
**ANARCHISM, HISTORICAL ILLEGITIMACY, AND CIVIL
DISOBEDIENCE: REFLECTIONS ON A. JOHN SIMMONS'S
*DISOBEDIENCE AND ITS OBJECTS***

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INTRODUCTION

At one point in his well-known article *Moral Judgment, Historical Reality, and Civil Disobedience*, David Lyons quotes Dr. Martin Luther King, Jr. as saying that “[w]hat the Negro wants – and will not stop until he gets – is absolute and unqualified freedom and equality.”¹ One way to understand the point A. John Simmons makes in his paper *Disobedience and Its Objects* is that we need not stop even there.² That is, “absolute and unqualified freedom and equality” understood as “absolute and unqualified freedom and equality *under the law*” need not be the *final* or indeed the *only* goal of civil disobedience. In this Paper, I develop three critical questions regarding the provocative analysis Simmons defends. Then in the final Part, I develop the anarchist underpinnings of Simmons’s argument, and in doing so bring him into conversation with Lyons’s original work on the topic, noting how the claims of both are potentially transformative for philosophical discussions of civil disobedience.

First, a note about terminology: the phrase “civil disobedience” has various connotations and a rich, complicated, and contested history. I follow Simmons in using the term in its thinnest or most minimal sense to mean “deliberate,

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¹ David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 PHIL. & PUB. AFF. 31, 43 (1998).

² A. John Simmons, *Disobedience and Its Objects*, 90 B.U. L. REV. 1805, 1825-27 (2010).

principled, plainly illegal conduct.”³ Simmons’s use of the term civil disobedience (or what he sometimes refers to as “legal disobedience”) is different from, and much broader than, the standard one in the literature.⁴ What he has in mind is resistance to civil government broadly conceived to include, for example, radical, and even violent, protest and revolutionary activities. Simmons does not concern himself with any of the finer details of civil disobedience on which political philosophers usually focus: for example, whether it must be public to be justified and whether disobedients must submit to punishment, among other things. Instead, he focuses on what he refers to as the “object” – that is, the *goal*, *aim*, or *target* – of principled illegal action. His only real concern is to identify two distinguishing features of civil disobedience: it is illegal action that is *deliberate*, and it is *principled*.

Simmons dedicates the bulk of his paper to a critique of John Rawls’s views about nonideal theory and civil disobedience in particular. Simmons develops a conception of what he calls “historical illegitimacy” as part of the claim that Rawls cannot account for what he calls “partial state illegitimacy.”⁵ For Rawls, civil disobedience is understood to aim at rectifying what Simmons calls “structural injustices,” that is, “injustice in the institutional rules of society’s basic structure.”⁶ And many in contemporary political philosophy take this very general view, namely that rectifying injustices of various sorts is the appropriate aim of civil disobedience. “Historical illegitimacy” on the other hand, is the “wrongful conduct in the history of the state’s subjection of persons or territories to its coercive powers.”⁷ Simmons argues that illegitimacy at the moment of subjection – that is, the point in time when a particular group comes under the authority of the state – taints or stains the state’s authority over the group from that point forward. And the illegitimacy persists over time. Simmons claims that because Rawls focuses exclusively on structural justice, he cannot account for the wrongness of such circumstances, nor can he justify civil disobedience in response to them.

In developing this critique, Simmons targets cases of historically marginalized subgroups who have been illegitimately subjected to a coercive state power (e.g., African slaves, currently occupied peoples, and displaced indigenous populations). He argues that this sort of historical illegitimacy should be understood to constitute an *additional* object of civil disobedience. The idea seems to be that acts of civil disobedience can, in some cases, target *illegitimate subjection to the law*, and not merely injustices or inequities in the laws, policies, institutions, or practices themselves. He names no instances of

³ *Id.* at 1809.

⁴ For an excellent overview of civil disobedience as an object of philosophical analysis, see Kimberley Brownlee, *Civil Disobedience*, STAN. ENCYCLOPEDIA OF PHIL. (2009), <http://plato.stanford.edu/entries/civil-disobedience>.

⁵ Simmons, *supra* note 2, at 1826.

⁶ *Id.* at 1824.

⁷ *Id.*

how civil disobedience would work in this regard; that is, he gives no specific examples of what it would mean for civil disobedience to take historical illegitimacy (as opposed to structural injustice) as its *primary* – or indeed its *sole* – object. He takes up the issue only in three rather vague references: first, he declares the need for “options and rectifications” when people are “indefensibly subjected to societies’ coercive powers”⁸ (though he does not explain what that might entail); second, he says “with respect to certain wronged peoples . . . the object of their disobedience is precisely to defy or to repair that wrong”;⁹ third (and most concretely) he references “group demands for reparations or for political autonomy.”¹⁰

In brief, then, Simmons’s claim is this: whereas many theorists think that there is only one object of civil disobedience, namely unjust laws and practices, there are in fact two. Historical illegitimacy constitutes an alternative object of civil disobedience, which exists separate from, and is not reducible to, structural injustice.¹¹ Given the western world’s legacy of colonialism, mass deportation, and the coercion of indigenous peoples, there are few existing states that do not face serious problems of historical illegitimacy with respect to at least part of their citizen populations. Simmons therefore is to be credited for bringing this significant contemporary problem under the mantle of debates over civil disobedience and political protest. Nevertheless, I see at least three potential points of concern for the scope and object of Simmons’s critique: (1) the problem of group membership; (2) the strict separation of structural injustice from historical illegitimacy; and (3) the success of his objection to Rawls. I take up each in turn.

⁸ *Id.* at 1830.

⁹ *Id.* at 1826.

¹⁰ *Id.* Like “civil disobedience,” the term “reparations” is a notoriously complicated one. As David Copp points out in his paper for this conference, David Lyons himself argued against the possibility of reparations. David Copp, *Corrective Justice as a Duty of the Political Community: David Lyons on the Moral Legacy of Slavery and Jim Crow*, 90 B.U. L. REV. 1731, 1732 (2010). But Simmons seems to be using the term “reparations” here in the most general sense, such that it is synonymous with “rectification” and “restitution,” and so he avoids many of the philosophical (and political) difficulties surrounding it. Simmons clarifies this point in an earlier piece. A. JOHN SIMMONS, *Historical Rights and Fair Shares*, in JUSTIFICATION AND LEGITIMACY 222, 222-23 n.2 (2001). John Torpey distinguishes between reparation in general, which can refer to broader policies of repair, and “reparations,” which is actually narrower and refers specifically to financial or material compensation or restitution. See JOHN TORPEY, MAKING WHOLE WHAT HAS BEEN SMASHED 42-77 (2006).

¹¹ It is worth noting that Simmons does not claim this list is exhaustive; his claim that historical illegitimacy constitutes a legitimate object of civil disobedience is perfectly consistent with the existence of still *other* legitimate objects of principled disobedience. The moral claims of those protesting nuclear proliferation or environmental degradation come to mind here.

I. GROUP MEMBERSHIP AND PROBLEMS OF IDENTIFICATION

Many thorny philosophical and political issues complicate the status and identification of historically marginalized subgroups and their members; and Simmons leaves such issues untouched. These issues have been hotly debated,¹² and there exist few clear-cut cases of easily specifiable groups with uncomplicated memberships. The difficulties of identification are especially pronounced when we begin to ask questions about the status of the descendants of illegitimately subjected groups, including those who have become more integrated into (and mixed with) the “dominant” population. For example, in settler states like the United States, Canada, Australia, and New Zealand, the urban population often contains a portion whose mixed ancestry includes a native or aboriginal grandparent or even great-grandparent.

The fact of massive historical wrongdoing in the acquisition of peoples and territories is as uncontentious as the complications and difficulties of theorizing about it. One cannot fault Simmons for failing to tackle these complications in the scope of a short, focused paper.¹³ However, the nature of his analysis – and in particular, his criticism of Rawls – is such that its success depends on his ability to flesh out *when* and *how* a state is culpable for the conditions under which a particular population is subjected to its authority. For Simmons, what differentiates illegitimately subjected groups from the rest of the population is a wrongful act on the part of the government in the subjection itself. Thus, because the United States annexed territories belonging to Mexicans or Native American tribes and forced those living on the lands to submit to the laws of the United States government, members of those groups are illegitimately subjected. In a different context, many immigrants came to the United States in order to flee famines, religious persecution, or genocide. Since immigration was a matter of survival, it would be odd to consider this voluntary or willing subjection. In both sets of cases, subjection to the United States government happened under extreme duress and was importantly not something undertaken as a matter of free choice. Yet, presumably, the immigrant would have no grounds for complaint in a perfectly just society. Simmons wants to make a distinction between the former and the

¹² For good discussions of this problem, see generally JANNA THOMPSON, *TAKING RESPONSIBILITY FOR THE PAST* (2002); TORPEY, *supra* note 10; Jeremy Waldron, *Superseding Historic Injustice*, 103 *ETHICS* 4 (1992); Margaret Urban Walker, *Restorative Justice and Reparations*, 37 *J. SOC. PHIL.* 377 (2006).

¹³ Simmons has touched on questions of group membership and identity in an earlier work, where he argues that the nature and extent of entitlements like reparations can be determined by employing counterfactual approaches familiar from David Lewis’s work in metaphysics. See A. John Simmons, *Historical Rights and Fair Shares*, 14 *LAW & PHIL.* 149, 157-59 (1995). But that is a slightly different question from the one that concerns us here: we need to know not only *what* groups might be owed and *which* groups count as candidates for inclusion but also, assuming we can answer the first questions, *who* counts as a member of the specified group. The counterfactual claim can help us only with the first of these three questions.

latter on the grounds that the United States government was the cause of the duress in the former. The issue then is one of *culpability*. Or more specifically, the issue is the culpability of the government to which the group in question is subjected. If immigrant population *I* immigrates from country *A* to country *B* because of something terrible country *A* did to it, then on this account country *B* would not be historically illegitimate with respect to *I*.

However, with increasing globalization and increased involvement of certain countries with the fates of others, things will rarely be that simple. Indeed, there are cases in which United States interference in neighboring countries resulted in many from those countries fleeing to the United States (Haiti, for example). Most agree that this interference by the United States was morally problematic, perhaps even culpable. Is the resulting subjection of those fleeing populations to United States authority thus illegitimate? The distinction Simmons makes between partial legitimacy and legitimacy is hard to sustain given the degree to which some states interfere with others. Very few instances of subjection will qualify as legitimate. In a country of immigrants where the government has been so active and so aggressive on the global stage, we can expect at least a significant amount of the population to have some justified grievance against the United States government for the way in which they became subjects.¹⁴ So although Simmons may very well be able to sidestep many of the difficulties associated with identifying historically marginalized groups and their members, he needs a stable way in which to delineate the kinds of peoples that will fit his criteria for historical illegitimacy and so ground his claims about partial state illegitimacy.

II. SEPARATING STRUCTURAL INJUSTICE AND HISTORICAL ILLEGITIMACY

It may not be as easy to separate issues of historical illegitimacy from issues of structural injustice as Simmons suggests. Simmons claims that structural injustice and historical illegitimacy can be separated both in theory and in practice. In a very telling (and *prima facie* compelling) thought experiment, Simmons asks us to imagine the United States of Thoreau's time as stripped of its unjust institutions and practices – it has abolished slavery, abandoned its expansionist and imperialist policies, and given equal rights and liberties to all.¹⁵ He claims that many members of this now much more just (or at least

¹⁴ Of course, we must be careful not to overstate this point. For example, many Eastern and Western Europeans who came over to the United States in the nineteenth and early twentieth centuries came fleeing violence that the United States government had no role in generating. In fact, many saw the United States as the greatest hope and fought to get here, and one of the things that they wanted was to be ruled by this very government (i.e., they *wanted* a strong state that protected their rights)! It would be misleading to characterize these vast numbers of people and their descendants as “forced by the United States” to emigrate here, much less as not having chosen to be subject to the United States government. Thanks to Matt Smith for forcing me to clarify this point.

¹⁵ Simmons, *supra* note 2, at 1825.

much less unjust) society are still illegitimately subjected to the rule of its government. He asks us to consider that the institutions of Thoreau's United States

had *plainly* not been imposed in defensible ways on those who had been kidnapped and brought to "his" country in chains to live out short, miserable lives in bondage, or on the aboriginal peoples who had been decimated, forcibly relocated, and whose ways of life had been destroyed or deliberately corrupted. Nor were the territories (or their inhabitants) seized from (or "ceded" by) Mexico in a trumped-up war of acquisition subjected to the United States' institutional rules in a legitimate fashion. Nor (finally) is it in any way obvious that the United States somehow mysteriously acquired legitimate authority over those persons or territories – or over the children of those persons – simply through the passage of time.¹⁶

The point of the hypothetical scenario is this: even if there was (1) an end to the horrendous, discriminatory, exploitative, and unequal treatment of those brought over from Africa to labor as slaves and those living on lands the United States had annexed or claimed as its own, and (2) institutional reform to prevent any further such abuses, the United States would still be illegitimate with respect to these subsets of its population. Yet Rawls would have no lingering objections to Thoreau's United States, so described, and more importantly, there are no resources in Rawls's system to call for civil disobedience under such conditions. Simmons notes that in the greatly improved United States,

Thoreau's refusal of allegiance would then be indefensible in Rawlsian terms, as would be similar refusals of allegiance by the remnants of and the children of slaughtered aboriginal peoples, by the now-freed African slaves and their children, or by newly anointed U.S. citizens in former Mexican territories. The grim and bloody histories of political subjection and their enduring consequences would purportedly be laid to rest by simple institutional reform and modification.¹⁷

Simmons clearly thinks that this implication, namely, that civil disobedience is unjustified in such cases, is, on the face of it, implausible. Even if slavery were abolished and imperialist tendencies reigned in, a very large number of people would still be living in the United States as a product of serious moral wrongs that have been left unaddressed. Simmons seems to think that to ignore this fact is to ignore something crucial, and this position seems plausible on the face of it, at least thus far.

This is a powerful thought experiment, but the example needs to be made even stronger. Rather than simply imagining events such as the abolition of slavery and the cessation of the Mexican American War (which both

¹⁶ *Id.*

¹⁷ *Id.*

eventually happened) and the cessation of all United States imperialism (which, of course, has not happened yet), we should instead imagine that Thoreau's United States has become a perfectly just society – however one wants to flesh that out. Simmons asks whether there can be good grounds for complaint even from within this perfectly just society. Simmons does not seem to appreciate the massive reordering that would have to occur to bring such a society into existence; it would clearly require much more than “simple institutional reform and modification.” The perfectly just society would be utterly unlike the one that existed at the time (and the one in which we currently live). The only thing left behind would be a *memory* of injustice – perhaps even a long ago injustice. This is not because the ancestors of those who bore the scars of the injustice have been killed off, but because there simply are no longer any outward scars of injustice at all. Thought would be all that remains.

Simmons does not go this far in characterizing the context in which Rawls contemplates civil disobedience, but he can, and indeed he should. After all, Simmons is trying to isolate historical injustice as distinct from present injustices or moral failings. He thinks the simple fact of historical injustice alone is morally important: it is a distinct phenomenon with effects on state legitimacy (and so state claims to our obedience) that are not reducible to – or explicable in terms of – anything else. So if we are going to consider historical injustice in its own right, we need to clear from the table (and from our imaginations) any (or at least as many as possible) remnants of structural injustice. That is, the strengthened version of the thought experiment establishes a theoretical separation of historical illegitimacy and structural injustice.¹⁸

Why is it important to strengthen the test example? It matters because Simmons is trading on our anticipated reactions to it, in order to make the theoretical distinction that he does – and thus to generate his critique of Rawls. Once we think carefully about what rectifying all of these structural injustices and establishing a perfectly just Rawlsian society would actually entail, it is hard to know what our intuitions about historical illegitimacy should or would be. It is a great understatement to refer dismissively to this undertaking as requiring “simple institutional reform and modification.” When we take seriously the stipulation of a society that suffers from historical injustice but with no (or only negligible) structural injustice, I contend that we do not have the same gripping reaction that there is some serious injustice desperately overdue for a remedy. That is not to say that there is *no* remaining issue; I will return to that in the next Part. But I suspect that Simmons's argument against Rawls on this point largely trades on our powerfully averse intuitive reactions about cases of structural injustice, which do not apply to cases of historical

¹⁸ I have no reason to suspect Simmons will be hostile to my suggested modifications; in fact, he agreed in conversation at the conference that what I have described as the test case really is the test case.

injustice considered in isolation. Again, the two so often come hand-in-hand that separating them requires no small amount of effort. I contend that when we do separate them, our reaction is significantly and noticeably weaker.¹⁹

Of course, Simmons also claims that the distinction between historical illegitimacy and structural injustice occurs in actual political practice and not only in theory, and he demonstrates this by appeal to grievances against governments grounded on the wrongness of the subjection itself as opposed to current structural injustice. He mentions the lawsuits brought by various Native American tribes against the United States government where the complaint was “the historical illegitimacy of state subjection [of *territory*], *not* appeals to any structural injustice”²⁰ as well as the charges of (some) Palestinians against the government of Israel.²¹ In the latter case (which he admits is problematic), he says:

Their principal charge is *not* that Israel’s basic structure is in itself deeply unjust or that its government is (for that or for any other reason) illegitimate with respect to *all* who live in Israel’s claimed territories. It is rather that the subjection specifically of Palestinians and their homeland to Israeli rule was historically, and, consequently continues to be, illegitimate.²²

In many practical or applied cases, including the two he mentions, it is wildly difficult to discriminate between the two types of concerns. Given that we are not in a perfectly just society (or anywhere near it), complaints about historical illegitimacy are often paired with concerns about current structural injustices, and one may have an amplifying or emphatic effect on the other. However, I do think that a narrow range of cases exists (for example, independence and secessionist movements of various sorts) where there is a real and important distinction. Simmons’s analysis applies best to this narrow range of cases. I

¹⁹ Arguably, we can find further support for this observation by looking at evidence given by Thoreau himself. Simmons quotes Thoreau’s famous statement: “I cannot for an instant recognize that political organization as *my* government which is the *slave’s* government also.” Simmons, *supra* note 2, at 1813 n.41 (quoting HENRY DAVID THOREAU, *Resistance to Civil Government*, in POLITICAL WRITINGS 1, 4 (Nancy L. Rosenblum ed., 1996)). Notice that it is the *slave’s* government that Thoreau says is not his government. It is not at all clear that if society were reformed to meet Simmons’s proposed improvements (let alone the more extensive improvements described above) that Thoreau would still maintain his lack of consent to the government. Simmons rightly points out that Thoreau has a second, and more radical argument to the effect that genuine political obligation is never possible, *id.* at 1813-14, but Simmons also rightly points out that if we follow this line of thinking it takes us very far away from the issue at hand and undercuts the possibility of any common ground between Thoreau’s position and Rawls’s, thereby making a productive dialogue (or any dialogue at all) on the issue impossible. *Id.* at 1809; *see also infra* note 29 and accompanying text.

²⁰ Simmons, *supra* note 2, at 1826.

²¹ *Id.*

²² *Id.*

worry that the distinction does not extend much beyond them – or that it is less useful in those cases where the call for change is not simply a call for an end to the subjection itself.

III. CAN RAWLS RESPOND?

There may be plausible ways for Rawls, or others who share Rawls's philosophical outlook, to answer Simmons's objections. In part, this could entail providing their own arguments for reparations and political autonomy without appeal to the framework Simmons lays out. I do not see any obvious reason why such arguments should be incompatible with Rawls's theories – though this might depend on how amenable one thinks Rawls's views are to various forms of multiculturalism.²³ Even if Rawls cannot account for the justifiability of civil disobedience in such cases, it is not obvious that his theory leaves historical injustice unaddressed. Indeed, at least one argument for reparations is already forward-looking in nature and ties the claim for reparations to conditions for equality of opportunity. Insofar as the conditions of a Rawlsian society are sufficiently met, one might claim that the grounds for reparation in a forward-looking analysis have also been fulfilled. So, Rawls's realistic utopia, or even the "greatly improved" United States of Simmons's thought-experiment, will have gone a long way toward satisfying many of the demands of historically marginalized groups. Thus, even if civil disobedience turns out to be necessary in order to bring about morally required reparations (presumably because the government has failed to initiate them without such prompting), such disobedience can be justified without reference to or reliance upon Simmons's argument. In short, it seems that Simmons's case against the Rawlsian stands or falls with our intuitions regarding a case in which there are absolutely *no* forward-looking reasons for reparations, *no* present forms of structural injustice, and *no* grounds for complaint except for the initial conditions of subjection, and I am not sure Simmons's assessment of our reaction to this case would be borne out. Indeed, his claims rest partly on the implausibility – and almost inconceivability – of the example.

The three concerns I have raised, namely, group membership, the separation of structural injustice and historical illegitimacy, and the potential for reparations grounded solely in forward-looking considerations, are interrelated in important ways. In many cases, the groups who can legitimately make claims for reparations or political autonomy are identified as victims of structural injustice. However, if and when various sorts of structural injustices are eliminated, the saliency of a person's membership in a particular group might very well become less pronounced. So, unless one is willing to reify or essentialize the conditions for group membership, there is little reason to think

²³ For example, Walker's argument that reparations are a form of restorative justice is almost entirely forward-looking. See Walker, *supra* note 12, at 385. For another argument that is partially, but not entirely, forward-looking, see generally ROY BROOKS, ATONEMENT AND FORGIVENESS (2006).

that these identities will continue to be important in the same way that they are in the face of the pervasive structural injustices.

In the remaining Part of this paper, I widen the focus of the discussion by turning from specific internal concerns regarding Simmons's argument to the broader philosophical context of his political views and their implications for the claims he makes. In doing so I call attention to an exciting, if peripheral, theme in his project.

IV. THE ANARCHIST APPROACH TO CIVIL DISOBEDIENCE

Simmons is well known for defending a particular brand of philosophical anarchism, and what I find most exciting in his paper is the way this philosophical anarchism is brought into conversation with theories of civil disobedience. Simmons's anarchist commitments manifest themselves at various points in his paper. First, he appeals to a distinction that he has famously drawn between *justification* and *legitimacy*, arguing that the justice of a state's institutions can never entail that they are legitimately imposed upon people or that people have an obligation to obey them.²⁴ Instead, he offers a consent theory: the state's authority over the individual is legitimate if and only if she willingly subjects herself to it.²⁵ He also notes that the fact of historical illegitimacy "requires options and rectifications for those indefensibly subjected to societies' coercive powers"²⁶ – which, if we take the distinction between justification and legitimacy seriously, is almost everyone. Lastly, his use of Thoreau reveals his anarchist commitments. He quotes Thoreau's famous words, "That government is best which governs not at all; and when men are prepared for it, that will be the kind of government which they will have."²⁷ The final sentence of the paper is quite telling in this regard; Simmons calls for a change of the sort famously recommended by Thoreau, a change that would allow individuals to "live aloof" from government.²⁸

Calling our attention to this aspect of Simmons's project has three immediate consequences for how we understand the ultimate upshots of his analysis. First, pursuing the anarchist line takes him out of conversation with Rawls – something Simmons himself seems to recognize.²⁹ There is a sense in which they do not share enough to sustain a fruitful dialogue. But more importantly, to the extent that we take the anarchist line seriously here, it also

²⁴ *Id.* at 1813-14.

²⁵ For the most-developed account of this distinction, see generally A. JOHN SIMMONS, *Justification and Legitimacy*, in JUSTIFICATION AND LEGITIMACY, *supra* note 10, at 122.

²⁶ Simmons, *supra* note 2, at 1830.

²⁷ *Id.* at 1814 n.46 (citing THOREAU, *supra* note 19, at 1).

²⁸ *Id.* at 1830-31 (citing THOREAU, *supra* note 19, at 21).

²⁹ Simmons says "[w]e can for current purposes set to one side Thoreau's anarchist pronouncements; Rawls obviously cannot endorse any argument aiming to show that even a perfectly just state would still be morally illegitimate with respect to all of its subjects." *Id.* at 1824.

undercuts his critique of Rawls, which depends on there being *partial* state illegitimacy. It follows from Simmons's anarchist insights that there is *complete* (or nearly complete) state illegitimacy. Simmons, of course, insists that legitimacy should be assessed on a case-by-case basis; but he also claims that the conditions for legitimacy will rarely, if ever, be met. In the end, then, Simmons's anarchist notion of a justified yet illegitimate state is a rich and thought-provoking idea worthy of much discussion in its own right, but it is likely too blunt of a tool to do the kind of work he puts it to in his critique of Rawls. Or to put the point another way, his anarchist commitments seem to rob him of the resources he needs to criticize Rawls in a way that the Rawlsian must take seriously.

Second, Simmons's anarchism undermines the special nature of cases involving recognizable historical injustice at the moment of subjection – Simmons's notion of historical illegitimacy becomes so broad it loses its descriptive power to call attention to the plights of indigenous peoples, for instance. Simmons claims to have shown that “[l]egal disobedience may be justified either simply in response to historically illegitimate subjection by demonstrating the absence of political obligation or by showing how disobedience can justifiably advance the cause of full political legitimacy – which we can here take to include full structural justice.”³⁰ However, members of historically wronged groups (Palestinians, slaves and their children, aboriginal peoples and their children) are not the only ones for whom the state is illegitimate. He says “[t]he legitimacy of state coercion requires more than its being in accordance with near-just institutions. It requires that those institutions be (and have been) imposed on persons and territories in morally defensible ways.”³¹ The key is that simply having democratic institutions is not sufficient for “legitimacy,” as Simmons understands it. But this means that existing states are legitimate for virtually nobody, a claim I gather Simmons fully, willingly (and enthusiastically) acknowledges. Notice that if this is the case, then there is no distinct work done by the act of identifying someone as a member of a group that was subject to historical injustice. On the surface it may appear as if, in taking this line, Simmons not only fails to preach to the choir, he risks losing the choir's support altogether. Some advocates of historically wronged groups and theorists sympathetic to their plight may be unwilling to accept grounds for civil disobedience that require them to share such grounds with most, if not all, other citizens of the state.

Third, in an important sense, Simmons's commitment to denying the legitimacy of states appears to render discussion of civil disobedience as a *moral* issue irrelevant. Since there is no preexisting obligation to obey the law, civil disobedience does not arise as a dilemma in Simmons's account. It might give rise to practical dilemmas or questions involving, say, weighing the costs

³⁰ *Id.* at 1830.

³¹ *Id.* at 1829.

of disobeying an extant legal system against the benefits; but for Simmons it will never be a *moral* conflict or a conflict of *obligations*. Thus, while we might ask about the prudence of disobedience and about its effects on our peers and neighbors, it simply makes no sense to ask about civil disobedience as an exception to one's obligations of obedience to a government requiring justification. Philosophical debates about civil disobedience take place within a certain framework with certain shared assumptions; and Simmons has removed himself from that framework, at least in part because he does not share those assumptions.³²

Simmons could accept these points. While his overall views in political philosophy are even more skeptical than the ones traced in this Paper, he appears to grant some basic claims to Rawls for the sake of argument – that is, he puts aside a more radical critique in order to offer an internal criticism that does not presuppose radical Simmons-style anarchism. Furthermore, it is consistent with Simmons's position for him to claim that just because the government is illegitimate with respect to all does not mean that there does not exist a special wrong with regard to certain groups in society; and civil disobedience raises moral and political issues worthy of philosophical consideration even if it is not understood to be predicated on a conflict of duties.

The anarchist strain in the paper does potentially limit conversation between Simmons and Rawls. At the same time, it opens up a new conversation, and (more importantly) it returns David Lyons's work to center stage. Both Simmons and Lyons have denied the existence of a generic moral presumption in favor of obedience to the law. Of course, they deny the generic obligation to obey the law on different grounds. Simmons's argument for this conclusion rests on anarchist commitments, while Lyons's argument derives from his recognition that deep injustices are a pervasive and inescapable feature of all existing societies.³³ Yet, while both Simmons and Lyons deny that there is genuine political obligation, both nevertheless insist that this does not provide a blanket justification for disobedience; and their reasoning is similar on this point. As Lyons puts the argument, “[p]olitical obligation is not the only moral factor favoring compliance. Other considerations can provide strong reason to abide by law, even when there is significant, deeply entrenched, systematic injustice.”³⁴ The interesting thing is that both Simmons and Lyons, unlike

³² Arguably, this is the mirror image of the criticism often leveled against natural law theorists, namely, that they cannot make sense of a conflict subjects might have between their obligation to obey the law and their obligation to promote justice, given that a condition for the validity of any law is that it be substantively just. Thanks to Colleen Murphy for this point.

³³ To give just one representative example, at one point, Lyons explains why he denies the existence of genuine political obligation, saying “[f]ew, if any, human societies have been free of significant, deeply entrenched, systematic injustice.” Lyons, *supra* note 1, at 46.

³⁴ *Id.* at 36.

Rawls and many others who are party to this debate, want to discuss the issue of civil disobedience in the absence of a political obligation to obey.

Note first that their respective analyses of civil disobedience recapitulate the distinction that Simmons wants to draw between two possible objects of civil disobedience. For Lyons, the object is structural injustice; for Simmons, the object is historical illegitimacy, now widely conceived as applying to most (or all) members of society. It is reasonable to assume that in some cases the pursuit of the two objects could be overlapping, and even complementary. But it seems that there could also be cases where there is conflict; *the call for no government might not always be compatible with the call for better (i.e., more just) governance*.

This is not to say that the anarchist could not take part in, say, the civil disobedience of the civil rights movement; she certainly could. That is not the point. Rather, questions arise when the object of civil disobedience is an anarchist one, that is, when the ultimate goal of the illegal action is to establish the kinds of institutions that the anarchist (or Simmons) thinks are ultimately justifiable, namely, the kind of government that allows individuals to “remain aloof” from it. This seems to potentially conflict with many of the demands of those seeking to rectify deep injustices, which often involves changing the law; for example, giving everyone equal rights. There are some matters of justice that require the power of government interference. For example, it is almost inconceivable that the battle for desegregated schools, a key feature of the civil rights struggle, could have been won without the power of state legislation to override recalcitrant, racist community fervor. One might reasonably think that in cases in which there is conflict between issues of historical illegitimacy and structural injustice, the fight against structural injustice should be prioritized – perhaps even at a cost to the claims of illegitimately subjected groups.

How might such conflict be negotiated; would it be determined on principled grounds? Pragmatic grounds? Simmons does not address this directly but we can easily infer his answer. At the very end of his paper, he remarks that

Nonideal theory will . . . recommend the most effective, morally permissible path to that end [of full political legitimacy]. And determinations of moral permissibility will presumably involve balancing the progress that legal disobedience can stimulate against any harms done to others and their associations by acts of legal disobedience, with any negative effects that disobedience might have on the provision of goods that even bad states often accomplish (such as the deterrence and disabling of ordinary criminals).³⁵

Simmons's very real concern for the concrete, practical effects of political disobedience and its consequences for civil society is evident in this quotation.

³⁵ Simmons, *supra* note 2, at 1830.

What we can justify doing in response to being illegitimately subjected will always depend on how such actions affect innocent people. He acknowledges that “even bad states” may have an important (if, presumably, temporary) role to play in achieving the goods of citizen safety and the deterrence of crime, and he appeals to the notion of “balance” in deciding how to proceed with legitimate claims to disobey. These are pragmatic cautions, not the words of a dogmatist. Even someone who takes up Thoreau’s call and advocates for free association would, almost necessarily, espouse a gradualist method of achieving it. And such an advocate might very well, at least if she heeded Simmons’s words, agree that the fight for equality took precedence.

CONCLUSION

In sum, I have suggested that the problematic lacuna Simmons identifies in the Rawlsian account of civil disobedience, namely cases of historical illegitimacy without structural injustice, is not as dire as Simmons supposes. Indeed, to the extent that it is problematic, the Rawlsian (or Rawlsian-sympathizer) might very well be able to muster resources to answer it. However, we should not therefore underestimate the impact of the project Simmons outlines in his paper. In fact, it might seem that his larger political philosophy actually serves to dissolve – and not further – the debate over civil disobedience. But such a conclusion would be premature. In demonstrating the moral and political significance of grounding civil disobedience, even when that significance is not taken to conflict with a preexisting political obligation to obey the law, Simmons has *transformed* and not dissolved the philosophical debate over disobedience. This not-insignificant achievement is one he can share with David Lyons.