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THE DISSENT OF THE GOVERNORS

STEPHEN L. CARTER*

In *Adam, Eve, and the Serpent*, Elaine Pagels discusses the tribulations of the early Christian church, when its members were torn by the effort to satisfy simultaneously two arguably inconsistent strands of teaching. The first strand taught that it was wrong to engage in homosexuality, promiscuity, abortion, infanticide, and contraception—in short, that it was wrong to enter into sexual relationships not intended to lead to children and family. The second demanded that true believers cast off the traditions of family responsibility and follow God without reservation. The church’s first solution was to establish the virtues of chastity and the value of virginity; the second was to proclaim the utter corruption of the body. The result in either case was cataclysmic upheaval. ¹

Contemporary liberalism, as a theory of legal and political obligation, is undergoing an upheaval of its own. On the one hand, liberalism teaches the importance of the rule of law. On the other, it teaches the primacy of individual conscience. Like the early church, liberalism at once demands that individuals remain within the confines of a set of given institutions and insists that the individuals are free to follow their own moral judgments. Unresolved tension results when the commands of conscience are inconsistent with a particular rule of law. The traditional liberal solution has been a doctrine of civil disobedience, but the doctrine has had so many incarnations that it is difficult to tell whether two theorists who think they disagree are even arguing about the same thing.

Michael Perry, in his recent book *Morality, Politics, and Law*, proposes a partial resolution of the conflict by characterizing law as the product of moral deliberation within a community. The outcome of the deliberation, he says, is not necessarily binding on dissenters: “Disobedience to law, including resistance to coercive law, is an alternative that remains for the sub-

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jects of law when moral discourse runs out.”2 Perry would not, however, require the disobedient to stand punishment for breaking the law: “[T]here is not even a presumptive obligation to obey all laws.”3 Stated so baldly, this claim is perhaps unexceptionable. For reasons that I shall explain, however, when it is stated in the course of constructing a deliberative model of moral judgment, it strikes a slightly awkward chord.

In this Essay, I contend that Perry’s attractive vision of a continuing moral dialogue is more consistent with a somewhat different proposition: that an individual who considers her society essentially a just one has a strong reason to obey all of its laws, and that if she nevertheless feels compelled by conscience to disobey that society’s laws, she ordinarily should stand punishment if she follows her compulsion. Rare circumstances might exist in which evading punishment is appropriate, but in choosing to do so, the disobedient should recognize that she is frustrating moral dialogue, not furthering it.

I also extend Perry’s model of a morally deliberative society, as well as the argument about the obligation to stand punishment for disobedience, to the case of nonprivate individuals: elected public officials and judges, especially constitutional judges. My conclusion is that if the obligation to obey the law (and, consequently, the obligation to stand punishment for breaking it) rests on an individual’s self-conscious judgment about the justice of her society, then one who in good faith takes on a responsible position of governance has a stronger obligation to obey. One who in good faith takes on the position of judge has perhaps the strongest obligation of all.

I.

I begin with the proposition that every morally reflective individual, that is, every person who sometimes judges the actions of others or of the state against some moral code, will occasionally perceive the necessity of creating an identity between her private moral judgment and her public action. I am not concerned here with her reasons for doing so. I am not even concerned with whether in some other moral scheme, different from hers, the imposition of her morality as public law is justified. I insist only that the time will come when she sees the need

3. Id.
to challenge the practices of the state because they do not accord with her moral judgment. I refer to her effort to secure the change as moral judgment-in-action because it represents her response to a private moral call to act.

Moral judgment-in-action may take three forms, which might be denominated legal, sub-legal, and supra-legal.

Legal action seeks to change the law through the processes that already exist in the state for that purpose. In the United States, legal action might include petitioning the legislature or challenging in the courts the law that individuals perceive as unjust.

Sub-legal action circumvents the law in a way that is designed to keep the circumvention from coming to the state’s attention. The Sanctuary Movement, the church-based drive to save Salvadoran refugees from deportation by shielding them from the Immigration and Naturalization Service, is an example of sub-legal action. So is the practice (I am assured by my friends that it exists) of shuffling figures on one’s federal income tax return in order to avoid providing money for causes that one dislikes.4

Supra-legal action involves a public appeal to some morality that is said to be higher than law. The appeal may be religious. In any case, such action requires a public and open disobedience of the law. The classic American examples of this appeal are the sit-ins and other nonviolent disobedient activities associated with the civil rights movement of the 1950s and 1960s. A more recent example is Operation Rescue, in which pro-life activists have blocked the entrances of facilities in which abortions are performed.5

Supra-legal action is not necessarily nonviolent action. The physical restraint of those about to do something the disobedient actor considers unjust, the bombing of government buildings, even assassination, are all supra-legal actions, and those who take these actions generally try to justify them through calling on some higher moral authority than the authority of the state.

4. Whether this is logical is another matter.
5. Supra-legal action can be further divided into two categories. In the first of these, the law that persons are violating is itself the subject of protest. The civil rights movement usually, although not always, selected protest of this sort. In the second category, the law that is being violated is not itself the unjust law but is violated nevertheless as a part of the protest. Operation Rescue exemplifies the second form of this protest. Perry considers each of these equally legitimate, and I believe that he is correct. M. PERRY, supra note 2, at 117-18.
Not only will nonviolent action sometimes be less effective than violent action, but, as Perry, among others, points out, nonviolent action at times entails greater social costs than violent action.\textsuperscript{6}

My reading of Perry is that, as a matter of moral legitimacy, all these categories are essentially one. He suggests two considerations that "should inform the decision whether to disobey a particular law in a particular situation."\textsuperscript{7} First, in our morally pluralistic nation, a citizen ought to reflect carefully on the fallibility of conscience and the plainly differing moral judgments of others before concluding that her moral judgment-in-action calls for disobedience.\textsuperscript{8} This conclusion is consistent with Perry’s admirable overall project of encouraging the development of a morally conscious, deliberative citizenry, and therefore can hardly be objectionable. Second, Perry endorses the idea of testing the chosen form of disobedience for its proportionality to the harm to be avoided or undone.\textsuperscript{9} It is difficult to disagree with such a test.

Perry is evidently prepared to stop here and declare that disobedience is legitimate. In particular, he does not believe that disobedient citizens are required either to act publicly in their disobedience or to stand punishment for what they have done.\textsuperscript{10} It is here that Perry and I part company.

Nevertheless, Perry is in good company. Today, the idea that individuals have a presumptive obligation to obey the law or stand punishment for their disobedience is looked on as a quaint relic of a more primitive era in the development of political philosophy. The arguments of Gandhi and King, the twentieth century’s twin icons of nonviolent resistance, are derided by contemporary philosophers through omission; they are treated as mere political polemics, not even worth a serious scholar’s mention, to say nothing of a refutation.\textsuperscript{11}

\textsuperscript{6} Id. at 116. But see R. Dworkin, A Matter of Principle 108 (1985) ("Of course, violence and terrorism cannot be justified in this way. If someone's conscience will not let him obey some law, neither should it let him kill or harm innocent people."); J. Rawls, A Theory of Justice 366 (1971) ("To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address.").

\textsuperscript{7} M. Perry, supra note 2, at 115.

\textsuperscript{8} Id.

\textsuperscript{9} Id. at 115-17.

\textsuperscript{10} Id. at 117-19.

\textsuperscript{11} For a particularly sensitive discussion of the obligation to face punishment, incorporating some insights of King and Gandhi, see K. Greenawalt, Conflicts of Law and Morality 230-40 (1987).
And yet contemporary constitutional theory places an indispensable reliance on the supposition that people are supposed to do what the courts tell them to do. After all, judicial activity is not a particularly reliable means of either preserving the status quo or reforming it if the people are always morally free to ignore the judges. Today's liberal constitutionalists seem particularly uncomfortable with the idea that a particular subset of the people—those who hold public office—are morally free to ignore the judges. This discomfort helps explain the thundering, if misdirected, anathemas rained upon former Attorney General Meese for daring to suggest the right of government officials to make independent assessments of constitutional meaning, notwithstanding what a court might have said the document means. So if the sweep of contemporary political philosophy is right, then there is something wrong with the institution of judicial review as currently conceived.

That proposition, however, is not Perry's problem. Perry does indeed believe that there is something wrong with the current concept of judicial review. A major purpose of his book is to reconceptualize judicial review as a species of politics—and "deliberative, transformative politics" at that. Deliberative politics, like any dialectical process, requires interlocutors. Perry's argument is comfortably rounded because he draws what is in essence a moral equivalence between judges and other individuals. Judges, Perry asserts, are (or ought to be) free to use their own moral compasses as guides to constitutional interpretation. But individuals who are the subjects of judicial opinions retain the moral freedom to defy those opinions if moral deliberation shows them to be unjust. Ultimately, I will return to this vision of judicial review as dialectic, and will discuss as well the moral freedom that it gives to judges and to the public. First, however, it is necessary to say a few more words about Perry's vision of the source of—or rather, the lack of—a presumptive obligation to obey the law, and about the reasons that I disagree.

II.

From the structure of Perry's argument, it is plain that the

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13. M. Perry, supra note 2, at 151-69.
14. Id. at 149.
ultimate test for legitimacy of disobedience is individual conscience. For Perry, the legitimacy of the disobedience is measured principally by the personal, internal, moral judgment of a morally reflective individual. But Perry’s formula relies on that individual’s judgment about either the justice of the particular law that she chooses to violate, or the particular practice at which the protest is aimed. His formula omits a crucial determinant of the morality of the disobedience, namely, the individual’s judgment about the justice of the state itself. My own claim is that the interaction of different judgments about the state and different types of disobedience is a good deal more complex. In particular, I suggest that individuals who believe the state itself to be essentially just have at least one reason—and quite a strong one—for standing punishment when they disobey the law.

Now, of course, in order to decide whether disobedient citizens have a moral obligation to stand punishment, it is necessary to say something about their obligation to obey law in the first place. Hardly anyone continues to believe in social contract because there is no actual agreement to be bound, and the case for tacit consent has, on somber reflection, proven to be shoddy. Naturally, lots of theorists have tried to fill the void with a variety of creative arguments for a presumptive obligation to obey the law in all, most, or some circumstances. Others—Perry among them—have denied that individuals have even one strong reason for obeying the law simply because it is the law.

I would like to sidestep that debate just a bit, and consider the possibility that whatever may be the moral obligations of citizens qua citizens, not all citizens are similarly situated. If there are some citizens for whom there is indeed a strong reason, amounting to a presumptive obligation, to obey the law just because it is the law, it follows that at least these individuals ought to be open and public in disobedience, and to stand punishment if the society chooses to administer it.

To work out whether such a group might exist, and who its members might be, it is useful to review Perry’s argument


against the proposition that disobedience of the law must always be open and that disobedient individuals must be prepared to face trial. Says Perry:

The position that disobedience must be open or public to be legitimate is . . . untenable. In the United States during the era of slavery, did those who operated the underground railroad act illegitimately because they acted covertly? In the present era, do those who hide Salvadoran refugees illegally in the United States act illegitimately because they act covertly? 

"[P]urposes other than the open protest normally associated with civil disobedience may underlie a valid claim that disobedience is morally justified. Sometimes a law is so wicked that the actor rightly acts to circumvent it. The person who contrary to the law assisted Jews to escape Nazi Germany acted morally."18

Not only that, but for similar reasons there is no obligation to stand punishment, either:

"If someone was illegally engaged in helping Jews escape from Nazi Germany, to have given himself up would have made it impossible for him to continue in that aid. It would have been perfectly moral for him to try to avoid punishment." Moreover, if someone helping Jews escape from Nazi Germany had been detected, he would have been no more obligated to refrain from attempting to escape Nazi Germany than were the Jews he had been helping.19

Obviously, no one will disagree with the force of these views. But they draw their force significantly from the moral consensus on the status of the particular regimes that Perry chooses as his examples. One is a state based on the enslavement of other human beings, the other a state with a fundamental policy of genocide.

Consequently, there is a reason that the examples resonate so powerfully: Both are drawn from regimes that are essentially unjust. It seems quite unlikely that the disobedient citizens in Perry’s Nazi Germany example were saying to themselves, “The government isn’t so bad if it would just stop killing the Jews”; such a position about the Nazi regime would be morally monstrous. More likely, the disobedient Germans would not be engaged in law reform at all. The judgment to help Jews escape

18. M. PERRY, supra note 2, at 118 (quoting Greenawalt, A Contextual Approach to Disobedience, 70 COLUM. L. REV. 48, 69 (1970)).

19. Id. (quoting Greenawalt, supra note 18, at 70).
would be partly moral, but also pragmatic, logical, even the result of instrumental rationality. Given my goal, the citizen has asked herself, how best can I attain it? The answer in Nazi Germany was evidently that change—in the sense of saving Jews—could be brought about only by evading punishment. But note that changing the law was not the objective of the disobedient citizen who was hiding Jews. This is not to deny that she would have celebrated had the law been changed, but she was not hiding Jews in order to convince the state of the futility of its persecution of them. She was hiding them to save their lives.

But of course there is a reason that she was not hiding them in order to change the law. She undoubtedly disbelieved in the possibility of changing the law. If a society possesses an unjust law that will not be changed (except, perhaps, by force), and if the law is sufficiently unjust, the society itself may be described as an unjust one. If the society is unjust, then the presumptive duty to obey its laws is nonexistent. Consequently, the citizen of Nazi Germany who hid Jews was not engaging in civil disobedience at all. She was engaging in rebellion, for she denied the authority of the state in which she lived. In other words, the Nazi Germany example involves disobedience by those who challenged the justice not of one law, but of the state itself. In my view, the same is true of the example drawn from the period when slavery was legal in the United States.

So Perry’s examples say very little about the proper moral consequences of disobedience in the United States. No doubt there are disobedient citizens of the United States who also deny the state’s authority, and who also consider the government fundamentally unjust and therefore consider themselves freed from any presumptive duty to obey its laws. For such citizens, the decision that moral judgment-in-action requires sheltering one’s self from prosecution will often be an easy one. As Perry himself points out, however: “Nazi Germany is one context. By any plausible standard, contemporary American society is quite another.”

Most Americans probably consider their government—their society—essentially just, and my empirical hunch is that most Americans consider the laws promulgated by their government presumptively entitled to respect. But although Perry concedes that the United States as a society is radically different
from Nazi Germany, he nevertheless declines to endorse the proposition that disobedience of American law by American citizens who consider their society a just one might carry an obligation that is different from the one that might have attached to disobedience of Nazi law by German citizens who considered their society an unjust one.

The point is that Perry does not consider the possibility that the individual's own assessment of the justice or injustice of her society can and should carry moral force in her decision on whether the society's laws are presumptively entitled to obedience. It may be that there exist out there in America (albeit relatively far from the academy) vast numbers of individuals with a deep and abiding faith in the essential justice of their nation's institutions, a faith which leads them to presume, in their own minds, that the commands of law are entitled to obedience.

If faith of this kind exists, it is not consent in the contractarian sense. The faith would, however, play a large role—perhaps the major role—in the decisions by those individuals who shared it on whether disobedience of law was right or wrong. Thus, for the purpose of determining obligation, the faith might plausibly be described as the functional equivalent of consent.

This seems to be what Joseph Raz has in mind when he presents, in *The Morality of Freedom*, his vision of an organic relationship between individual and community that rests on the citizen's self-conscious respect for her community's law. Raz, it should be pointed out, is essentially a philosophical anarchist, one who denies the existence of a presumptive obligation to obey the law simply because it is the law.²¹ He does not believe that consent is possible. But neither does he believe that consent in the social contract sense is even necessary to confer an obligation. Rather, the sense of respect that he describes, one in which the citizen seems almost to will an obligation, need not "be related to any act performed in the belief that it has normative consequences."²² This sense of respect for law, the self-conscious, willed belief in one's own obligation to obey, is something that evolves over time, not something that arrives at a moment:

²¹. See generally J. RAZ, supra note 15.
²². J. RAZ, THE MORALITY OF FREEDOM 98 (1986) [hereinafter MORALITY]. This process is similar to what J.L. Mackie has called an "invented" obligation. See Mackie, Obligations to Obey the Law, 67 VA. L. REV. 143, 151 (1981).
"It is likely to be the product of a gradual process as lengthy as the process of acquiring a sense of belonging to a community and identifying with it."\(^{23}\) In other words, the sense of respect is an emergent attitude, the product not of conscious decision to be bound but of a variety of social forces that combine to produce it. It is not consent. "But in a reasonably just society this belief in an obligation to obey the law, this attitude of respect for law, is as valid as an obligation acquired through consent and for precisely the same reasons."\(^{24}\)

Raz's principal point is that the obligation to obey the law simply because of its status in society as law might stem from attitudinal rather than consensual sources. His suggestion is that the individual who believes for whatever reason that her society is a just one and that its laws are presumptively entitled to respect stands on a different footing from other citizens. Moreover, her footing is in the place that matters most, the place at which moral deliberation on whether to obey the law takes place: her own mind. When this citizen must decide whether to obey a law or whether her moral judgment-in-action counsels disobedience, she begins at a point that is different from the one at which Perry and others start. She begins with the belief that obedience is obligatory. This belief, whatever its source, sharply alters the debate over whether she ought to stand punishment if she disobeys.

When one tries to generate an obligation based on this perception, one runs into a problem: The citizens who take this view naturally imagine that their obligation to obey the law comes not from their belief that the obligation exists, but from some other, unstated source. Thus, there is an unsettling recursive character to basing authority on this belief; there is a reason to obey the law because the belief exists, and the belief exists because there is a reason to obey the law, and so on. Worse, the citizens who hold the belief are likely unaware of its self-referencing character, because they also believe that something else out there provides the source of their obligation.

Raz answers the objection this way. "But ill-articulated as many people's thoughts sometimes are in substance, they often amount to an assumption of semi-voluntary performative submission to an authority, because it is a morally worthwhile atti-

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23. J. Raz, Morality, supra note 22, at 98.
24. Id.
For the purpose of considering disobedience as moral judgment-in-action, this response is entirely sufficient because I am testing the legitimacy of disobedience only against the individual's own conception of the justice or injustice of the state in which the disobedience takes place. This limitation seems entirely sensible, for the true disobedient is rarely committed to the state's destruction. As Ronald Dworkin has put the point: "Civil disobedience, in all its various forms and strategies, has a stormy and complex relationship with majority rule. It does not reject the principle entirely, as a radical revolutionary might; civil disobediants remain democrats at heart."26

Dworkin's generalization does not of course describe all civil disobedients, but it is true of many and perhaps most. Once this affection for majority-rule democracy exists, its source scarcely matters. Nevertheless, it is important to distinguish Raz's argument, and my use of it, from the proposition that there exists a special obligation to obey laws that are generated through the democratic process. Perry quite correctly points out that even a democratic society can produce very bad laws. He echoes Kent Greenawalt's claim that the moral case for disobedience in Nazi Germany would not have been weakened had Hitler been elected democratically or had a majority of Germans approved genocide.27 But the case for a presumptive obligation to obey the laws of a just society does not turn on whether that society styles itself as democratic. It turns, as Perry correctly notes, on the individual's moral judgment. That individual moral judgment may be addressed to a larger target than any particular law; judgment can be passed on the society as a whole. Surely the respect that underlies the obligation to obey can be shattered in a radically discontinuous manner by a radically unjust result of democratic processes. A law may be so bad that it sunders not merely the presumptive obligation to obey that particular law, but also the self-conscious link of the individual to the community. Perry's Nazi Germany example is surely at best a law of this kind.

Thus, that the democratic processes are available has no necessary bearing on whether an individual has at least one strong reason to obey the state's laws. Similarly, in Raz's formulation of the evolutionary, emergent attitude of respect for

25. Id.
26. R. DWORKIN, supra note 6, at 110.
27. M. PERRY, supra note 2, at 119.
law, it is enough that the citizen believes that her attitude of presumptive obligation is morally worthwhile, whatever her "true" reasons. Once she believes this, the question whether she can consistently disobey the laws of the state and yet seek to avoid punishment is prominently posed.

Simplifying Raz’s model for the sake of clarity and brevity, imagine that there are two possible conceptions that the individual who is considering disobedience might hold about the state:

1. I reside within a state that I consider essentially an unjust one, although it promulgates some just laws;
2. I reside within a state that I consider essentially a just one, although it promulgates some unjust laws.

The first category is easily disposed of. On Raz’s model, individuals in that category are unlikely to consider themselves generally bound by the laws of the state. Because the individual’s own belief—however formed—is the font of obligations, individuals who consider themselves not bound by the state at all have no presumptive obligation to obey its laws.28 For these individuals, Perry’s argument works perfectly. They may deliberate in a morally reflective way over disobedience and consider the possibility of moral error. Once they believe that moral judgment-in-action requires disobedience, however, the only question remaining is one of proportionality. There is no obligation to be public and to stand punishment because there is no obligation to the state itself.29

What about individuals in the second category? They consider their state essentially just, so by hypothesis, they consider that they have a presumptive obligation to obey its laws.

This presumptive obligation—the one strong reason to obey—flows from the individual’s internal moral judgment

28. Obviously, they might decide to obey for practical reasons of self-interest. Besides, “opposing an illegitimate or unjust state does not always (though it may often) mean disobeying its laws. There sometimes may be other means that not only are more effective, but have greater moral legitimacy.” Holmes, State-Legitimacy and the Obligation to Obey the Law, 67 Va. L. Rev. 133, 141 (1981).

29. Of course, one might object that many and perhaps most individuals have no settled opinion on whether their society is a just one. This theory might be so, although my suspicion is that in the United States, at least, the great majority of citizens do indeed have strongly held views. That view is no more than an empirical hunch, and it is entitled to very little weight. But it is not necessary to my argument that most people have settled views. I am interested in the source of obligation, not the source of lack of obligation. My only claim is that those individuals who do consider their society essentially a just one have at least one strong reason to obey its law simply because it is the law. Whether anyone else has a reason or not is not important to the project.
about the state. If that judgment entails a self-conscious respect for the laws of the state, an emergent sense of justice, then it might fairly be said that the individual holds the state to be just. In the remainder of this paper, when I refer to the individual who considers her state essentially just, I will have in mind this emergent, self-conscious respect for law. It is to the implications of this attitude, and to the specification of some of those who might hold it, that I now turn.

III.

Martin Luther King, Jr., the principal exponent of nonviolent resistance to unjust law during the American civil rights movement, held that the individual whose moral judgment-in-action moved her to disobey the law had a moral obligation to stand punishment. His reasons are instructive, and, for people who consider the state essentially just, they are to my mind unrefuted as well.

King laid out his thesis squarely in an address that he gave in 1961: "I submit that the individual who disobeys the law, whose conscience tells him it is unjust and who is willing to accept the penalty by staying in jail until that law is altered, is expressing at the moment the very highest respect for law."30 The thesis over the years has been the subject of much criticism and debate, and, as Perry’s book illustrates, it is not a popular thesis among contemporary philosophers. But its ringing, aspirational justification squares better than the alternatives with the vision of a presumptive obligation based on an emergent self-conscious belief that the society is a just one and that its law is presumptively entitled to respect.

For King, disobedience had one purpose: change. And for a citizen who believes her society essentially just, change is necessarily the reason for moral judgment-in-action because her faith in society’s justice carries with it an optimism about the society’s capacity to undo its injustice. This is why King’s disobedience was relentlessly optimistic, why he premised his justification for disobedience on the supposition that the hearts of others could be moved by the spectacle of the state’s oppression. In this sense, he believed in the essential justice of the state,

which is why he was able to say, in accepting the Nobel Peace Prize in 1964: "I refuse to accept the view that mankind is so tragically bound to the starless midnight of racism and war that the bright daybreak of peace and brotherhood can never become a reality."31 King believed in a state comprising essentially decent people who would finally be willing to change its laws. Consequently, his vision of the state and its people was much like the vision that animates contemporary liberal political theory, and Perry's book, too: a vision of reflective, deliberative individuals who are willing to engage in dialogue about policy and to change their minds if convinced that they are wrong.32

King's optimism, his sense that dialogue, once joined, can lead to change, is illustrated by his Letter from Birmingham City Jail, in which he wrote: "Nonviolent direct action seeks to create... a crisis and establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored."33 The idea was to change the system by changing the minds and hearts of the people who ran it. This faith in dialogue was intimately linked to his justification for the claim that the disobedient citizen should stand punishment. Thus, in the same essay, he penned this well-known passage:

In no sense do I advocate evading or defying the law as the rabid segregationist would do. This would lead to anarchy. One who breaks an unjust law must do it openly, lovingly (not hatefully as the white mothers did in New Orleans when they were seen on television screaming, "nigger, nigger, nigger"), and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.34

Clearly, this argument makes sense only if one accepts the essential justness of the state. One who believes the state unjust can have little hope that an open and loving act of disobedience will accomplish very much (although, in the right circumstances, it might accomplish a little). But one who believes that the state is

32. I return to this dialogic metaphor in the next section.
34. Id. at 294.
essentially just necessarily believes that unjust laws can be changed. She shares the personal moral judgment of most of her fellow citizens, a judgment that counsels a respect for law and a presumptive obligation to obey. She can show no greater love for the ideal of just law and no greater faith in the capacity of just societies to change than by submitting herself to punishment under the law that is unjust.

King's argument seems entirely persuasive for those individuals whose goal in disobedience is change. Even in a just society, however, there are other goals that might prompt disobedience. The principal "other goal" is circumvention—not so much changing the law as avoiding its effect. To the circumventer, avoiding punishment is the point of the strategy. I agree with Perry that the judgment on whether moral judgment-in-action counsels disobedience must ultimately be left to each individual. I would argue, however, that even those who consider circumvention morally desirable should respect the force of the presumptive obligation to obey that flows from an emergent, self-conscious belief that the society is essentially just. Plainly, the circumventers will sometimes reject the obligation to obey—and, in consequence, will reject the obligation to stand punishment—but they should do so only after a deliberative process that includes the arguments for presumptive obedience that I have discussed.

In our society, curiously, circumvention is surely the most common form of disobedience. After all, as Perry notes, "There seem to be some situations in which my obedience to some laws would benefit no one and my disobedience harm no one—for example, my making a U-turn on the street in front of my house at two in the morning." He also repeats Greenawalt's example of individuals who exceed the speed limit at four in the morning or trespass far from anyone's sight. These are not examples of moral judgment-in-action, however, except in a very crude sense, and the moral justification for avoiding punishment does not seem particularly strong. They are examples, rather, of personal convenience, of putting self-interest ahead of community judgment on legal norms. In this sense, the individuals in the examples are not civil disobedients at all, at least not in the traditional sense—they are simple, humdrum lawbreakers. They are

35. M. Perry, supra note 2, at 108.
36. Id. at 108-09 (quoting Greenawalt, Promise, Benefit, and Need: Ties That Bind Us to the Law, 18 GA. L. REV. 727, 763 (1984)).
not, in Ronald Dworkin's phrase, engaged in activity that is "very different from ordinary criminal activity motivated by selfishness or anger or cruelty or madness."37 They are simply trying to get away with something, and figuring, no doubt correctly, that it is not worth anyone's trouble to prosecute them. But they are making no moral claim. Were it worthwhile to prosecute—were the town to announce a sudden crackdown on early morning speeders (indeed, were a police car to appear in the rearview mirror)—the speeder would no doubt slow down. Were the rancher suddenly to appear with a shotgun, the trespasser would surely scurry for safer territory.

It seems entirely plausible, moreover, that when Michael Perry makes his U-turn at two in the morning, he conceives of himself not as protesting the law, and not even as violating it, but rather as interpreting it. Perhaps he is thinking, "The rule against U-turns could not have been intended to cover this situation. I will interpret it in accordance with its purpose—as a safety rule—in order to make sense of its terms in the real world in which they must be applied." Perhaps the law enforcement authorities might even connive in this interpretation. Cognitive dissonance problems aside, if this is what Perry really believes, then he may not be disobedient at all; certainly he is not disobedient in the strong sense of an individual whose moral judgment-in-action compels disobedience because the law is unjust.

Perry appends the example of a black person who uses a "whites only" bathroom, asking: "In what way does a black person's violation of the law contravene the norm of fairness?"38 The answer is that if the black person does it for convenience alone, without regard to moral judgment about the law itself, then the black person is arguably in the same position as the early-morning speeder: both are humdrum lawbreakers making no moral claim. If, on the other hand, the black person is engaged in a strategy of circumvention, then the goal is to change the law. If the black person considers the state itself essentially unjust, then there is little to be gained by standing punishment. If, however, the black person considers the state essentially just, then we are back once more to the civil rights movement, and the protester must confront King's argument that when moral judgment-in-action counsels disobedience of

37. R. DWORKIN, supra note 6, at 105.
38. M. PERRY, supra note 2, at 109.
the laws of an essentially just society, she shows the highest respect for the ideal of just law when she stands punishment. If she seeks to avoid punishment, she is challenging the justness not simply of the law but—at least implicitly—of the society that has enacted it.

But again, note why this is so. The goal of King’s disobedience was to provoke dialogue; the goal of the dialogue was change. In his vision, a just society was one that could be inspired by the open and loving defiance of others to change the objectionable laws. Conversely, a society that could not be moved by nonviolent protest was not really a just one. If the black person who uses the bathroom reserved for whites is trying to change the law but also considers the society essentially just, then she has a strong reason for standing punishment for her disobedience. Consequently, she has good reason to reject the strategy of circumvention.

It is possible, however, to envision situations in which an individual might consider her society a just one, and therefore concede a strong presumption in favor of standing punishment for disobedience. Nevertheless she may reject the presumption in favor of circumvention. I have in mind the situation of something like the Sanctuary Movement, which stands on a different footing because of its different goal.

There is no doubt that the consciences—the personal moral judgments—of the Movement’s members counsel disobedience and insist that returning Salvadoran refugees, or passively allowing their arrest and deportation, is wrong. According to King’s argument, if they consider the law unjust and the state just, the members of the Movement ought to stand punishment. Before the law, they are no different from the individual whose disobedience takes the form of exceeding the speed limit at some convenient hour. Their presumptive obligation to the state, which by hypothesis they accept as just, is to make their case by legal means and, if they choose supra-legal means, to let the punishment itself serve as their argument.

But the obligation is only presumptive. Although it gives the individuals in question one strong reason to obey the law or

39. I am assuming that the members of the Sanctuary Movement do not consider the state to be essentially unjust. If they do, then there is no moral dilemma. Similarly, I take no position on those members who have no settled view on the justice or injustice of the state. I am considering only those members of the Movement who consider the state to be essentially just.
stand punishment, the presumption can be rebutted. The members of the Sanctuary Movement, by choosing the strategy of circumvention, have in effect proclaimed their rebuttal of the presumption in their particular case. The proclamation is one that is worth a closer look.

Although in most ways the Sanctuary Movement is in precisely the same position as any other disobedient group, it differs in one crucial respect. The Movement's goal is not simply to change the law, but also to save the refugees. If the disobedience is open, if the members of the Movement must stand punishment, then saving the refugees might be impossible. For the Movement's adherents, this difference is plainly sufficient to place their circumvention in a different moral light.

The decision that moral judgment-in-action is necessary is ultimately a personal one. So is the decision about the appropriate form that the action should take. Like Perry, I am disinclined to look behind either decision, except to exhort morally aware individuals to accept the possibility of learning from the often quite different moral sentiments of others. As a consequence, it would be presumptuous for me to suggest that the Movement's preference for circumvention over open defiance is in any sense morally problematic. I would rather point out two analytical difficulties that those considering circumvention as a strategy should consider.

First, it is quite conceivable that any disobedient individual could recast her moral judgment-in-action to say that her purpose is not simply to protest the law, but that morality requires her to avoid its effects. Indeed, the protester will often be tempted to do so. As Carl Cohen has stated, however, "Such claims are often mistaken and are sometimes outrageous." \(^{40}\) So, for example, the tax protester might say that it is not only the immorality of the tax that is her concern, but also the immorality of the jail sentence that follows upon conviction. No one could say that this is wrong, but it does not seem a particularly appealing case when weighed against King's lofty rhetoric on open and loving defiance. The principal point, then, is that an individual convinced of the justice of her society and the injustice of one of its laws ought to search her soul to be very sure that circumvention really is the only effective strategy.

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Second, the claim that the Sanctuary Movement, or any other protest movement, stands on a different footing because of the necessity of secrecy reduces moral judgment to a question of instrumental rationality—the issue is not the ends, but the means. The goal is no longer changing the law by changing the hearts of the lawgivers, nor is it to engage in a dialogue; instead, the goal is freedom to act as though the objectionable law did not exist. In a sense, the goal is a laudable one, for it is difficult to criticize any individuals for acting out the dictates of conscience. And yet it is not easy to see how circumvention as a strategy advances the public dialogue that, according to Perry, ought to characterize our societal reflection on tough moral issues. Here I am reminded of John Rawls's admittedly controversial defense of the principle that civil disobedience ought to be public:

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. One may compare it to public speech, and being a form of address, an expression of profound and conscientious political conviction, it takes place in the public forum. Perry, I think, would respond with a stubborn "Sez who?" and as a matter of political argument, the response is entirely adequate. Still, the proposition that conscience can lead to a quiet and hidden circumvention of the law, without necessary legal consequences for the protesters, should sit uneasily upon the consciences of individuals who believe in dialogue and who consider the law of their society presumptively worthy of respect because the society itself is essentially just.

IV.

Another consideration that weighs in favor of openness of disobedience in a state that is essentially just is the commitment that such a society ought to have to public moral dialogue as the preferred means for resolving difficult questions of policy. For those who view the liberal state as a place in which citizens undertake rational deliberations about morality and policy, the principle of dialogue has an obvious appeal. The Enlightenment emphasized the ability of humans to come to moral conclusions through exercising their faculty of reason, and the Neo-Enlight-
enment liberals of the current era make the exercise of reason the rule—that is, conclusions that are reached through less rational decision processes (as liberalism defines rationality) are excluded from the universe of discourse. The rationality requirement is in theory a mediating force. It permits communities with different moral and epistemological premises to argue with one another over policy, so long as they are willing to put aside their respective preferred means of understanding the world in order to engage in the form of dialogue that is available to everyone.

In general, I find this model attractive, although I confess to some dissatisfaction with the use of a rationality requirement as the tool that mediates the dialogue. My own preference—and, I suspect, Michael Perry’s as well—is to envision such a world as one in which citizens may enter the dialogue in ways and at times of their own choosing, but in which they are encouraged to be morally reflective both prior to and subsequent to entrance. The advantage of dialogue so understood is that it includes individuals whose concepts of how fundamental morality is discovered might be at war with the liberal notion of rationality. This is a difference that matters, because a dialogue that excludes dissenters by defining their views as irrelevant is not a truly liberal one. Everyone would be welcome, provided only that they sought to be morally reflective and to listen generously to the counsels of their opponents.

In a world of reflective, self-aware individuals who are generous and who treat fellow citizens with respect, it is difficult to understand why any particular form of dialogue must be excluded ex ante. As Perry points out, to try to envision a reflective and self-aware individual who separates her basic moral convictions (including her religious convictions) from the rest of

42. For examples of efforts to discover moral truth through dialogue, see generally B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); J. RAWLS, supra note 6. The claim that deliberation can lead to moral consensus undergirds some theories of free speech, see, e.g., A. MEIKLEJOHN, POLITICAL FREEDOM (1965), and much of the so-called “republican revival” in contemporary constitutional theory, see, e.g., Michelman, Law’s Republic, 97 YALE L.J. 1493 (1988).


44. For the religiously devout, as Perry suggests, this reflection might take the form of prayer—of seeking in commonality with other believers a fuller understanding of God’s will—and, upon entrance into the dialogue, the form of humility as well. For whatever the status of a sacred text may be, the individual who is trying to divine God’s will and bring it into the secular world is only mortal.
her world view is to imagine a poorly integrated personality, for
the effort would destroy anyone else as a person. On the other
hand, once the religiously devout citizen, or any other citizen,
chooses to participate in public dialogue, she commits herself to
listen as well as to speak, and to think and act in a reflective and
generous spirit.

Martin Luther King's emphasis on faith and love in disobe-
dience obviously reflects such a spirit. The individual who, in
Raz's terms, has evolved a conscious respect for law and has
come to believe in her own obligation to obey, acts with similar
faith and love when she takes her disobedience public. In openly
resisting the law in order to change it, she is inviting dialogue;
indeed, she is insisting on it, "provoking" it, in King's terms.
And in the process she is demonstrating her respect for her fel-
low citizens and for their quite different conceptions of justice by
submitting to their will. She may lose out in the dialogue, but
she will not lose the morally worthy satisfaction of having acted
correctly.

This vision of public dialogue makes bedfellows of two quite
different groups recently involved in disobedient behavior: the
pro-life activists of Operation Rescue and the advisers to the
family of Tawana Brawley. Participants in Operation Rescue
are called by their moral judgments-in-action to use a variety of
tactics, including blocking the entrances to clinics where abor-
tions are performed, praying, chanting, singing, and sometimes
calling names, in an effort to change the minds of those seeking
abortions and of those performing them, or perhaps to make it
physically impossible for the participants to enter the buildings,
or at the very least, to embarrass them or bring about second
thoughts. The participants are quite willing to be arrested and
to stand punishment. They seem to believe that in so doing they
are keeping a dialogue alive, and at the same time showing the
highest respect for law.

45. M. Perry, supra note 2, at 72-73. "[A] person—a 'self'—is partly constituted by
her moral convictions . . . . To bracket them would be to bracket—indeed, to annihilate—
herself." See also id. at 61-62 (using this argument to criticize Rawls). Cf. P. Tillich,
Dynamics of Faith 106 (1957): "Faith, therefore, is not a matter of the mind in
isolation, or of the soul in contrast to mind and body, or of the body (in the sense of animal
faith), but is the centered movement of the whole personality toward something of ultimate
meaning and significance."

46. Not all pro-life activists agree with the tactics of Operation Rescue. The
Reverend Charles Stanley of the First Baptist Church of Atlanta, a prominent figure in
the pro-life movement, has circulated a flyer entitled A Biblical Perspective on Civil
The advisers to the Brawley family refused to permit their clients to cooperate with law enforcement authorities investigating Tawana Brawley's alleged abduction and rape. The goal of this noncooperation, the advisers said, was to protest the racism said to be endemic in the system of criminal justice. The many people who said that the Brawley advisers were wrong may have paid too much attention to the advisers' silly and often offensive rabble-rousing rhetoric, and too little to their strategic position. Their strategic position was to try to force officialdom either to run the investigation as the family advisers believed that it should be run or to show its ugly, racist face (as the advisers apparently conceived it). They tried to do this by withholding their own cooperation. In so doing, their hope may have been to promote a public dialogue on the extent of racism in the criminal justice system. One may like or dislike this strategy—as it happens, I think they had matters exactly backwards—but the strategy (as against the rhetoric) was neither evil nor ridiculous. To be sure, the Brawley advisers are not perhaps the most appealing group of pure moral agents that one might envision, but their public image should not detract from the analytical point; to wit, that their strategy of public noncooperation can certainly be cast as moral judgment-in-action by individuals who consider their society essentially just.

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Disobedience, in which he takes the members of Operation Rescue to task for what he describes as a misunderstanding of God's law. They cannot, Stanley says, break laws prohibiting trespass and the like in order to protest the sins of others. C. STANLEY, A BIBLICAL PERSPECTIVE ON CIVIL DISOBEDIENCE (copy on file with author). Similarly, in King's day, any number of clergy and others who proclaimed their allegiance to his goals sharply disputed his tactics.

47. The reason I say that the Brawley advisers had matters exactly backwards is that even if one takes them at their word in explaining why they picked the strategy that they did, the way to get officialdom to show its ugly, racist face, if it has one, is to cooperate and then show that nothing came of it. Otherwise, the claim that nothing good can possibly come from cooperation is likely to ring a little hollow with most listeners, and hollow-sounding rhetoric produces few results. It is one thing for King to parade in Birmingham without a permit, when the American public was already primed to believe that the system being protested was an evil and oppressive one; it is something else for the Brawley family advisers to counsel noncooperation with a system that most of the public probably does not regard as racist. If officialdom punishes Dr. King, then the ugly, racist face is revealed; it officialdom ignores the posturing of the Brawley advisers, then it is the fault of the advisers themselves. The strategy was wrong, in short, not because the strategy of noncooperation is always wrong, but because it was selected in circumstances when it could not have achieved what its proponents hoped. Their persistence in the face of the obvious failure of the strategy is surely the reason that so many came to doubt the bona fide issues of the underlying story (even before the grand jury rejected it) and, in consequence, came to doubt the good faith of the advisers in selecting the strategy.
The point is that the Brawley advisers and the Yonkers City Council and many other controversial disobedients all have in common the selection of strategies that are sufficiently provocative that public dialogue is bound to occur. The dialogue will not always be as reflective and generous as Perry's approach suggests that it should be; and yet even a raucous and angry argument is better than silence. Underlying any disobedience aimed at change is a fairly simple strategy: whatever the society might decide to do to the disobedient individual, it will not be done quietly.

This, finally, is the reason that disobedience is morally legitimate even among individuals who consider their society essentially just, but that, at the same time, those individuals have a strong reason to be open in their disobedience and accept punishment. Punishment is a social act. It is not simply something that the society does, but something that the society does to someone, and in a just society, the fact of punishment is difficult to ignore because the subject of the punishment is a real person. The punishment itself sparks a dialogue. The loving and faithful acceptance of it shows the highest respect for the rule of law and also for the moral vision of the rest of the society, the rest of the people. Disobedient individuals, in short, ought to consider the lesson that Bickel and others have tried to teach the courts: If the people don't matter, neither does anything else.

V.

Alexander Bickel's lesson, if I may call it that, characterized his writing throughout his career, but culminated in his most controversial work, The Morality of Consent, which was published after his death. There he admonished the courts that their decisions were all part of an "endlessly renewed educational conversation" between the judges and the public that must finally decide whether to obey their edicts.48 For Bickel, public protest was, over the long run, a sign that something was wrong, that perhaps the court had made a mistake, which is why he added the stern admonition that the dialogue he contemplated "is a conversation, not a monologue."49

Since that time, scholars have argued over the limitations of...
the Bickelian metaphor: Was he proposing open defiance as a check on the courts? Certainly his work can be read that way, although his commitment to the rule of law makes such an interpretation suspect. My own view, however, is that at the very least, a commitment to public dialogue is necessary to make sense of the moral dimension of constitutional adjudication, at least under the broadly worded clauses that aim at the protection of individual rights. The judges who are called upon to decide the meanings of these clauses are thrown far more on their own resources—including their moral resources—than are the judges considering the interpretation of the structural clauses. 50 There are as many theories on what the judges should do in interpreting the individual rights clauses as there are theorists who have pondered the question. What is plain, however, is that sensitive judges can hardly avoid letting their own moral assessments play a role, and the more obscure the constitutional language, the more morally aware the judge, the greater the role that her personal moral judgment is likely to play.

Judges work hard at the pretense that they are enforcing someone else's moral vision—the vision of the founders, for example, or of the larger society—rather than their own. Perhaps the judges truly believe it. The psychological pressure to believe it is intense. One reason is that the prescriptive norms of adjudication seem to require interpretation without the interference of the judge's own values. Another is that sensitive judges are certainly aware of the enormous potential authority that they wield in this society, especially when interpreting the Constitution, and of the enormous potential for that authority's abuse.

For both of those reasons, it is sensible to conclude that the more that judges have to rely on their own moral judgments, the less certain they should be of their rightness. This was Alexander Bickel's original, controversial insight when he described the process of judicial review as conversation rather than monologue, and it is one that Perry, elsewhere in his book, in large measure endorses. After describing judicial review as essentially aspirational in nature, Perry has this to say:

A thoughtful judge will rely on her own beliefs as to what the aspiration requires only after forming those beliefs, or at least

testing them, in the crucible of dialogic encounter with the wisdom of the past, of the tradition, including original beliefs, precedent, and anything else relevant and helpful. Moreover, the thoughtful judge will rely on her own beliefs only after forming or testing them in the crucible of dialogic encounter with the beliefs of her contemporaries, in particular, other judges struggling with the same or similar problems.  

I have never been entirely comfortable with the free-wheeling review of the sort that judges tend to indulge under the individual right clauses of the Constitution. My confidence would be increased, however, were I more sure that the judges who interpret those clauses follow Perry's advice and recognize the fragility and fallibility of their own moral judgments. Such judges would be willing to pay generous and thoughtful attention to the moral judgments-in-action of the people who dispute them.  

The principal point of joining the concept of civil disobedience to judicial review is that court decisions are law, and morally reflective individuals might sometimes consider them unjust. In the continuing conversation of the Bickelian metaphor, judges have an obligation to pay attention to the popular response to their activity. What is often worrisome is that the response, especially when the judicial action is controversial, might well take the form of organized defiance. This insight has always been a part of our constitutional heritage, but it tends to leave liberal reformers a bit nervous. It is one thing to praise Lincoln for talking bravely, if vaguely, of defying *Dred Scott v. Sandford* but when the committed segregationists of the 1950s and

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52. Perhaps a fortiori—but, alas, perhaps not—commentators on, and critics of, judicial opinions who by hypothesis have more time for dialogue and reflection should also pay attention to those whose moral judgments are sharply different from their own, and should do so not to refute the views of others, but to learn from them.
53. In the course of his unsuccessful try for the Senate against Stephen Douglas, Abraham Lincoln said the following about Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857):

> We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free.... [W]e nevertheless do oppose that decision as a political rule.... which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision..... We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon the subject.

1960s borrowed the same rhetoric to explain why they were standing in the schoolhouse doors, a conclusive presumption of illegitimacy settled like a shroud over their actions.

The presumption, however, should not have been quite so conclusive, for the lesson of the dialogic model of judicial review is that the individual whose moral judgment-in-action counsels disobedience will sometimes be a public official. By standing for election to public office, an individual implicitly accepts the essential justice of her society. But she does not thereafter sacrifice all independent moral judgment. The official who decides, in the exercise of that moral judgment, that her society is just but that a court's ruling is unjust, might simply criticize the court. But she also might seek to defy the ruling of the court, daring the judge to mete out punishment for contempt. This was the attitude of some members of the Yonkers City Council in the recent controversy over housing desegregation.\(^4\) Obviously, the officials who refused to comply with the court order, or with the underlying consent decree, were being legally contemptuous. But the moral status of their actions is another matter. Their disobedience was open, and they accepted the court's punishment, so they plainly met the criteria for morally legitimate disobedience among those who consider their society essentially just. Is there any moral reason that, due to their official positions, they should have refrained?

I would suggest not. Public officials ought perhaps to give very strong presumptive force to the moral norm that counsels respect for and obedience to law in a just society. But when their moral judgment counsels action that is disobedient, if in their own minds the presumption is overcome, then they are in the same position as other citizens. Yes, public officials should deliberate long and hard on the effect of their disobedience, including what they might teach about the ideal of respect for law that they, through their public positions, surely seek to inculcate. But outrage is outrage. If sufficiently outraged, public officials ought to go ahead and disobey, provided only that the test of proportionality is satisfied; that their disobedience is public, so that it forms a part of the dialogue; and that they are

\(^4\) The trial court accepted the dare, although whether the contempt decree against individual council members will hold up on appeal remains to be seen. See Spallone v. United States, 109 S. Ct. 14 (1988) (mem.) (granting stay of lower court's contempt judgment against individual council members).
willing to stand punishment, if any, as a sign of their respect for the law of their society.

This last aspect of official disobedience is a particularly important one. I have argued earlier that every individual who has come to view her society as essentially just has a strong reason to obey its laws or suffer punishment for refusing to do so. Public officials, elected or appointed to serve their constituents, ought to view that one reason as particularly compelling. Unlike individual citizens, who are safe from mandatory moral obligations because of the failure of social contract theory, the public official has taken on a trust that includes an explicit affirmation of obedience—certainly to the state, often to the laws or the Constitution in so many words. The official's constituents cannot approve or disavow actions of which they are unaware; neither can anyone else. Consequently, a public official whose moral judgment-in-action counsels disobedience should nearly always conclude that open defiance and standing punishment are appropriate. When public officials engage in open defiance, as the Yonkers City Council did, their message to the courts is, in effect: We respect you and the law that you must enforce, and we invite you to punish us if you must, but through our example, through our moral judgment-in-action, we also implore you to consider our moral position, and the possibility of your own moral error.

VI.

But what if the public official whose moral judgment-in-action counsels disobedience is a judge? There may after all be circumstances in which a judge's moral judgment-in-action counsels disobedience in the sense of transgressing the rules of her official function. John Ely indeed has suggested that a judge who permits her personal moral choice to guide her constitutional interpretations is by definition engaging in civil disobedience.\(^{55}\) Perry himself argues that the same moral reflectiveness that should guide other members of society ought to guide judges as well.\(^{56}\) One need not accept that model of the judicial role to appreciate that situations might arise in which a judge understands, in a self-conscious way, that her commission dic-

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56. M. PERRY, supra note 2, at 148-72.
tates an action that her moral system forbids. This judge might of course resign, but her moral system might forbid resignation. If, for example, the judge feels herself compelled, as I heard in a sermon not long ago, to use the levers of power to align herself with the beloved of Christ, she could hardly surrender those levers simply because they had been placed in her hands for another purpose.

Or, to take another example, consider Catherine MacKinnon’s much-criticized comment about the judge who decided a sex discrimination case in favor of Yale University, and who, in the course of reaching her decision, evidently was required to reject the testimony of a woman who claimed to have been harassed by a member of the faculty. MacKinnon wrote that we—by whom she meant those who worked to put women in positions of power—had expected more (that is, something different) of the judge, apparently because the judge was a woman. The common-sense interpretation of her words is simply that the judge should have been particularly sensitive to nuances that judges used to miss in the days when judging was largely a white male preserve. The subtext, so MacKinnon’s critics say, is that women in positions of authority should believe everything that other women say, no matter what the state of the evidence. This the critics have held to be an absurd and potentially oppressive categorization.

But of course, MacKinnon’s remark is a rhetorical flourish, and her principal project is epistemological: The secret of feminism, she says, is to believe what women say. Still, unless I misunderstand her, she is not saying that no woman would ever lie, even about something that a man had done. She is not even talking about the facts of any given case. She is referring, rather, to a habit of mind, an intuition that the sorts of things that women say they experience, including sexual harassment, are real. Her call, in consequence, is for listeners who are sympathetic and do not throw up barriers to belief because they already doubt.

Thus, another way of conceptualizing her point about the sexual harassment case against Yale (I make no claim that this is

59. Id. at 113 (the “methodological secret” of feminism is that it “is built on believing women’s accounts of sexual use and abuse by men”).
the point that she was trying to make) is that it provides a link between her larger epistemological project and the judicial role in a particular case. No doubt fidelity to the prescriptive norms of adjudication required the judge to decide the case on her reading of the evidence before her, and this reading of the evidence was that the student, a plaintiff, had not discharged her burden of proving that the harassment took place.

But must this be the end of the matter? After all, the relief sought in the case involved in large measure an order that Yale establish a program for dealing with allegations of sexual harassment. Perhaps a judge who reads and is convinced by MacKinnon's argument might consider the establishment of such a program something that Yale really ought to do, and might consequently decide, in Ely's terms, to "stay[ ] on the bench and engag[e] in a little judicial civil disobedience."60 "What difference does the evidence in this one case make?" the judge might ask herself. "I know in my heart of hearts that women are the subjects of sexual harassment, and frequently, even (especially?) at places like Yale. So what if this plaintiff, because of the rules of evidence, has been unable to prove that this particular act took place? I need not believe that this woman has provided her case in order to believe that women like this woman deserve protection from sexual harassment."

The judge who reasoned this way would be responding to the larger truth that women are harassed. As a judge, she could do something about this by granting judgment against Yale, not because this case has been proven, but because (in her view) situations like the one alleged happen all the time. This line of reasoning clearly would not be in accord with the norms of the judicial profession; in fact, it would appear absurd on its face. Certainly it would therefore entail sacrifice, because it might throw the judge, however briefly, into disrepute. The judge, however, might have a different view. She might believe that by requiring Yale to establish special procedures, she was striking a much-needed blow against sexual harassment and in favor of sex equality.61

My intention here is not to claim that judges should reason this way, nor even to discover whether this really was MacKinnon's meaning. My point, rather, is to suggest that a judge who

60. J. Ely, supra note 55, at 183.
61. I make no claim—and I don't believe MacKinnon does either—that women are more likely than men to reason this way.
carried out this project would be engaged in civil disobedience precisely on Perry's model. She would recognize the injustice of sexual harassment and be unwilling to be bound by professional norms that, in her judgment, make it extraordinarily difficult for courts to do anything about it. She would fight that injustice by rendering a judgment that would force Yale to do something about it.

Now, of course, judges are not selected in the expectation that they will reason this way; on the contrary, no matter how many clever scholars might know better, our public dialogue insists that our judges are simply interpreting the law—not making it. At the same time, it is difficult to explain the fundamental rights strand of constitutional jurisprudence as anything other than a process through which the Justices of the Supreme Court determine the results that morality commands and then find legal arguments to support their conclusions. That is not really so different from what my hypothetical judge has done in the sexual harassment case. The norms of judging, at least as articulated publicly, do not permit judges to do what the Supreme Court does all the time. But they do it anyway—which might itself be described as a kind of civil disobedience. The question is whether it is done in a way that promotes dialogue.

I said at the outset that an individual who believes her society to be essentially just has at least one very strong reason for breaking its laws openly and standing punishment after the law has been broken. I also suggested that elected public officials have a stronger reason for making their defiance open rather than secret. I would simply add that judges, who are in our mythos the law made manifest, have perhaps the strongest reason of any actor to obey, or, when they do not obey, to be open about their disobedience. In an important sense, a judge's disobedience is always public, because the record of the case is there to be seen, the precedents are available, and the reasoning is plain on the face of the opinion. But in another sense, the judicial disobedience would necessarily be secret, because an opinion reading "I don't believe the plaintiff. Judgment for the plaintiff anyway" would be overturned within days, if not hours. In other words, the disobedience wouldn't work if it had to be fully public. Because judges must explain their decisions, only a covert disobedience—only a lie, really—will suffice.

The proposition that judicial disobedience works best when hidden weakens the moral justification for it, because judges
have the strongest presumption in favor of obedience or open
defiance. Again, this is true only to the extent that the disobedi­
ent judge considers the society essentially just. But if the judge
does consider the society essentially just—if we are not asking
about a judge trying to halt a genocide or subvert the slave sys­
tem—then the judge whose moral judgment-in-action counsels
disobedience should in most cases proclaim that disobedience to
the world by laying bare the moral content of her decision. This
plain and undisguised moral reasoning might in itself invite the
public dialogue that open, discoverable, and punishable disobe­
dience is meant to spark, and might therefore serve the same
purpose.

The unadorned truth might be that at least when the judge
interprets the Constitution, the personal moral content of her
decision will be patent, even if she tries to disguise it. For exam­
ple, most commentators seem to think that *Roe v. Wade* is a
poorly written opinion. If the commentators are right, the rea­
son might be that *Roe* represents judicial disobedience—a lack of
fidelity to the prescriptive norms of judging. Certainly if that is
what the Supreme Court was up to, its act of defiance was open,
and it has sparked a public moral dialogue that shows no sign of
flagging. Punishment has been meted out, too, in the sense
that the Court has itself become a prize that is battled for in the
political arena. But that is what one who chooses disobedience
but respects the society and its law ought to expect.

Of course, liberal law is justifiably uncomfortable with the
idea that judges might act this way. Even Perry, in his effort to
transcend liberalism, is able to offer only a very small dissent
from orthodoxy on the judicial role. He will grant to judges a
certain freedom of moral action, but only within the particular
constraints on the judicial role. No other view makes much

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62. For a sensitive and somewhat depressing analysis of the reasons that some anti­
slavery judges might have declined to use their commissions to advance their private moral
goals, see R. COVER, JUSTICE ACUSED: ANTISLAVERY AND THE JUDICIAL PROCESS
(1975).

63. 410 U.S. 113 (1973).

64. Robert Burt has argued that in deciding *Roe* the way that it did, the Court has
frustrated public dialogue rather than enabled it. See Burt, Constitutional Law and the
Teaching of the Parables, 93 YALE L.J. 455, 487-88 n.106 (1984); Burt, The Constitution of
the Family, 1979 SUP. CT. REV. 329, 371-73. Perry criticizes *Roe* on a somewhat different
ground. The problem, he says, is that the decision is premised on the proposition that “the
protection of fetal life is not a good of sufficient importance”—a proposition sufficiently
contested among “people of good will and high intelligence” that reliance on it “as a basis
for constitutional judgment” is “plainly imperial.” M. PERRY, *supra* note 2, at 175.
sense. Judges, after all, are the preeminent interpreters and even prophets of law. Through their pronouncements, they seek to bind others. Should the judges whose task it is to exemplify the rule of law also be held as free as anyone else to disobey it, the situation becomes, to say the least, morally and politically awkward.

As a matter of ordinary conversation—the conversation in which respect for law, including constitutional law, is inculcated so that a continuous polity might survive—it is perfectly sensible to treat judges as forbidden from engaging in disobedience of the sort that other citizens remain morally free to undertake. This need for respect for the law might help explain Perry’s presumption. But judges, no less than other individuals, have the human character that Perry wants to preserve, and in that character they might be as morally deliberative and reflective as anyone else. And while it is not clear that we should encourage a moral deliberation that leads to self-conscious judicial disobedience, we should not consider it a moral outrage when it happens, so long as the disobedient judges are open about their moral choices and display a generosity and sensitivity to the moral visions of those who disagree with them. In short, so long as the disobedience invites a dialogue, it is good disobedience—not substantively good or even procedurally good, but good for the moral deliberation of a reflective society. If, on the other hand, the disobedient judges consider themselves free to defy the prescriptive norms of judging, but arrogate to themselves the ultimate moral authority of the society, with no concern for dialogue, then they are engaging in bad disobedience.

The troubling question, however, is this: What precisely does it mean for judges to engage in dialogue? The problem arises every time the Supreme Court construes the Constitution in a fashion that turns out to be not only controversial, but radically unpopular—radically unpopular in the sense that people are not to be bullied from their opposition by opinion leaders who counsel deference to the legitimate commands of duly constituted authority, including courts. There is public protest. Politicians join it. The interpretation in question becomes an issue in election campaigns. There are growls about congressional override, jurisdiction stripping, new Justices, constitutional amendment. People are angry. The protest swirls like a fire storm, and the Court is at the center, likely to be consumed at any instant. Had the Supreme Court backed away from
Brown v. Board of Education in the face of massive resistance, would that have represented morally reflective deliberation or judicial cowardice? If, as appears quite possible, the Justices should decide to limit or overturn Roe v. Wade, would they be engaging in dialogue or shirking their duty?

The difficult truth—difficult, at least, in a world in which law is supposed to be predictable—is that there is no way to answer these questions ex ante, and there may not even be any way to answer them ex post. The moral reasoning of a judge, the commitment to dialogue, and the generosity and humility with which she considers opinions different from her own, are ultimately not matters capable of external ascertainment. We cannot tell from the results of the process whether they are the products of moral reflection. We can certainly try, for example through the nomination and confirmation of Supreme Court Justices, to fill the bench with morally reflective individuals. Other than through exhortation and external criticism, however, we cannot guarantee that those who are selected for the bench will be morally reflective once they get there.

We can, however, make our own judgments, as individual moral agents, about the rightness or wrongness of what the courts decree. And as moral agents, we might decide, after similar deliberation, that our internal moral judgments-in-action counsel disobedience. Martin Luther King’s defiance of a court’s order prohibiting the Easter Sunday March in Birmingham was a shining example of moral judgment-in-action, even though the Supreme Court was unimpressed. There is a practice in some parts of the country of holding organized prayer in the public schools, no matter what the Supreme Court might say about it. That, too, is moral judgment-in-action in defiance of judicial decree. So is the intermittent effort by opponents of Roe v. Wade to convince the Congress to enact the so-called Human Life Bill.

The point, in whatever case, is that the public deliberation that should, in Perry’s estimation, guide the society’s moral

judgments will quite likely be carried on in many different forums and in many different forms. Sometimes the dissenters will be among the governed, sometimes among the governors. Nearly always there will be among the dissenters thoughtful, generous individuals of good will. Courts, including constitutional courts, that hand down decisions for what they consider morally proper reasons ought to listen closely to moral dissent. If the chorus of dissent rises, the confidence of the judges in the correctness of their own moral visions ought perhaps to tremble a bit.\textsuperscript{70}

And sometimes, although it is no easy matter to pin down with empirical precision the cases where it has occurred, even the Supreme Court will reverse a radically unpopular decision, and the swarming dissent fades into history. A Court that backs down frequently cannot possibly be said to be fulfilling its proper role in the constitutional structure, for the fundamental law will be malleable and imprecise. Besides, the purpose of urging the judges to pay attention to the dissent is to promote the moral dialogue necessary to the survival of a liberal polity. Interpretation of the Constitution's broadly worded clauses is simply not possible in the absence of reliance on some moral vision. The judges should listen to their critics because their critics may have the better of the moral argument. Consequently, it makes considerable difference whether the Court has backed down because the Justices are convinced or because the Justices are afraid.

In either case, the Court has plainly backed down in the face of protest. The classical liberal analysis might label this as judicial cowardice and condemn it as illegitimate. It is illegitimate because the Justices are voting in a way that is different from what they believe their commissions require. The distinction between the judge in my sexual harrassment hypothetical and the Justices who have retreated in the face of protest is that only in the first case is it likely that moral judgment-in-action is provoking the judicial disobedience. On the other hand, the Supreme Court's retreat in the second example might not be quite so ignominious as it appears. It might instead reflect the efficacy of public moral dialogue. Perhaps the Justices have indeed changed their substantive views; perhaps in the conversation (not a monologue, remember), they have become convinced

\textsuperscript{70} For a further discussion of this point, see Carter, \textit{The Courts Are Not the Constitution}, Wall St. J., Feb. 7, 1989, at A24, col. 4.
that the moral vision underlying the now-abandoned decision was not as good as the competing vision urged upon them by an angry public. The trouble is that there is no way to tell.

The Constitution might be a safer document, and judicial review a somewhat more exacting science, if all the clauses spoke with the relative precision that marks the provisions establishing the structure of government—what I have called elsewhere our Political Constitution. Then it would be far easier (although still not trivial) to tell whether the judges called upon to interpret it were doing their jobs. But the Political Constitution is only a part of our Constitution. We also have a Natural Law Constitution, comprising clauses so broadly worded that it is difficult to imagine interpreting or applying them without the aid of moral judgment. We can appoint judges from among those people we consider morally reflective; we can argue with them when they are wrong, and try to convince them of their moral error; and, in extremis, we can defy them. But if we are to have the Constitution that we do, then we must also recognize that sometimes judges will do things that we very much dislike. And sometimes they will do those things for very bad reasons.

VII.

Those who, like Perry and myself, are attracted to the Bickelian metaphor and think of courts as interlocutors in a continuing moral dialogue, must face up to the difficulties. Those difficulties are legion. Perhaps the most obvious is the problem of speaking different languages. When one interlocutor wants to argue over neutrality and reason and another insists that the answer is found in divine revelation, there is little common ground. The contemporary liberal solution is to prohibit one of the languages—religion—in public moral dialogue. Perry's solution, more attractive but still not without its problems, would permit individuals to enter the dialogue as they choose, provided only that they enter with generosity of spirit and a genuine willingness to listen to and consider the concerns of others. This solution in itself reflects a moral judgment that some would already reject; and yet it is cast in very attractive terms of charity and redemption.

A second difficulty with dialogue is pointed out by the title character of John Sayles's film *Lianna* who at one point tosses out a splendid line that goes something like this: "Just because you can argue better than me doesn't mean you're right." In other words, reliance on dialogue as a means of resolving disputes carries with it the risk that the dialogue will be resolved, not according to substance, but according to skill. A third weakness is that if the dialogue is taken to imply that even the obligation of public officials to obey is willed, and therefore evanescent, the theorist might end up defending not law, but anarchy. If these problems are to be resolved at all, their solutions will likely be found in the development of dialogic norms teaching, in the one case, the virtue of substance, and in the other, the proposition that in most cases public officials have a special and strong presumptive obligation to obey the law.

Finally, and perhaps most troubling of all, there is always the risk, not an insubstantial one, that one side or another will win, not because it has the better argument, but simply because it wears the other down. There is no answer to this challenge, except to note that, in a curious fashion, this possibility of change through sheer perseverance also reflects an ultimately positive judgment about human character—a judgment that formed a vital part of Martin Luther King's optimism. According to King, people did not necessarily change because they wanted to. People sometimes changed because they had to—because they were worn down. In an essay not published until after his death, King wrote:

> America has not yet changed because so many think it need not change, but this is the illusion of the damned. America must change because twenty-three million black citizens will no longer live supinely in a wretched past. They have left the valley of despair; they have found strength in struggle; and whether they live or die, they shall never crawl nor retreat again. Joined by white allies, they will shake the prison walls until they fall. America must change. 72

I do not know where or how to draw the line between a judicial retreat in the face of superior force and a judicial understanding of the Constitution that has been enriched through the process of public moral dialogue. I have a faith, however, that one is wrong and the other is right. I do know how to draw the line.

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between an individual who believes her society and its law to be essentially just and one who does not; the line is drawn when she decides whether she has a presumptive obligation to obey the law just because it is the law—a decision that will in turn influence her determination whether to accept punishment for disobedience. One either believes in the efficacy of dialogue in a just society or one does not—but the one who does not cannot truly believe that the society is just. The greatest love that one can have for a society and its people, the greatest respect that one can show for the differing moral visions that create the objectionable law, is to sacrifice one’s self-interest in order to change them.