *id.* at 383.

74. In addition to Kimberley Brownlee and Joseph Raz's theories of disobedience that the author has mentioned in the Part 1, Howard Zinn has developed another type of disobedience. In *Disobedience and Democracy: Nine Fallacies on Law and Order*, Howard Zinn argues for the function of disobedience by saying "We need devices which are powerful but restrained, explosive but controlled: to rests the government's actions against the lives and liberties of its citizens; to pressure, even to shock the government into change; to organize people to replace the holders of power, as one round in that continuing cycle of political renewal which alone can prevent tyranny." See HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER 7 (2nd ed. 2002). Howard Zinn's theory of disobedience considers the communicative function and looking-forward justice less important. While this is not a place to evaluate Zinn's theory, I want to make it explicit that the communicative function of disobedience is one solid reason for supporting the principle of nonviolence in civil disobedience in John Rawls's theory. Andrew Sabl has the similar idea by saying "Once we recognize that civil disobedience assumes not a current propensity by the powerful to act justly but their capacity to do so in the future, the self-discipline and voluntary restraint that are civil disobedience's outstanding characteristics become easier to under and justify." See Sabl, *supra* note 3, at 312.

account of this function.⁷⁵

A. *Political Principles Can Be the Only Legitimate Source for Justifying and Guiding Civil Disobedience*

Comparing the texts of TJ and TJCD, it is obvious that only political principles constitute the appropriate normative grounds for justifying civil disobedience while personal morality and religious reasons are not. Rawls's two principles of justice are political principles. Therefore, the two principles of justice constitute the normative grounds for justifying civil disobedience. But when looking at TJ itself, *there remains a question of whether a comprehensive doctrine of morality can justify disobedience even if such a doctrine is consistent with Rawls's theory of justice.*

A comprehensive doctrine can be defined as "a set of beliefs affirmed by citizens concerning a range of values, including moral, metaphysical, and religious commitments, as well as beliefs about personal virtues, and political beliefs about the way society ought to be arranged."⁷⁶ Rawls differentiates his political conception of justice, later developed in *Political Liberalism*, from the idea of a comprehensive doctrine. Comprehensive doctrines can apply to all aspects of life and cover "all recognized values and virtues within one rather precisely articulated scheme of thought."⁷⁷ He presents the political conception of justice as a *freestanding view*. Therefore, the justification for accepting the political conception of justice is not derived from the acceptance of a particular comprehensive doctrine. The political conception of justice is limited to the basic structure of society and does not cover every aspect of life or even the full range of government action.⁷⁸

In TJ Rawls seems to assume that his articulation of justice can be accepted by all members of society applying to all issues relevant to the basic structure of society. In this sense his theory of justice is universal (reaching all citizens) and primary (of highest priority within its domain of application). However, as Samuel Freeman states, "the members of a well-ordered society of justice as fairness could not themselves reasonably agree upon the philosophical justification of the principle of

75. Chen, *supra* note 54, at 23-25.

76. Paul Voice, *Comprehensive Doctrine*, in THE CAMBRIDGE RAWLS LEXICON 126, 126-29 (Jon Mandle & David A. Reidy eds., 2015).

77. RAWLS, *supra* note 45, at 13.

78. In *Political Liberalism*, Rawls distinguishes several kinds of comprehensive doctrine like partially v. fully, and reasonable v. unreasonable comprehensive doctrines. For the purpose of this article I will ignore these details because the point is to demonstrate the idea of comprehensive doctrine, not what a comprehensive doctrine might be. *See Id.* at 58-66, 175.

justice.”⁷⁹ Nonetheless, members of society can reasonably agree that justification of disobedience can be based on their acceptance of political principles of justice.

Rawls’s development of the idea of public reason aims to resolve the problem as to how a political conception of justice can be shared by all members of society despite the fact that they have their own comprehensive doctrines of morality. His theory of public reason implicitly reveals one question for civil disobedience: must civil disobedience be justified by public reasons? Or does the justification of civil disobedience require (or allow) reasons based on a comprehensive conception of the good?⁸⁰ I will deal with this problem step by step in line with the chronological development of Rawls’s thought.

In TJCD Rawls seems to recognize that members of society could share, communicate, and hold *the same conception of justice*; given that, there would be no problem of disagreement when some members of society seek to justify disobedience by basing their sense of justice on their political convictions. Rawls says, “It rests, then, on *political* conviction as opposed to a search for self or group interest; and in the case of a constitutional democracy, we may assume that this conviction involves *the conception of justice* (say that expressed by the contract doctrine).”⁸¹ One plausible reason for him to rely on the conception of justice is that this conception is a fully developed account of justice that every member of a well-ordered society should accept when thinking about issues relevant to the basic structure of society. So there is no need to make the political principle the *only source* for justifying disobedience. Members of society could use any moral principle associated with their comprehensive conception so long as this moral principle is connected to a political conviction that is part of the conception of justice shared with other members of society.

In TJ, Rawls does not use the term, “moral principle” as the source of justification but instead uses “political principle.” It is relatively clear that the scope of what kinds of principles justify disobedience has become narrower. The new picture is different because the appropriate normative source can only be political principles within the conception of justice. Rawls also makes a second slight change of terminology when describing the conception of justice. In TJ he uses the phrase “the commonly shared conception of justice” instead of “the conception of justice” in TJCD.⁸²

79. FREEMAN, *supra* note 31, at 325.

80. I distinguish between “public reason” and “public reasons.” Samuel Freeman has explicated the distinction between these two concepts. *See id.* at 387.

81. RAWLS, COLLECTED PAPERS, *supra* note 4, at 181.

82. RAWLS, *supra* note 2, at 365.

The idea of the conception of justice now must be “commonly shared.” Because Rawls excludes personal morality and religious reasons from the role of justifying disobedience, he then needs to re-characterize actions that he would have formerly called “civil disobedience” but which were based on reasons that form part of a comprehensive religious or moral conception of the good. His strategy is to move these actions into a different category that he calls “conscientious refusal.” In this article I do not investigate this category, but Rawls’s strategy reveals that he is more concerned with the question of what principles can justify civil disobedience in a well-ordered society. Or in other words, what principles are appropriate for members of society to use when justifying disobedience in the public forum?

Given these changes, *it becomes obvious that Rawls takes the feature of being political more seriously in TJ than he did in TJCD*. This feature renders his account of disobedience *more constrained* in the sense that personal morality and religious principles alone lack the justificatory force for civil disobedience. For Rawls personal morality and religious beliefs can “support” actions of disobedience but they are not reason enough to justify these actions.

What’s more, in TJ, Rawls calls for political principles to do more than serve as the justification for disobedience; he gives them an additional function. Disobedience not only must be justified but also *guided* by political principles. In TJ the normative component of being political is articulated as a requirement that disobedience “be guided and justified by political principle.” Political principles now have justificatory force and a guidance function for actions of disobedience. This opens the possibility that the choice of which law to disobey is not a strategic question. It is also a question of principle for the disobedients.

Rawls’s discussion of public reason makes this development clearer. The idea of public reason is complex and here I focus only on the relationship between this idea and civil disobedience. For Rawls the idea of public reason is “characteristic of a democratic people: it is the reason of its citizens, of course sharing the status of equal citizenship.”⁸³ Rawls articulates a distinction between public reasons and nonpublic reasons. Non-public reasons are reasons available for “associations of all kinds: churches and universities, scientific societies and professional groups.”⁸⁴ Therefore, non-public reasons are reasons for a particular group, not for “a political society and citizens generally.”⁸⁵ As such, they cannot be shared by citizens who, as individuals, have many different

83. RAWLS, *supra* note 45, at 213.

84. *Id.* at 220.

85. *Id.*

comprehensive views.

These nonpublic reasons raise a question for Rawls's theory of civil disobedience: can the disobedients justify their disobedience by presenting their comprehensive doctrine in a way that supports public reasons in the public forum? In other words, can nonpublic reasons be offered so long as they play a supporting role and are not themselves the primary justification for disobedience? Rawls answers this question in *Political Liberalism* when discussing the limits of public reason. He distinguishes two views: the exclusive view and the inclusive view. The exclusive view is that "the public reasons such a [comprehensive] doctrine supports may, of course, be given but not the supporting doctrine itself."⁸⁶ The inclusive view is the view that allows citizens, in certain situations, to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen the idea of public reason itself."⁸⁷ In PL, Rawls adopts the inclusive view of public reason.

Rawls's rationale for the inclusive view is developed through his discussion of three scenarios. The first two are situated in a well-ordered society and the third one in a non-ideal society with "a profound division about constitutional essentials."⁸⁸ Here I mainly focus on the third scenario.

The third scenario Rawls provides is situated in a non-ideal society in which there is deep disagreement about the constitutional essentials.⁸⁹ "Constitutional essentials" is the term coined by Rawls in *Political Liberalism* for the purpose of identifying "a class of fundamental questions for which the conception's political values yield reasonable answers."⁹⁰ There are two kinds of constitutional essentials. The first kind concerns "the general structure of government and political process," and the second includes "equal basic rights and liberties of citizenship that legislative majorities are to respect."⁹¹

These two kinds of constitutional essentials are not identical but differ in two ways. The first difference is that specifications of the first kind of constitutional essentials can be varied while the specifications of the second kind involve a relatively small variation. Therefore, it could be the case that two political regimes have different forms of government and a similar list of basic liberties.

86. *Id.* at 247.

87. *Id.*

88. *Id.* at 249.

89. He takes the case of abolitionists emancipating slaves and the civil rights movement led by Dr. Martin Luther King Jr. as paradigms to illustrate the third scenario.

90. *Id.* at 227.

91. *Id.*

The second difference is rooted in “*the principles of justice* specifying the equal basic rights and liberties and *the principles* regulating basic matters of distributive justice.”⁹² Rawls does not think that all goods specified in the two principles of justice belong to constitutional essentials. He excludes the “fair equality of opportunity” from constitutional essentials by saying “A principle specifying the basic rights and liberties covers the second kind of constitutional essentials. But while some principle of opportunity is surely such an essential, for example, a principle requiring at least freedom of movement and free choice of occupation, *fair equality of opportunity (as I have specified it) goes beyond that and is not such an essential.*”⁹³

For Rawls, the second kind of constitutional essential is specified by the principles of justice that grant members of society equal basic rights and liberties and the first kind by the political principles that regulate forms of government and distribution of wealth and income. It is also clear that Rawls uses the idea of constitutional essentials to refer to a class of basic questions of society needed to achieve an agreement through public reasons in the public forum.

The third scenario is premised on the fact that members of a non-ideal society may have a deep disagreement with respect to the content of the second kind of constitutional essentials (the specification of the equal basic rights and liberties of citizens). In this third scenario some members might appeal to their comprehensive conception of morality or religious belief in the public forum and believe that political force supported by their comprehensive conception is one “among the necessary historical conditions to establish political justice.”⁹⁴ Is this third scenario inconsistent with Rawls’s explanation of public reason? For Rawls, members who disagree about the second kind of constitutional essentials in a non-ideal society remain capable of advocating public reason because members of the non-ideal society could rely on their comprehensive conception as the means by which to provide “sufficient strength to the political conception to be subsequently realized.”⁹⁵

92. *Id.* at 228

93. *Id.* See also David A. Reidy, *Constitution and Constitutional Essentials*, in THE CAMBRIDGE RAWLS LEXICON 142, 141-46 (Jon Mandle & David A. Reidy eds., 2015). “This workable general structure of government and the political process is itself a constitutional essential, and while a constitution is just with respect to this essential only to the extent that the government structure and political process it specifies tends to yield legislation and policies consistent with both principles of justice, the second principle of justice is not itself embedded or entrenched as a constitutional essential. Though it sets out requirements of basic justice, it need not, and in Rawls’s view should not be built into the constitution itself in the way the first principle is.”

94. RAWLS, *supra* note 45, at 251.

95. *Id.*

Rawls's discussion of the third scenario shows that the limits of public reason depend on historical and social conditions. But his discussion assumes that public reason functions in a certain way despite its dependence on historical conditions and implies the possibility that comprehensive reason can "justify" (not merely support) disobedience in a restricted sense. Therefore, what justifies disobedience is not the public reason accepted by members of society but the comprehensive doctrine held by the disobedients.

Therefore, justification of disobedience by the comprehensive doctrines of the disobedients is restricted to cases such that the reasons provided by a comprehensive doctrine is the best argument that could be provided by the disobedients to establish the political conception of justice. The point here is not how a comprehensive doctrine justifies disobedience but when a comprehensive doctrine can justify disobedience in the public forum. Justification of disobedience by a comprehensive doctrine can be acceptable when such justification is the best argument that the disobedients have for the sake of establishing the political conception of justice supported by public reason in a given historical condition. This point becomes clear when Rawls says, "The abolitionists and King would not have been unreasonable in these conjectured beliefs if the political forces they led were among the necessary historical conditions *to establish political justice*, as does indeed seem plausible in their situation."⁹⁶

This illustration is consistent with Rawls's position in TJ with respect to the justification of civil disobedience. Rawls still does not allow a comprehensive doctrine itself to be the necessary and sufficient reason for justifying disobedience but grants that it could be the necessary condition *for* a given society to realize a political conception of justice in the future.

B. *The Communicative Function of Disobedience Becomes More Explicit in a Theory of Justice*

In order to understand the communicative function of disobedience, it is necessary to distinguish two senses in which disobedience can have a communicative function. First, disobedience itself is communicative in the sense that it is a kind of speech act that transmits the communicative content of the disobedients and aims at engaging others in action. Second, disobedience is a means for opening a communicative opportunity between the disobedients and their addressees. The discussion that follows focuses on the first sense.

96. *Id.*

The communicative function of civil disobedience implies that civil disobedience is part of a rational dialogue between two sets of parties who have a significant disagreement about relevant issues. For this reason, performing disobedience might be a way of expressing one point of view, a way of signaling one's sincere conviction, and a way of communicating with respect to an issue with others who disagree. Irrespective of the purpose for which disobedience is performed, the act of disobedience is a communicative act that assumes a background condition of an equal relationship⁹⁷ between the disobedients and the addressee (or audience).

In TJCD it is still unclear whether disobedience is communicative or not although Rawls says in passing that disobedience is a "form of speech."⁹⁸ The phrase "form of speech" could be interpreted in various ways and the semantic meaning of the phrase encompasses a wide range of activities. A "form of speech" could refer to a boring speech given by a speaker whose only concern is expression of his beliefs and who has no empathy with the audience, but the same phrase could encompass a sincere attempt to communicate based on an equal relationship between speaker and audience as the necessary condition for having a successful speech. In TJCD civil disobedience might be considered either expressive or communicative.

But the idea of disobedience being communicative is not obvious because Rawls mentions disobedience as "a form of speech, an expression of conviction." This seems to put more weight on the expressive function of disobedience to emphasize what disobedience can *be used for*, not what disobedience *is*.

The reason for interpreting Rawls's conception of disobedience as communicative is that nonviolence cannot be a necessary component of disobedience if we take disobedience as merely expressive. For example, disobedients who are only concerned with expressing their rage or anger might use violent actions to express these strong emotions. This is a familiar phenomenon in ordinary communication, where the connection between the expression of anger and violence is well known.

Moreover, it is possible for disobedients to take into account the way that their actions are perceived by others in ways that are not sufficient for disobedience to function as communication. Only when the disobedients treat others (their audience) as their equals does nonviolence become a necessary component of *civil disobedience*.

Based on this interpretation we can understand two sentences that

97. The relationship is equal with respect to communication, but of course could be unequal in other respects. For example, the disobedients might have less political power than those whom they address.

98. RAWLS, COLLECTED PAPERS, *supra* note 4, at 182.

appeared in TJ, but not in TJCD. Rawls ultimately thinks that civil disobedience is a “form of address,” not merely “a form of speech” and it is a form of address that expresses one’s “profound and conscientious political conviction.” Such an expression is also final in the sense that it leaves the audience to decide whether or not to agree with the disobedients’ appeal. Only by taking the communicative function of disobedience into account can we explain why nonviolence is an intrinsic feature of civil disobedience.

I take the communicative function of disobedience as the most important feature in Rawls’s theory of civil disobedience. Rawls’s insistence on nonviolence can be best defended as required by the communicative function of disobedience. Although he situates nonviolence at the definitional level, this should not negate the role of the communicative function of disobedience in TJ as an explanation of and justification for the requirement of nonviolence.

C. *Rawls Has Relaxed the Justificatory Elements in a Theory of Justice*

In TJ, Rawls relaxed several requirements for civil disobedience from the formulation he had articulated in TJCD. There are three ways in which he relaxed the formulation.

First, in TJCD, violations of equal opportunity are appropriate objects of disobedience *only* when such violations happen in the economic sphere. But in TJ, Rawls explicitly mentions that *various opportunities* can also be appropriate objects. This includes a wider range of opportunities for performing civil disobedience.

Second, with respect to the ineffectiveness of normal political appeal, Rawls does not require disobedients to exhaust all “actual opportunities” for making an appeal. Instead, whether a valid appeal exists partly depends on disobedients’ reasonable subjective judgment. And this requirement becomes a presumption rather than a rule. Under exceptional circumstances, this requirement no longer applies at all.

Third, in TJ Rawls has changed his view with respect to the extensiveness of disobedience. In TJCD he took mutual recognition of others’ entitlement to disobedience in a similar circumstance as one important justificatory element. But in TJ he becomes less optimistic because of the possibility of causing social disorder via disobedience.

This change is significant because comparing Rawls’s two texts in terms of the third justificatory element (the extensiveness of civil disobedience) reveals the fact that the third element functions as a constraint for the disobedients. In TJ Rawls emphasizes that disobedients should rely on the efficacy of the constitution and avoid the creation of

social disorder; he does not require the mutual recognition of others' entitlement to disobedience. It is unclear why he made this change. One possible reason might be that he realizes that more and more cases would qualify as reasonable given that the first two justificatory elements had been relaxed; therefore, the third justificatory element needed to play a constraining function in order to avoid social disorder. Or Rawls might have come to realize the potential for greater destructive force of civil disobedience if disobedients spontaneously perform unlawful acts without considering the collateral damages produced collectively by disobedients' actions.⁹⁹

D. *The Communicative Function of Rawlsian Disobedience*

Every theory of disobedience has as its core a set of ideas that differentiate civil disobedience from other activities (especially ordinary law breaking). The best way to characterize Rawls's account of the distinctiveness of disobedience is to focus on how disobedience becomes a vehicle for transporting disobedients' messages to the public, the people who have political power, and the majority. For Rawls, civil disobedience performs a communicative function in an asymmetric relationship between the majority and the minority in order to bring about a change in law and policy. Disobedience is not only an action that makes some basic issue of justice significant but also an action that engages others in action in a deliberative process. From the previous discussion, we can see Rawls's theory becoming more communication-focused in TJ. He characterizes disobedience as a mode of address and, implicitly, as a speech act the illocutionary force of which is a call for action with the intended perlocutionary effect of actually producing political action.

By asserting that civil disobedience is a mode of address and analogizing disobedience with public speech, Rawls shows that the principle of nonviolence is an integral part of the practice of civil disobedience. The question is no longer whether disobedience *should be* nonviolent or not. From Rawls's argument civil disobedience *itself* must be nonviolent.

This Rawlsian theory of disobedience might seem to be overly idealized because, when looking at the history of the world, a complete embrace of nonviolent disobedience is rarely found. Even in the case of Gandhi's program of disobedience aimed at the British government, there was strong dissent within his group about the method advanced by

99. Although cooperation of political allies to initiate disobedience is highly difficult, Rawls still thinks it is not impossible. He says, "To be sure, an alliance of this sort is difficult to arrange; but with perceptive leadership, it does not appear impossible." See RAWLS, *supra* note 2, at 374.

Gandhi.¹⁰⁰ For this reason, it might be argued that the Rawlsian conception of civil disobedience lacks explanatory power with respect to actual cases that are understood as clear or paradigmatic cases of civil disobedience.

Criticizing John Rawls's theory of disobedience for his failure to discuss actual cases that are commonly recognized as civil disobedience is not new. But I believe that Rawls "intentionally" distances himself from evaluating actual events in the world. For example, he did not mention Gandhi's case in TJ. He mentions David Thoreau several times in footnotes.¹⁰¹ What is most surprising is the fact that he never explains whether his theory of disobedience accounts for real world instances of civil disobedience. But this is not a defect in his theory, once we understand the role that his conception of civil disobedience is intended to play in justice as fairness--that is, in Rawls's theory of justice.

There are two ideas that are important to understanding the role that Rawls's conception of disobedience plays in his theory of justice. First, his theory is normative in the sense that his articulation of the principle of justice, fundamental ideas, and the theory of disobedience shows how a conception of justice can be adopted in a given circumstance. His theory of disobedience is a part of his overall theory of justice in a well-ordered society. Because that theory is an ideal theory, there is no theoretical requirement to refer to actual cases and illustrate the applicability of his theory. Secondly, seeming "critics" of Rawls's ideal theory are best understood not as critics but as fellow theorists opening a door for the further work that connects Rawls's ideal theory to a non-ideal world. This understanding of the role of Rawls's critics does not entail the conclusion that Rawls's theory cannot be replaced by other theories (if they can be demonstrated to offer a more attractive account of civil disobedience); rather, the point is that criticism of Rawls's decision to advance an "ideal theory" of disobedience is insufficient by itself, because this criticism does not and cannot show that his ideal theory is inadequate on its own terms.

The account of the communicative function of disobedience offered in this part constitutes my attempt to make Rawls's theory of disobedience the best it can be in a way that accounts for what Rawls himself says in both TJCD and TJ. This account aims to illuminate Rawls's argument for nonviolence and to show that this argument is sound. Taking the communicative function into account not only demonstrates why disobedience is nonviolent but also helps us cast light onto the possible

100. WILLIAM L. SHIRER, *GANDHI: A MEMOIR* § 3 (1980).

101. RAWLS, *supra* note 2, at 364, 368.

conditions for having this communicative function. Illustrating this communicative function also helps disobedients understand what the guiding principle for their actions generally should be.

E. *A Comparison between “The Justification of Civil Disobedience” and a Theory of Justice in Terms of Constitutive and Justificatory Elements*

The following Table compares his arguments in *The Justification of Civil Disobedience* with those in *A Theory of Justice*.

Table 6: A Comparison Between TJCD and TJ in Terms of Civil Disobedience

Rawls's Arguments		<i>A Theory of Justice</i>	“The Justification of Civil Disobedience”
The Constitutive Elements	<i>Political</i>	Actions of disobedience need to be justified by political principles.	Actions of disobedience can be justified by moral principles and disobedients must have a political conviction.
	<i>Public</i>	Disobedience is done in public and is analogous to a public speech.	Disobedience is a way of addressing the sense of justice of the majority.
	<i>Nonviolent</i>	Disobedience is a form of speech and disobedients' acceptance of legal penalty and of nonresistance.	Disobedience is analogous to a public speech as a mode of address and disobedients must have a sincere attitude.
The Justificatory Elements	<i>Objects and Wrongs</i>	A violation of equal liberty should be serious and a violation of fair opportunity blatant. A violation of fair opportunity is not limited to the field of economy.	Rawls does not explicitly distinguish different standards. A violation of fair opportunity is limited to the field of economy.
	<i>Normal Appeal</i>	Normal appeal has been proved ineffective and is a presumption.	Normal appeal has been proved ineffective but Rawls does not mention normal appeal as a presumption.

Rawls's Arguments		<i>A Theory of Justice</i>	"The Justification of Civil Disobedience"
	<i>Scope of Disobedience</i>	Takes the destructive force of disobedience into account in terms of the stability of the constitution.	Optimistic view about the destructive force of disobedience focusing on the mutual recognition of disobedients.

V. CONCLUSION

John Rawls, one of the most important political philosophers in the 20th century, has devoted his whole writing into one question, what is justice. In *A Theory of Justice*, he situates the theory of civil disobedience in the context of political obligation and the natural duties. This article does not take this into account but takes his two, might be only two, pieces of writings on disobedience into account and tries to find out the difference between his earlier writing and his mature theory.

After giving a close reading to his two texts slight changes and important refinements can be found. First, for him political principles are the only legitimate source for justifying and guiding civil disobedience. Secondly, the communicative function of civil disobedience becomes more salient in *A Theory of Justice*. Thirdly, while he relaxed the justificatory elements of civil disobedience in *A Theory of Justice* Rawls noticed the potential dangerousness of civil disobedience. Therefore, he adds one new element that cannot be found in his earlier writing, that is, the extensiveness of civil disobedience.

I also explicate the idea of the communicative function of disobedience and argue that the principle of nonviolence is not only a part of definition of civil disobedience but also constitutes a background condition of exercising disobedience. By shedding light on civil disobedience from the perspective of speech act, we can further develop multiple conceptions of disobedience in the future.

REFERENCES

- Allen, A. (2012). The Unforced Force of the Better Argument: Reason and Power in Habermas' Political Theory. *Constellations*, 19(3), 353-368.
- Brownlee, K. (2012). *Conscience and Conviction: The Case for Civil Disobedience*. Oxford, UK: Oxford University Press.
- Chen, H.-J. (2016). The Rawlsian Civil Disobedience and The Principle of Nonviolence. *Asian Legal Philosophy*, 3(1), 5-31.
- Freeman, S. (2007). *Rawls*. New York, NY: Routledge.
- Lovett, F. (2013). *Rawls's a Theory of Justice*. New York, NY: Bloomsbury Publishing Plc.
- Marshall. R. (補月份n.d.). Conscience and Conviction. Retrieved from <https://316am.site123.me/articles/conscience-and-conviction?c=end-times-archive>.
- Rawls, J. (1971). *A Theory of Justice*. London, UK: Harvard University Press.
- Rawls, J. (1969). The Justification of Civil Disobedience. In H. A. Bedau (Ed.), *Civil Disobedience: Theory and Practice*. (pp. 240-255). New York, NY: Pegasus.
- Rawls, J. (1999). The Justification of Civil Disobedience. In S. Freeman (Ed.), *Collected Papers* (pp. 176-189). Cambridge, Mass: Harvard University Press.
- Rawls, J. (2005). *Political Liberalism* (expended ed.). New York, NY: Columbia University Press.
- Raz, J. (2009). *The Authority of Law*. (2nd ed.). Oxford, UK: Oxford University Press.
- Reidy, D. (2015). Constitution and Constitutional Essentials. In J. Mabdle & D. A. Reidy (Eds.), *The Cambridge Rawls Lexicon*. (pp. 141-146). Cambridge, UK: Cambridge University Press.
- Sabl, A. (2001). Looking Forward to Justice: Rawlsian Civil Disobedience and Its Non-Rawlsian Lessons. *The Journal of Political Philosophy*, 9(3), 307-330.
- Shirer, W. L. (1980). *Gandhi: A Memoir*. New York, NY: Simon & Schuster Press.
- Thoreau, H. D. (1993). *Civil Disobedience and Other Essays*. New York, NY: Dover Publications, Inc.
- Voice, P. (2015). Comprehensive Doctrine. In J. Mabdle & D. A. Reidy

(Eds.), *The Cambridge Rawls Lexicon*. (pp. 126-129). Cambridge, UK: Cambridge University Press.

Wenar, L. (2013). John Rawls. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy*. Retrieved from <http://plato.stanford.edu/archives/win2013/entries/rawls/>.

Zinn, H. (2002). *Disobedience and Democracy: Nine Fallacies on Law and Order* (2nd ed.). Cambridge, MA: South End Press.

初探羅爾斯的公民不服從： 從雛形到成熟的發展

陳弘儒

摘要

羅爾斯在「正義論」中對於公民不服從的討論一直以來是政治哲學在此議題上的重要思考資源。然而，在1971年「正義論」正式出版之前，羅爾斯曾在1969年發表過一篇小文章：The Justification of Civil Disobedience作為其正義論在公民不服從的理論雛形，由於正義論在相關論述的嚴謹與完整，這篇小文章往往不在理論家關注的視野之中。而這樣的忽視讓我們對於羅爾斯如何發展其不服從理論有了一個缺角，這個缺角不僅構成了對於羅爾斯作為深刻思想家的遺憾，也遮蔽了對於他在正義論中成熟理論的重要意涵。本文章作為一篇對於羅爾斯不服從理論的研究文章，針對羅爾斯1969年的文章與1971年的成熟之作進行細緻比較與分析，從文本分析開始說明羅爾斯在兩個版本中對於公民不服從的定義與正當性理據之差異，並且說明此類差異對於其成熟理論的意涵。在分析兩份文本之後，筆者透過言語行動理論的視野將羅爾斯的不服從定性為溝通不服從，其將行動者與大眾之關係視為一種平等的對話關係，因此非暴力不僅是手段之特色，更是雙方溝通得以成立的背景條件。透過言語行動的視野理解羅爾斯的不服從後，我們可以更清楚地看見其理論的核心意義，在未來也可以讓我們進一步思索非溝通為主的不服從概念觀之可能性。

關鍵詞：公民不服從、羅爾斯、非暴力、正義二原則、公共理性、
溝通性不服從