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Do Not Delete 10/15/ PM Justifying Wartime Limits on Civil Rights and Liberties Robert J. Pushaw, Jr. Many law professors and commentators condemned the Bush.*

In his essay, Thoreau observes that only a very few people â€" heroes, martyrs, patriots, reformers in the best sense â€" serve their society with their consciences, and so necessarily resist society for the most part, and are commonly treated by it as enemies. Thoreau, for his part, spent time in jail for his protest. Many after him have proudly identified their protests as acts of civil disobedience and have been treated by their societies â€" sometimes temporarily, sometimes indefinitely â€" as its enemies. The ultimate impact of more recent acts of civil disobedience â€" anti-abortion trespass demonstrations or acts of disobedience taken as part of the environmental movement and animal rights movement â€" remains to be seen. Certain features of civil disobedience seem vital not only to its impact on societies and governments, but also to its status as a potentially justifiable breach of law. Civil disobedience is generally regarded as more morally defensible than both ordinary offences and other forms of protest such as militant action or coercive violence. Before contrasting civil disobedience with both ordinary offences and other types of protest, attention should be given to the features exemplified in the influential cases noted above. These features include, amongst other things, a conscientious or principled outlook and the communication of both condemnation and a desire for change in law or policy. Other features commonly cited â€" publicity, non-violence, fidelity to law â€" will also be considered here though they prove to be less central than is sometimes assumed. This feature, highlighted in almost all accounts of civil disobedience, points to the seriousness, sincerity and moral conviction with which civil disobedients breach the law. For many disobedients, their breach of law is demanded of them not only by self-respect and moral consistency but also by their perception of the interests of their society. Through their disobedience, they draw attention to laws or policies that they believe require reassessment or rejection. Whether their challenges are well-founded is another matter, which will be taken up in Section 2. The activism of Martin Luther King Jr. King was motivated by his religious convictions and his commitments to democracy, equality, and justice to undertake protests such as the Montgomery bus boycott. Rawls maintains that, while he does not know whether King thought of himself as fulfilling the purpose of the proviso, King could have fulfilled it; and had he accepted public reason he certainly would have fulfilled it. Since people can undertake political protest for a variety of reasons, civil disobedience sometimes overlaps with other forms of dissent. A US draft-dodger during the Vietnam War might be said to combine civil disobedience and conscientious objection in the same action. And, most famously, Gandhi may be credited with combining civil disobedience with revolutionary action. In civilly disobeying the law, a person typically has both forward-looking and backward-looking aims. She seeks not only to convey her disavowal and condemnation of a certain law or policy, but also to draw public attention to this particular issue and thereby to instigate a change in law or policy. A parallel may be drawn between the communicative aspect of civil disobedience and the communicative aspect of lawful punishment by the state Brownlee ; Like civil disobedience, lawful punishment is associated with a backward-looking aim to demonstrate condemnation of certain conduct as well as a forward-looking aim to bring about a lasting change in that conduct. The forward and backward-looking aims of punishment apply not only to the particular offence in question, but also to the kind of conduct of which this offence is an example. There is some dispute over the kinds of policies that civil disobedients may target through their breach of law. Some exclude from the class of civilly disobedient acts those breaches of law that protest the decisions of private agents such as trade unions, banks, private universities, etc. Others, by contrast, maintain that disobedience in opposition to the decisions of private agents can reflect a larger challenge to the legal system that permits those decisions to be taken, which makes it appropriate to place this disobedience under the umbrella of civil disobedience Brownlee ; There is more agreement amongst thinkers that civil disobedience can be either direct or indirect. In other words, civil

disobedients can either breach the law they oppose or breach a law which, other things being equal, they do not oppose in order to demonstrate their protest against another law or policy. Trespassing on a military base to spray-paint nuclear missile silos in protest against current military policy would be an example of indirect civil disobedience. It is worth noting that the distinction often drawn between direct civil disobedience and indirect civil disobedience is less clear-cut than generally assumed. For example, refusing to pay taxes that support the military could be seen as either indirect or direct civil disobedience against military policy. The feature of communication may be contrasted with that of publicity. The latter is endorsed by Rawls who argues that civil disobedience is never covert or secretive; it is only ever committed in public, openly, and with fair notice to legal authorities Rawls , As noted at the outset, publicity sometimes detracts from or undermines the attempt to communicate through civil disobedience. If a person publicises her intention to breach the law, then she provides both political opponents and legal authorities with the opportunity to abort her efforts to communicate Smart , For this reason, unannounced or initially covert disobedience is sometimes preferable to actions undertaken publicly and with fair warning. Examples include releasing animals from research laboratories or vandalising military property; to succeed in carrying out these actions, disobedients would have to avoid publicity of the kind Rawls defends. A controversial issue in debates on civil disobedience is non-violence. Like publicity, non-violence is said to diminish the negative effects of breaching the law. Some theorists go further and say that civil disobedience is, by definition, non-violent. According to Rawls, violent acts likely to injure are incompatible with civil disobedience as a mode of address. First, there is the problem of specifying an appropriate notion of violence. It is unclear, for example, whether violence to self, violence to property, or minor violence against others such as a vicious pinch should be included in a conception of the relevant kinds of violence. If the significant criterion for a commonsense notion of a violent act is a likelihood of causing injury, however minor, then these kinds of acts count as acts of violence see Morreall Second, non-violent acts or legal acts sometimes cause more harm to others than do violent acts Raz , A legal strike by ambulance workers may well have much more severe consequences than minor acts of vandalism. These observations do not alter the fact that non-violent dissent normally is preferable to violent dissent. As Raz observes, non-violence avoids the direct harm caused by violence, and non-violence does not encourage violence in other situations where violence would be wrong, something which an otherwise warranted use of violence may do. Moreover, as a matter of prudence, non-violence does not carry the same risk of antagonising potential allies or confirming the antipathy of opponents Raz , Furthermore, non-violence does not distract the attention of the public, and it probably denies authorities an excuse to use violent countermeasures against disobedients. Those who deny that these features are definitive of civil disobedience endorse a more inclusive conception according to which civil disobedience involves a conscientious and communicative breach of law designed to demonstrate condemnation of a law or policy and to contribute to a change in that law or policy. Such a conception allows that civil disobedience can be violent, partially covert, and revolutionary. This conception also accommodates vagaries in the practice and justifiability of civil disobedience for different political contexts: An even broader conception of civil disobedience would draw no clear boundaries between civil disobedience and other forms of protest such as conscientious objection, forcible resistance, and revolutionary action. A disadvantage of this last conception is that it blurs the lines between these different types of protest and so might both weaken claims about the defensibility of civil disobedience and invite authorities and opponents of civil disobedience to lump all illegal protest under one umbrella. If a disobedient is punished by the law, it is not for civil disobedience, but for the recognised offences she commits, such as blocking a road or disturbing the peace, or trespassing, or damaging property, etc. Therefore, if judges are persuaded, as they sometimes are, either not to punish a disobedient or to punish her differently from other people who breach the same laws, it must be on the basis of some feature or features of her action which distinguish it from the acts of ordinary offenders. Typically a person who commits an offence has no wish to communicate with her government or society. This is evinced by the fact that usually an offender does not intend to make it known that she has breached the law. Since, in most cases, she wishes

to benefit or, at least, not to suffer from her unlawful action, it is in her interests to preserve the secrecy of her conduct. Another exception might be where a person wishes to thumb her nose at authorities by advertising that she has committed a crime. By making an exception of herself and by distancing herself from a legal rule, this ordinary offender communicates a certain disregard for the law. This communication, however, does not normally reflect an aim either to demonstrate conscientiously held objections to that law or to lead society to reform the law. Civil disobedients, by contrast, seek to make their disobedience known to specific members of the community either before or after the fact to demonstrate both the seriousness of their condemnation of that law or policy and their sincere desire for policy change. The difference in communication between the civil disobedient and the ordinary offender reflects a deeper difference in motivation for breaching the law Brownlee A further difference between civil disobedience and common crimes pertains to the willingness of the offender to accept the legal consequences. The willingness of disobedients to accept punishment is taken not only as a mark of general fidelity to the law, but also as an assertion that they differ from ordinary offenders. Accepting punishment also can have great strategic value, as Martin Luther King Jr observes: This willingness may make the majority realise that what is for them a matter of indifference is for disobedients a matter of great importance Singer , Furthermore, the link between a willingness to accept punishment and respect for law can be pulled apart. A revolutionary like Gandhi was happy to go to jail for his offences, but felt no fidelity toward the particular legal system in which he acted. The obvious difference between legal protest and civil disobedience is that the former lies within the bounds of the law, but the latter does not. Most of the other features exemplified in civil disobedience can be found in legal protest including a conscientious and communicative demonstration of protest, a desire to bring about through moral dialogue some lasting change in policy or principle, an attempt to educate and to raise awareness, and so on. The difference in legality translates into a more significant, moral difference when placed against the backdrop of a general moral obligation to follow the law. If it is morally wrong to breach the law, then special justification is required for civil disobedience which is not required for legal protest. However, the political regime in which obedience is demanded may be relevant here. David Lyons maintains that the Jim Crow laws racial segregation laws in force in the southern US until , British colonial rule in India, and chattel slavery in antebellum America offer three refutations of the view that civil disobedience requires moral justification in morally objectionable regimes. According to Lyons, there can be no moral presumption in favour of obedience to the law in such regimes, and therefore no moral justification is required for civil disobedience. If one takes the view that there is no general moral obligation to follow the law irrespective of regime , then both adherence to the law and breach of law must be judged not on their legality, but on their character and consequences. And this would mean that, even in morally reprehensible regimes, justification may be demanded for civil disobedience that either has significant negative consequences or falls below certain moral standards. Although questions of justification will be addressed more fully in the next section, it is worth noting here one point in favour of civil disobedience over legal protest. As Bertrand Russell observes, typically it is difficult to make the most salient facts in a dispute known through conventional channels of participation. The controllers of mainstream media tend to give defenders of unpopular views limited space to make their case. Given the sensational news value of illegal methods, however, engaging in civil disobedience often leads to wide dissemination of a position Russell , John Stuart Mill observes, with regard to dissent in general, that sometimes the only way to make a view heard is to allow, or even to invite, society to ridicule and sensationalise it as intemperate and irrational Mill Admittedly, the success of this strategy depends partly on the character of the society in which it is employed; but it should not be ruled out as a strategy for communication. A practice distinct from, but related to, civil disobedience is rule departure on the part of authorities. Rule departure is essentially the deliberate decision by an official, for conscientious reasons, not to discharge the duties of her office Feinberg It may involve a decision by police not to arrest offenders cf. Smith or a decision by prosecutors not to proceed to trial, or a decision by a jury or by a judge to acquit an obviously guilty person. Whether these conscientious acts actually contravene the general duties of the office

is debatable. Moreover, both are communicative, though their audiences may differ. The official who departs from the rules of her office addresses her action principally to the individuals or groups whom she intends to assist through her breach of a specific duty. Her action demonstrates to these parties both that she disagrees with a policy that would treat them in a certain way and that her actions align with her commitments. Where civil disobedience and rule departure differ is, first, in the identity of their practitioners. Whereas rule departure typically is an action taken by an agent of the state including juries , civil disobedience typically is an action taken by citizens including officials acting as ordinary citizens and not in the capacity of their official role. Second these practices differ in their legality. Whether rule departure actually involves a breach of law is unclear.

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Chapter 2 : Archives â€“ Chapman Law Review

The orthodox view is that Americans support wartime Presidents who trample civil liberties, but later feel remorseful and support the generous granting of additional civil rights. However, civil rights laws are created and enhanced due to multiple political, legal, social, and other factors beyond collective guilt over wartime sins.

Background[edit] Schenck v. United States was the first in a line of Supreme Court Cases defining the modern understanding of the First Amendment. The Wilson Administration launched a broad campaign of criminal enforcement that resulted in thousands of prosecutions. Many of these were for trivial acts of dissent. In the first case arising from this campaign to come before the Court, Baltzer v. They were charged with obstructing the recruitment and enlistment service, and convicted. When a majority of the Court voted during their conference to affirm the conviction, Holmes quickly drafted and circulated a strongly worded dissenting opinion: Real obstructions of the law, giving real aid and comfort to the enemy, I should have been glad to see punished more summarily and severely than they sometimes were. But I think that our intention to put out all our powers in aid of success in war should not hurry us into intolerance of opinions and speech that could not be imagined to do harm, although opposed to our own. It is better for those who have unquestioned and almost unlimited power in their hands to err on the side of freedom. White then asked Holmes to write the opinion for a unanimous Court in the next case, one in which they could agree, Schenck v. Holmes wrote that opinion, and wrote again for a unanimous court upholding convictions in two more cases that spring, Frohwerk v. United States and Debs v. United States , establishing what remains the standard for deciding the constitutionality of criminal convictions based on expressive behavior. Holmes disliked legislative-style formulas, and did not repeat the language of "clear and present danger" in any subsequent opinion, however. The Schenck opinion alone accordingly is often cited as the source of this legal standard, and some scholars have suggested that Holmes changed his mind and offered a different view in his equally famous dissent in Abrams v. United States The facts of the Schenck Case were as follows. The executive committee authorized, and Schenck oversaw, printing and mailing more than 15, fliers to men slated for conscription during World War I. The fliers urged men not to submit to the draft, saying "Do not submit to intimidation", "Assert your rights", "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain," and urged men not to comply with the draft on the grounds that military conscription constituted involuntary servitude , which is prohibited by the Thirteenth Amendment. They relied heavily on the text of the First Amendment, and their claim that the Espionage Act of had what today one would call a "chilling effect" on free discussion of the war effort. The statute only applied to successful obstructions of the draft, but common-law precedents allowed prosecution for attempts that were dangerously close to success. Attempts made by speech or writing could be punished like other attempted crimes; the First Amendment did not protect speech encouraging men to resist induction, because, "when a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. Subsequent jurisprudence[edit] In subsequent cases, when it appeared to him that the Court was departing from the precedents established in Schenck and companion cases, Holmes dissented, reiterating his view that expressions of honest opinion were entitled to near absolute protection, but that expressions made with the specific intent to cause a criminal harm, or that threatened a clear and present danger of such harm, could be punished. United States , he elaborated on the common-law privileges for freedom of speech and of the press, and stated his conviction that freedom of opinion was central to the constitutional scheme because competition in the "marketplace" of ideas was the best test of their truth. California , concerning a conviction for seditious speech forbidden by California law, Holmes joined a concurring opinion written by Justice Louis D. Brandeis once again explaining the clear-and-present-danger

standard for criminal attempts in these terms, reiterating the argument that political speech was protected because of the value of democratic deliberation. The Supreme Court continued to affirm convictions for seditious speech in a series of prosecutions of leftists, however, culminating in Dennis v. United States , U. Judge Learned Hand in the court below and Chief Justice Vinson for the plurality in the Supreme Court cited Schenck, and the language of "clear and present danger" accordingly fell into disfavor among the advocates of free speech and freedom of the press. A unanimous Court in a brief per curiam opinion in Brandenburg v. Ohio , abandoned the disfavored language while seemingly applying the reasoning of Schenck to reverse the conviction of a Ku Klux Klan member prosecuted for giving an inflammatory speech. The Court said that speech could be prosecuted only when it posed a danger of " imminent lawless action ," a formulation which is sometimes said to reflect Holmes reasoning as more fully explicated in his Abrams dissent, rather than the common law of attempts explained in Schenck. Brandenburg is also taken to have repudiated the clear-and-present-danger standard as construed in Dennis, and to have adopted something more like the explication given by Holmes and Brandeis in subsequent opinions. Partly because the standard for protecting expressive behavior under the First Amendment was stated differently in his different opinions, "revisionist" scholars have argued that Holmes changed his mind in the summer of , and that after writing three opinions for a unanimous court, he stated a different and more liberal view in his Abrams dissent a few weeks later. The facts in Holder v. Humanitarian Law Project were similar to those in Abrams: Section B, for providing material support for terrorist organizations. The Supreme Court held that such prosecutions were not barred by the First Amendment, expressly rejecting the argument that a "specific intent" to assist terrorist acts was required, rejecting also the claim of the dissenting justices that the case was governed by the concurrence in Whitney, or by the standard stated in Brandenburg. Finally, in Citizens United v. FEC , the majority of the Court rejected the argument made by the dissenters that the First Amendment was premised on the value of democratic deliberation in the "marketplace of ideas.

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Civil Liberties and War. From the outset of the new American government under the Articles of Confederation , the need for striking a delicate balance between authority and liberty was essential. Fear of powerful central control was stated clearly regarding the English king in the U. It remained an ongoing concern under the Constitution. Hence the Alien and Sedition Acts , which sought to sharply curtail freedom of speech and press as long as the Undeclared Naval War with France of â€" was underway. It also resulted in a movement headed by political writers to define more precisely the permissible limits of free speech and press. The War of with England , highly unpopular in Federalist New England , not only elicited bitter criticism of Republican president James Madison but produced discussions by some Federalists at the Hartford Convention regarding secession. Madison prosecuted none, but deplored many. The Mexican War of the s carried with it so many subtle moral and political issues that formal legalistic civil liberties issues took a backseat. Congressmen, including Abraham Lincoln , worried aloud how slavery could be further curtailed so as not to destroy the union. Henry David Thoreau denounced the war and refused to pay taxes to support it, but also called for civil disobedience and noncompliance with wartime actions that might result in obtaining more slave territory. Winfield Scott appeased some critics by seeking to protect Mexican property rights by setting up military commissions that would develop a form of due process of law for citizens subjected to unruly behavior by occupying U. Even though this did not restrain the U. Army, it brought a new technique of controlling the more extreme abuses of the military in its dealing with civilian populations. The Civil War saw important crises in civil liberties developed ultimately out of the White House as President Abraham Lincoln claimed a body of Presidential War Powers which had the force of law and which frequently sublimated civil liberties to national security. This sprang from presidential initiative, but was then followed by congressional approval or acquiescence. Translated informally, this led to various orders for control of the press and curtailment of disloyal utterances. The army was to control reporters and take action against incorrect reports and inadvertent leaking of strategic and military secrets. Feeling that more control was needed, an effort was made to exclude from the mails printed material that was calculated to interfere with the war policy. This followed its Treason Act, which was never held to cover the expression of disloyal sentiments. These actions, plus the use of martial law against critical civilians, constituted a kind of prior restraint and drew strong negative public reaction.

Chapter 4 : Civil Disobedience (Stanford Encyclopedia of Philosophy)

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Chapter 5 : Chapman Law Review | Vol 12 | Iss 3

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Chapter 6 : Schenck v. United States - Wikipedia

The orthodox view is that Americans support wartime Presidents who trample civil liberties, but later feel remorseful and support the generous granting of additional civil rights.

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Chapter 7 : "Justifying Wartime Limits on Civil Rights and Liberties" by Robert J. Pushaw

Rumsfeld / US Supreme Court -- Trading civil liberties for apparent security is a bad deal, cont'd / Marjorie Cohn -- Justifying wartime limits on civil rights and liberties, cont'd / Robert J. Pushaw, Jr. -- Boumediene v.

Chapter 8 : Back Issues | Chapman Law Review | Fowler School of Law | Chapman University

Lincoln, Habeas Corpus and the Suspension of Civil Liberties During the Civil War: Law Review & Journal Articles This guide is designed to complement "Lincoln: The Constitution and the Civil War," a traveling exhibition held at the Pace Law Library between March 5 - April 11,

Chapter 9 : Pepperdine Law - Vol. 29, Iss. 1 (Spring/Summer) by Pepperdine University - Issuu

A Response to Dean Chemerinsky Robert J. Pushaw, Jr. Reflections on Civil Liberties in Wartime, Robert J. Pushaw, Jr., Justifying Wartime Limits on Civil.*