# Law, Morality, and Thoreau

*By* PHILIP H. RHINELANDER*

My reservations about Professor Bennett's article, *The Constitution and the Moral Order*,[1] are of two kinds. One kind pertains to the multiplicity and variety of the relations between law and morality, of which I think Professor Bennett takes insufficient note. Professor Hart, in opening his lectures on *Law, Liberty and Morality*,[2] observed that "in the heat of the controversy often generated when law and morals are mentioned in conjunction, it is often overlooked that there is not just one question concerning their relations but many different questions needing quite separate consideration."[3] Instead of sorting out causal questions, conceptual questions, and normative questions for separate consideration, Professor Bennett lumps them together, thereby obscuring some significant issues. It will be necessary to consider some of the main distinctions that need to be made. My second set of reservations pertains to the *relata* that the relations between law and morals are thought to connect. While the term "law" is relatively unambiguous when applied to positive law[4] (as I shall apply it unless otherwise indicated), terms like "morality" and "moral order" have different content in different contexts. Morality, for example, may refer to the mores of a society as practiced at a given time, or to its professed standards, or to some other standards that are neither practiced nor professed by the society in question but are invoked by some moralist as being required by his concept of moral rectitude. Again, if a distinction is drawn between morality and expediency, the force of that dis-

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1. Bennett, *The Constitution and the Moral Order*, 3 HASTINGS CONST. L.Q. 899 (1976) [hereinafter cited as Bennett].

2. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963) [hereinafter cited as HART].

3. *Id.* at 1.

4. By "positive law" I mean actual laws, including constitutional provisions, legislative enactments, and judicial decisions, as contrasted with ideal norms of so-called "natural" law or "higher" law.

tinction will vary according to the ethical outlook within which it occurs. I do not believe Professor Bennett takes proper account of variant meanings of this sort or of the need to consider basic differences among ethical terms.

Both sets of difficulties come to a head over Professor Bennett's interpretation of Thoreau. I shall therefore take that as the focus of my discussion, hoping to call attention to some of the main issues that need first, to be untangled, and second, to be separately identified, before any of them can be effectively dealt with. Professor Bennett's estimate of Thoreau is as follows:

> In Thoreau's view, matters of expediency belong to the law, while morality is found in the conscience of the individual. His exaltation of conscience is well known. "[A]ny man more right than his neighbors," he informs us, "constitutes a majority of one. . . ." The moral bankruptcy of the social order is assumed: "Government," he claims, "is at best but an expedient," and Thoreau is even "desirous . . . of being a bad subject." In believing that law is limited to matters of nonmoral relations, Thoreau goes far beyond the idea that law cannot create values, to the position that the legal and moral domains are mutually exclusive.[5]

From this interpretation, for which Professor Bennett claims the authority of Professor Hurst,[6] he goes on to attribute to Thoreau "the theory of the moral insignificance of the legal order";[7] he accuses Thoreau of making a "categorical, simplistic dichotomy";[8] he speaks of Thoreau's "denigration of social process to mere expediency";[9] and he rejects "Thoreau's denuded Constitution."[10] This interpretation of Thoreau strikes me as both mistaken and internally incoherent.

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5. Bennett, *supra* note 1, at 911-12 (footnotes omitted).

6. Professor Hurst's article, *Thoreau, Conscience and Law*, 19 S.D.L. REV. 1 (1974) [hereinafter cited as Hurst], ascribed to Thoreau a belief in the "sovereignty of individual conscience" (*id.* at 8) that supposedly had the effect of "limiting uses of law to matters merely of utilitarian expediency." *Id.* at 5. Hurst refers to "Thoreau's rigid division between the domains of humane values and the domains of law" (*id.* at 37); and he deplores "Thoreau's wholesale rejection of legal processes as instruments of humane values . . . ." *Id.* at 38. He does not, however, as far as I can find, equate "humane values" with the whole of morality. Hurst, like Bennett, ignores Thoreau's belief in higher law as providing the ultimate norm to which both positive law and positive morality ought to conform. This is, I think, a serious error, but Hurst does not make the further mistake of excluding all considerations of utilitarian expediency from the sphere of morals as Bennett seems to do.

7. Bennett, *supra* note 1, at 912.

8. *Id.*

9. *Id.* at 913.

10. *Id.*

## I. Relations between Law and Morality

Between law and morality there is no single type of relationship. Instead there is a variety of relations, giving rise to a multiplicity of different but interlocking questions that can be approached from different points of view and on most of which there is room for a diversity of views. The main types of questions may be grouped, at least roughly, under three general headings, corresponding to the three main types of relations or possible relations that may be the subject of inquiry: (1) causal and functional, (2) analytical and conceptual, and (3) evaluative and normative.

### 1. Causal and Functional Issues

Examples of causal-functional questions are: (a) Is the development of law influenced by morals? (b) Is the development of morals influenced by law? (c) Can a law, or a system of law, be (or remain) effective if the moral convictions of the people as a whole fail to support it? Inquiries of this sort call for historical and sociological evidence, including evidence about the historical impact of moral and political ideas. The passage from Judge Learned Hand with which Professor Bennett begins his paper[11] raises questions in this regard. Professor Bennett's discussion of the principal values of the American constitutional system[12] and their historical background also pertains to this sort of inquiry, as does his apt observation that other societies have been ravaged as often by decay from within as by invasion from without.

It is to be observed, however, that inquiries under this heading do not ask whether the American constitutional system is worth preserving; that point is here taken for granted. The discussion aims at

11. *Id.* at 899.

12. It makes for clarity to distinguish between values and norms. Values—if considered as comprising human needs, wants, attitudes, aspirations, and their objects—do not, in and of themselves, provide specific standards or principles of action, which is the function of norms. G. VONWRIGHT, NORM AND ACTION (1961); A. ROSS, DIRECTIVES AND NORMS 78-92 (1968). The two are, of course, closely connected. A.P. D'Entreves has pointed out that "values must be given a 'normative' expression in order to have a meaning." A.P. D'ENTREVES, NATURAL LAW: AN HISTORICAL SURVEY 117 (1962). D'Entreves also observes that "[w]hat language is to thought, norms are to values." *Id.* at 120. Kurt Baier argues that values constitute backing for norms, in the sense that values provide the basis for the creation and the evaluation of norms. Baier, *What is Value?: An Analysis of the Concept*, in VALUES AND THE FUTURE 33, 50-53 (K. Baier & N. Rescher eds. 1969). It should be noted that a norm, *e.g.*, the rule that promises ought to be kept, may itself have a value insofar as it is an object of approbation. If the validity of the norm is challenged, it may be defended by pointing to the function it performs in maintaining mere basic social values.

clarifying the kind of functional relation between law and morality that is necessary for its preservation. I do not question the importance of this inquiry. I agree generally that an active convergence of law and morality is necessary to the effective functioning of any system, including our own. As Professor Lon Fuller has observed:

> No written constitution can be self-executing. To be effective it requires not merely the respectful deference we show for ordinary legal enactments, but that willing convergence of effort we give to moral principles in which we have an active belief. One may properly work to amend a constitution, but so long as it remains unamended one must work with it, not against it or around it. All this amounts to saying that to be effective a written constitution must be accepted, at least provisionally, not just as law, but as good law.[13]

### 2. Analytical and Conceptual Issues

Examples of analytical-conceptual questions are: (a) Must some reference to moral principles enter into an adequate conception or definition of law or of a legal system? (b) Is it merely a contingent fact that law and morals often overlap and share a common vocabulary of rights, obligations, and duties? (c) What are the appropriate criteria for an adequate conception or definition of law or legal systems, as such? Professor Hart (whose formulation of these questions I have substantially adopted) notes that they "are famous questions in the long history of the philosophy of law, but perhaps they are not so important as the amount of time and ink expended upon them suggests."[14] Such questions need to be noted, however, if only to be distinguished from other types of inquiry. I would add that familiarity with the long debates over the conceptual nature of law[15] and legal systems,[16] between adherents of natural law and natural rights on the one hand, and utilitarians (like Bentham and Austin), analysts (like John Chipman Gray), pragmatists (like Pound or Learned Hand), positivists (like

13. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 642 (1958) [hereinafter cited as Fuller], *reprinted in* OLAFSON, SOCIETY, LAW, AND MORALITY 471, 479 (1960).

14. HART, *supra* note 2, at 2.

15. Particularly valuable is the Hart-Fuller debate. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 599 (1958); Fuller, *supra* note 13, at 630. *See also* H.L.A. HART, THE CONCEPT OF LAW (Oxford 1961).

16. *See, e.g.*, J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (1970); Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); J. Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

Hans Kelsen), and legal "realists" (like Jerome Frank) on the other, throw considerable light on the import of a position like Thoreau's.

### 3. Evaluative and Normative Issues

Examples of evaluative-normative issues are: (a) Is law or a system of law subject to moral criticism? (b) If so, by what standards? (c) Under what circumstances, if any, can there be a moral right or duty to disobey the law. A further question is this: (d) Does the fact that certain conduct is viewed as immoral by prevailing community standards justify, in and of itself, the imposition of criminal penalties? In other terms, ought immorality, as such, to be punishable by law?[17]

Inquiries of this type may be relevant to inquiries of the first type, because a law that is regarded by a substantial proportion of the people as manifestly unjust is likely to be ineffective and to encourage disrespect rather than support for law in general. Yet the immediate focus of evaluative-normative questions is different from that of causal-functional questions. As applied to the American constitutional system, we are no longer asking how the system is to be preserved, but whether it is worth preserving, or how to improve it so that it will become more clearly worth preserving. This, I submit, is probably the most fundamental of all questions in the area of law and morals. It is too important to be confused with—or hidden behind—other questions.

These three different kinds of questions should be kept in mind in an examination of Professor Bennett's claim that Thoreau went "far beyond the idea that law cannot create values, to the position that the legal and moral domains are mutually exclusive."[18]

Did Thoreau assert the causal-functional independence of law and morals. Clearly not. In fact he claimed just the opposite. His most influential thesis, which influenced Gandhi as well as many radicals here and abroad in the 1960's, was that passive resistance on moral grounds could destroy the practical effectiveness of laws and bring

17. This last question, which is the subject of Mill's *On Liberty*, is addressed by Hart in *Law, Liberty, and Morality*. *See* Hart, *supra* note 2. Among the extensive recent discussions, Herbert Packer's *The Limits of the Criminal Sanction* (1968), is especially significant. Although Professor Bennett does not deal with this problem, it arises by necessity when concrete steps are taken to implement several of the values he lists as basic, especially those concerned with respect for persons and the protection of thought and speech.

18. Bennett, *supra* note 1, at 912.

about change in the laws.[19] Such a claim as this presupposes the functional *dependence* of law upon morality, at least in any democratic society where the authorities take cognizance of the need for general popular support to make laws practically effective. If Thoreau had believed that American laws were causally and functionally *independent* of popular moral convictions, he could not have supposed that passive resistance on moral grounds would be influential. "Wise law makers," Professor Hurst notes, "have shared Thoreau's perception that 'a minority . . . is irresistible when it clogs by its whole weight.' "[20] He cites a specific instance when Congress "yielded to the moral claims as well as to the economic ambitions" of influential minorities,[21] adding:

> Thoreau reminds us that, at least in the kind of society we have aspired to be, the force of law is marginal and must be husbanded, and that when substantial numbers of people reach moral judgments that differ with those embodied in law, the law is likely to change.[22]

Thoreau's position on this point is complementary to that of Judge Learned Hand in the passage quoted by Professor Bennett at the beginning of his article.[23] Judge Hand argued that if our system of laws is to be preserved, it must have the active moral support of the people.[24] Thoreau believed that active moral opposition would defeat the system and induce change. These are not opposing positions; they are two sides of the same coin.

If Thoreau thus recognized that morality affects law, did he nevertheless assert (as Professor Bennett seems to suppose) that law cannot affect morality? Again the answer is no. Thoreau regarded the influence of the law on morality as significant, but primarily bad. He as-

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19. "I know this well," he wrote, "that if one thousand, if one hundred, if ten men whom I could name,—if ten *honest* men only—aye, if *one* HONEST man, in this State of Massachusetts, *ceasing to hold slaves*, were actually to withdraw from this copartnership, and be locked up in the county jail therefor, it would be the abolition of slavery in America. . . .

"If any think that their influence would be lost there, and their voices no longer afflict the ear of the State, that they would not be as an enemy within its walls, they do not know by how much truth is stronger than error . . . . A minority is powerless while it conforms to the majority; it is not even a minority then; but it is irresistible when it clogs by its whole weight. If the alternative is to keep all just men in prison, or give up war and slavery, the State will not hesitate which to choose. . . ." Thoreau, *On the Duty of Civil Disobedience*, in WALDEN AND CIVIL DISOBEDIENCE 222, 230-31 (Signet ed. 1960) [hereinafter cited as Thoreau, *Civil Disobedience*].

20. Hurst, *supra* note 6, at 9.

21. *Id.* at 9.

22. *Id.* at 10.

23. See note 11 *supra.*

24. Bennett, *supra* note 1, at 899.

serted quite explicitly that uncritical respect for law tended to dull the moral sense and to encourage mechanical obedience and blind conformity.[25] Thoreau may be open to criticism for having emphasized the bad effects of law upon morality without allowing sufficiently for the positive and constructive effects. But he was fully aware of a close causal and functional interaction between law and morality.

Let us look now at the second type of question. Can Thoreau be taken as asserting the analytical-conceptual independence of law and morality? Again the answer must be negative. Thoreau's position was rooted in his belief, which Professor Bennett fails to mention, that there exists a higher law of rectitude and justice, not made by any human fiat but discoverable intuitively by the conscientious mind, to which all counsels of expediency, whether legal or moral, must be subordinated.[26] Thoreau stood in the venerable tradition of natural law, in company with the fictional Antigone and with historical figures such as Cicero, St. Thomas Aquinas, Grotius, the subscribers to the Declaration of Independence, and, in our own day, Martin Luther King. According to this view, which may take either a religious or a secularized form, the domains of law and morality are not mutually exclusive; rather, positive law falls within the sphere of morality, so that a law that is morally unjust is invalid and cannot command obedience.

25. "It is not desirable to cultivate a respect for the law, so much as for the right. . . . Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice. . . .

"The mass of men serve the state thus, not as men mainly, but as machines, with their bodies. . . . In most cases there is no free exercise whatever of the judgment or of the moral sense; but they put themselves on a level with wood and earth and stones; and wooden men can perhaps be manufactured that will serve the purpose as well." Thoreau, *Civil Disobedience, supra* note 19, at 223-24.

26. Thoreau's belief in the existence of higher laws transcending the norms of positive morality as well as those of positive law is evident in *Walden*, notably in chapter eleven, entitled *Higher Laws*. The same view is reflected in a number of passages in Thoreau's *Civil Disobedience*: "It is not so important that many should be as good as you, as that there be some absolute goodness somewhere; for that will leaven the whole lump." Thoreau, *Civil Disobedience, supra* note 19, at 226. "Action from principle—the perception and the performance of right—changes things and relations; it is essentially revolutionary, and does not consist wholly with anything which was. It not only divides States and churches, it divides families; ay, it divides the *individual*, separating the diabolical in him from the divine." *Id.* at 228. "I do not hesitate to say, that those who call themselves Abolitionists should at once effectually withdraw their support, both in person and property, from the government of Massachusetts and not wait till they constitute a majority of one, before they suffer the right to prevail through them. I think that it is enough if they have God on their side, without waiting for that other one. Moreover, any man more right than his neighbors constitutes a majority of one already." *Id.* at 229-30. Note that if the last sentence is taken out of its immediate context, its import may be mistaken.

Hence Professor Bennett's interpretation of Thoreau fails here, as it failed in the causal-functional aspect.

Finally, in the context of evaluative-normative issues, can we say that Thoreau separated law and morals in such a way as to exclude moral criticism of law? A position of this sort was taken by the late Hans Kelsen, who held that while legal norms can be objectively valid, moral judgments are no more than emotive expressions of individual feelings lacking objective validity. On this basis, Kelsen concluded that it is logically impossible to assert the existence of a binding moral obligation to disobey a duly enacted law.[27] Whatever one thinks of such a position,[28] it is the complete antithesis of Thoreau's. Thoreau believed that moral criticism of law was obligatory; that objective moral standards of right conduct and right legislation were to be found in higher law; and that the conscientious citizen is under a moral duty to disobey laws that work injustice to others.[29] There were not, for him, two mutually exclusive domains, but different levels of obligation reflecting higher and lower moral perspectives—the utilitarian perspective being insufficient. It should be stressed that for Thoreau, as his criticism of Paley makes clear,[30] the higher demands of justice apply equally to individuals, societies, and governments. There is not a double standard, but a hierarchy of universal standards. It should be noted also in this connection that Thoreau did not dismiss the American constitutional system as morally valueless; he regarded it as good, but from the higher moral perspective, notably imperfect:

> Seen from a lower point of view, the Constitution, with all its faults, is very good; the law and the courts are very respectable; even this State and this American government are, in many respects, very admirable, and rare things, to be thankful for, such as a great many

27. H. KELSEN, GENERAL THEORY OF LAW AND THE STATE 374-75, 407-10 (1945).

28. Kelsen's view has been much criticized. *See, e.g.*, A. ROSS, DIRECTIVES AND NORMS 156-58 (1968) (suggesting that Kelsen later modified his view).

29. Thoreau held that some injustices do not warrant disobedience: "If the injustice is part of the necessary friction of the machine of government, let it go, let it go: perchance it will wear smooth . . . but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law." Thoreau, *Civil Disobedience, supra* note 19, at 229.

30. "Paley, a common authority with many on moral questions . . . resolves all civil obligation into expediency . . . . But Paley appears never to have contemplated those cases to which the rule of expediency does not apply, in which a people, as well as an individual, must do justice, cost what it may. If I have unjustly wrested a plank from a drowning man, I must restore it to him though I drown myself. This, according to Paley, would be inconvenient. But he that would save his life, in such a case, shall lose it. This people must cease to hold slaves, and to make war on Mexico, though it cost them their existence as a people." Thoreau, *Civil Disobedience, supra* note 19, at 225.

> have described them; but seen from a point of view a little higher, they are what I have described them; seen from a higher still, and the highest, who shall say what they are, or that they are worth looking at or thinking of at all?[31]

It is evident that Thoreau, far from asserting the separation of law and morality, asserted their interdependence in all three aspects. He believed that there was close causal and functional interaction between them, although, as regards the influence of law on values, he stressed the bad effects only, ignoring the good. As a believer in higher law, he stood in a tradition that conceived of law as falling conceptually within the moral domain, subject to transcendent requirements of justice. He firmly asserted that law ought to conform to the ultimate norms of justice; it was on this basis that he justified disobedience to laws that failed to meet the highest standards of morality. In sum, Professor Bennett's interpretation misrepresents Thoreau on every essential point.

## II. Morality and Expediency

I turn now briefly to the second set of difficulties, namely those arising from the looseness and shifting senses of ethical terms. I have claimed that Professor Bennett has misrepresented Thoreau, but let us assume that I am wrong and that Thoreau in fact held substantially the views attributed to him. The question then arises: What is the significance of such views, as summarized by Professor Bennett? Consider this statement on its own terms: "[M]atters of expediency belong to the law, while morality is found in the conscience of the individual. . . . [T]he legal and moral domains are mutually exclusive."[32]

Neither law nor morality designates any particular kind of action or conduct; what law and morality both provide are rules and standards for guiding and judging conduct. To say that "morality is found in the conscience of the individual" must be taken to mean that the standards of moral action and moral judgment are either made or discovered by conscience.[33] But to locate the standards in this way does not tell us

31. *Id.* at 238.

32. This is a composite of the opening and closing statements in Professor Bennett's summary description of the position attributed to Thoreau. *See* Bennett, *supra* note 1, at 911-12.

33. According to traditional theories of natural law and natural rights, the individual discovers through conscience (or "reason," the "moral sense," or "common sense") the moral law ordained by God or Nature, but does not make it. The distinction between discovering and making the moral law is of great importance, at least theoretically, because on this view the basic rules of morality are given to all individuals equally and

what the standards are. On the other hand, to speak of matters of expediency is apparently to speak of those acts, of whatever sort, that are done from certain motives, with the purpose of securing some advantage. But to say that such actions "belong to the law" does not tell us what standards the law applies or should apply in judging them. Nor does it tell us what the law does, or should do, about actions done from other motives, such as killing a man in a blind rage or torturing an animal for the sheer enjoyment of its suffering. Are these matters of expediency merely? It would seem not, yet the law forbids them, and quite properly. The question is one of conflicting, or possibly conflicting, standards and obligations. Yet these do not enter into Professor Bennett's description. The result is that his supposed antithesis fails; the alternatives are neither coordinate, nor mutually exclusive, nor exhaustive. The morality of conscience might well approve certain acts done because they were deemed "expedient," like exercising personal self-discipline for the sake of health. And the law might well aim at justice rather than merely seeking to maximize utility and economic advantage.

I suspect that Professor Bennett has been victimized by a metaphor—a metaphor apparently borrowed from Professor Hurst.[34] I refer to the conception of law and morality as each having its own "domain." However, if "domain" signifies a range of application, the domains of law and morality largely overlap. Much conduct that is legally prohibited is also morally condemned; much conduct that is morally condemned is also legally prohibited. And the question whether the law should prohibit conduct solely on the ground that it is considered immoral under prevailing community standards is in large measure a moral question.[35]

There is a further difficulty about the term "expediency" when it is used as an independent substantive. Expediency is relational; it implies that something is conducive to something else. When expediency is contrasted with morality, it usually signifies something done for the sake of some advantage or benefit to be gained, with the implication that a truly moral act should exclude all considerations of the

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are uniform for all. In this context, conscience (or "reason," the "moral sense," or "common sense") is a cognitive faculty capable of moral intuition. As to the importance of this tradition in 17th, 18th, and early 19th century thought, and as to Thoreau's place in it, see S. LYND, INTELLECTUAL ORIGINS OF AMERICAN RADICALISM (1968). It must be emphasized that Thoreau, though a strong individualist, was not a proto-existentialist, though sometimes so treated.

34. Hurst, *supra* note 6, at 37 (opposing the "domains" of humane values and law).

35. See note 17 *supra*.

actor's self-interest. Such was Kant's position. But many other moralists have held that certain kinds of self-interest are morally admissible, even praise-worthy. Still others, like the utilitarians, have made social expediency the basis of all morality as well as law.

It appears from Thoreau's comments on Paley[36] that while he rejected the utilitarian position, he did not go to the opposite Kantian extreme. What he seems to have believed was that expediency is a morally acceptable guide for ordinary purposes, but not when it would allow or require an individual or a nation to do injustice to others.[37]

## III. Is Our Constitutional System Worth Preserving?

I noted earlier that there is an important difference between asking how our constitutional system is to be preserved and asking how it is to be made more clearly worth preserving. It remains to say a word about the latter question.

Nobody considers our present system of law perfect as it stands. Certainly Judge Learned Hand did not. In an eloquent short article on the value of civil liberties,[38] he reaffirmed the conviction that their

36. See note 30 *supra.*

37. Professor Hurst takes Thoreau's remark that government is "at best but an expedient" in conjunction with his expressed wish for "a government in which majorities decide only those questions to which the rule of expediency is applicable" as implying (in Hurst's words) "that governmental procedures are legitimate only to decide 'these questions to which the rule of expediency is applicable' while all questions of moral content must be left to individual conscience." Hurst, *supra* note 6, at 13. I do not think this follows. What Thoreau was attacking here was not law or government as such, but majority rule where the majority was not sufficiently enlightened to follow the guidance of conscience. What he wrote was: "But a government in which the majority rule in all cases cannot be based on justice, even as far as men understand it. Can there not be a government in which majorities do not virtually decide right and wrong, but conscience?—in which majorities decide only those questions to which the rule of expediency is applicable? Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then? I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right. . . ." Thoreau, *Civil Disobedience, supra* note 19, at 223.

Thoreau, while believing that "every man has a conscience," was distrustful of the masses and of legislators generally, including Daniel Webster, because they failed to heed, or to live by, the dictates of the higher law as manifested to conscience. If it be objected that Thoreau had no right to treat himself as more conscientious than other men, or than the average man, or than Daniel Webster, it should be noted that this difficulty is common to all theories of natural law or higher law, when they are joined with the right of private judgment. If we, on this account, reject higher law theories, this does not justify our subtracting this view from Thoreau and then reconstructing his view to cover the omission. It was Thoreau's devotion to higher law, as he saw it, which led him to distrust what J.S. Mill called the tyranny of the majority, and to reject (in

preservation depends more upon the spirit and moral temper of the people than upon the Bill of Rights or upon the courts' interpretations.[39] But he went on to make clear, as one reason for this belief, that he viewed our basic constitutional principles not as eternal verities, but as "the best postulates so far attainable." He went on to say:

> [I]f at the end some friendly critic shall pass by and say, "My friend, how good a job do you really think you have made of it all?" we can answer, "I know as well as you that it is not of high quality, but I did put into it whatever I had, and that was the game I started out to play."
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> It is still in the lap of the gods whether a society can succeed based on "civil liberties and human rights," conceived as I have tried to describe them; but of one thing at least we may be sure: the alternatives that have so far appeared have been immeasurably worse, and so, whatever the outcome, I submit to you that we must press along. Borrowing from Epictetus, let us say to ourselves: "Since we are men we will play the part of a Man. . . ."[40]

Readers of Thoreau will recall his convergent admonition: "I think that we should be men first and subjects afterward."[41] They will recognize also that the fundamental difference between Thoreau's moral stance and that of Judge Hand was that Thoreau invoked, while Judge Hand rejected, the authority of higher laws of rectitude and justice, intuitively discoverable by conscientious minds, to which all counsels of expediency, whether moral or legal, must give way. Measured by such transcendent standards, Thoreau found the American constitutional system valuable but sufficiently imperfect to warrant civil disobedience to remedy injustice. Judge Hand, the pragmatist, stressed the positive values despite the imperfections.[42] The difference here is one of perspectives such as the difference between the man who regrets that the glass of water is half empty and the man who

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effect) the maxim, *vox populi, vox Dei.* But he shared the view expressed by Milton in *Areopagitica* that the truth, if put forward, would eventually prevail over error. See note 19 *supra.*

38. Hand, *Freedom of Dissent,* N.Y. Times Mag., Feb. 16, 1955, *reprinted in* BEYOND BERKELEY 419 (Katope & Zolbrod eds. 1966).

39. *Id.*

40. *Id.* at 424.

41. See note 37 *supra.*

42. I do not know whether Judge Hand specifically discussed civil disobedience, but I should have expected him to agree largely with Thoreau's position, though on different grounds. Although most defenders of civil disobedience as a morally defensible tactic for securing the change of unjust laws have relied, like Thoreau, on some type of higher law theory, it is possible to defend it on utilitarian or pragmatic grounds. See C. COHEN, CIVIL DISOBEDIENCE 102-28 (1971), for a review and critique of various grounds of moral justification.

is pleased that it is half full. Hand and Thoreau agreed in seeing the American legal system as fragile and as depending for its continued existence on the active moral support of the people. Although Thoreau was in one respect more cynical, he was in another respect perhaps more optimistic by virtue of his belief that the principles of perfect justice are knowable and that moral truth, once publicly declared, will be recognized and will ultimately prevail.

A paragraph from the concluding chapter of *Walden*,[43] which was published in 1854, several years after the essay on civil disobedience,[44] may be regarded as reflecting Thoreau's considered view:

> It is said that Mirabeau took to highway robbery "to ascertain what degree of resolution was necessary in order to place one's self in formal opposition to the most sacred laws of society." He declared that "a soldier who fights in the ranks does not require half so much courage as a foot-pad,"—"that honor and religion have never stood in the way of a well-considered and a firm resolve." This was manly, as the world goes; and yet it was idle, if not desperate. A saner man would have found himself often enough "in formal opposition" to what are deemed "the most sacred laws of society," *through obedience to yet more sacred laws*, and so have tested his resolution without going out of his way. It is not for a man to put himself in such an attitude to society, but to maintain himself in whatever attitude he find himself through obedience to the laws of his being, *which will never be one of opposition to a just government, if he should chance to meet with such.*[45]

My criticism of Thoreau is not that he separated law and government from morality but that he separated *himself* from law and government, disclaiming responsibility for the process of political design and construction, while reserving the right to pass moral judgment upon the result. The conscientious individual, he seems to say, should stand aside from the institutions of society, withholding his cooperation until they have been brought, by the labors of other people, up to the levels of rectitude and justice prescribed by the laws of his own being. Having complained that "[s]tatesmen and legislators, standing so completely within the institution, never distinctly and nakedly behold it,"[46] he takes his own stance outside the institution as a detached but critical spectator. In one respect, this is admirable. The difficulty is that even if there are natural principles of justice, written in heaven and manifest, as he believed, to the mind of any conscientious individual willing to

43. H. THOREAU, *Walden*, in THE WORKS OF THOREAU (H. Canby ed. 1937) [hereinafter cited as THOREAU, *Walden*].

44. Thoreau, *Civil Disobedience*, *supra* note 19.

45. THOREAU, *Walden*, *supra* note 43, at 458 (emphasis added).

46. Thoreau, *Civil Disobedience*, *supra* note 19, at 238.

take heed of them, just laws and just governments must still be fashioned, slowly and laboriously, by the efforts of fallible mortals—statesmen, legislators, and judges who are willing, like Judge Learned Hand, to press forward step by step as best they can. If such principles of justice are not thus divinely ordained but must be worked out, as Judge Hand believed, by human trial and error, the task is far longer and more uncertain. In either case, with legal systems as with other human contrivances, preoccupation with the best can sometimes serve to discredit the good and prevent the achievement of the better.

There is good reason to see danger in public detachment from, or public disillusion with, our constitutional principles, from whatever cause such attitudes arise. This, apparently, is the danger that concerns Professor Bennett. It deserves the best attention we can give it.