

Mountain Resistance: Appalachian Civil Disobedience in Critical Legal Research Modeled Law Reform

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John Rawls authored the modern seminal work on civil disobedience in A Theory of Justice. Like all Rawlsian political theory, civil disobedience is very much conceived vis-à-vis the liberalism paradigm. Through this restrictive lens, the role of civil disobedience is in communicating injustices to the societal majority and to legal-institutional elites, who thereafter effect intra-systemic change (i.e., based on the pleas of disobedients). This Article, however, rejects the Rawlsian model, instead adopting a critical legal theory-based approach to civil disobedience. The role of civil disobedience via critical thought is not in communicating to the societal majority—but rather in engaging in collective contestation and self-determination. Thus imbued with contemporary critical theory, civil disobedience is re-envisioned as a grassroots sociopolitical end and not as a mere communicative means towards reform.

This Article discusses critically informed civil disobedience in the context of the critical legal research movement (“CLR”). Dedicated equally to intra-systemic and systemic reform, CLR is a proceduralist-based school that aims to effect change via radical approaches to legal research and analysis. Core CLR practices are as follows: (1) the deconstruction of the commercial legal research regime, which facilitates the unpacking of unjust doctrine, (2) a newfound practitioner reliance upon critically based theoretical resources for doctrinal reconstruction, and (3) the incorporation of grassroots activists into progressive reform initiatives. As an expansionist project, this Article examines the role of critically informed civil disobedience in this latter practice, demonstrating that transformative doctrinal and systemic change may best be achieved through the egalitarian cultivation of the civil disobedient work

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product. Civil disobedients—in addition to reformist-minded attorneys, theoreticians, and other grassroots activists—occupy a privileged reform space in this novel framework.

In linking theory to concrete reality, Appalachian civil disobedience practices are utilized as the case model for this Article. Civil disobedience is often the sole contestatory means available to the structurally subordinated Appalachian citizenry, which has suffered interminably at the hands of extractive industries and the captured ruling elite. Mountaintop removal mining, a singularly destructive practice, has long been contested by both disobedients and legal-institutional reformers; recently, momentous mountaintop removal change has at last occurred. This Article demonstrates that by incorporating Appalachian civil disobedients into continued surface mining and related reformist projects, we may best succeed in crafting both procedurally just and maximally effective transformative change for the region.

Civil disobedience [is] critical legal theory in practice.

—Günter Frankenberg¹

[C]ivil disobedience exposes the tension between . . . constitutional politics and insurrectional politics. This tension, however, is at the basis of democracy—and it keeps open the dialectic between these two poles against the claim that it has been successfully resolved and that no further struggles are necessary.

—Robin Celikates²

Ollie Combs lived in a small cabin in Clear Creek Valley, Kentucky. . . . when the [strip-mining] operations began, Combs climbed upon the ridge by her house and stood in front of the bulldozers to stop their operations.

—Joyce M. Barry on Ollie Combs³

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¹ Günter Frankenberg, *Disorder is Possible: An Essay on Systems, Laws, and Disobedience*, in *CULTURAL-POLITICAL INTERVENTIONS IN THE UNFINISHED PROJECT OF ENLIGHTENMENT* 30 (Axel Honneth ed., 1992) [hereinafter Frankenberg, *Disorder is Possible*].

² Robin Celikates, *Rethinking Civil Disobedience as a Practice of Contestation—Beyond the Liberal Paradigm*, 23.1 *CONTELLATIONS* 37, 43 (2016) [hereinafter Celikates, *Beyond the Liberal Paradigm*].

³ JOYCE. M. BARRY, *STANDING OUR GROUND: WOMEN, ENVIRONMENTAL JUSTICE, AND THE FIGHT TO END MOUNTAINTOP REMOVAL* 76 (2012) [hereinafter BARRY, *STANDING OUR GROUND*] (Ollie Combs—widely known as the “The Widow Combs”—was an influential 1960s era Appalachian disobedient).

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I. INTRODUCTION

Few would dispute the proposition that progressive socio-legal change has come slowly, if at all, in Appalachia. A century of environmental devastation and endemic socio-economic issues plague the region.⁴ Appalachia also faces

⁴ See *id.* at 20 (noting that “Central Appalachia faces formidable challenges in raising the standard of living and providing educational opportunities for the population.”); James P. Ziliak, *Progress and Prospects for Appalachia*, in *APPALACHIAN LEGACY: ECONOMIC OPPORTUNITY AFTER THE WAR ON POVERTY* 7 (James P. Ziliak ed. 2012) (“[T]he region continues to lag behind the rest of the nation on many measures of economic development and health, and parts of Central Appalachia share lingering characteristics of a poverty gap. . . . to this day Appalachia . . . is often viewed as ‘the other America.’”); APPALACHIAN REG’L COMM’N, *Strategies for Economic Improvement in Appalachia’s Distressed Rural Counties* 3 (May 2012) (“While many parts of Appalachia have shown significant improvements in income, public, [sic] health and quality of life, others still languish.”); Sam Evans, *Voices from the Desecrated Places: A Journey to End Mountaintop Removal Mining*, 34 HARV. ENVTL. L. REV. 521, 525 (2010) (“[T]he impact of MTR

unique structural problems with gender, class, and race subordination.⁵ And yet formal legal-institutional channels—whether legislative or judicial, federal or state-based—have, on the whole, yielded scant reform victories.⁶ Hegemonic interests such as pan-regional extractive industries working with captured⁷ governmental elites have long maintained an unchecked, insidious dominance. This dominance has been affected only recently, and scarcely to the benefit of the Appalachian citizenry, by the tumultuous energy market transitions discussed in this Article.⁸

mines on the natural environment is outpaced by its impact on the people who live nearby.”); Joyce M. Barry, *Mountaineers Are Always Free?: An Examination of The Effects of Mountaintop Removal in West Virginia*, 29 WOMEN’S STUD. Q. 116, 128 (2001) (“Given the economic, social, and political situations in West Virginia, mountaintop removal operators have indeed chosen the path of least possible political resistance to the exploitation nature and society by locating their operations in West Virginia.”). Many contemporary Appalachian Studies commentators focus on the fact that structural issues in Appalachia—emanating from the century’s long fossil fuel hegemony—are ultimately responsible for the region’s complex issues. See RONALD D. ELLER, UNEVEN GROUND: APPALACHIA SINCE 1945 63 (2008) (noting that few architects of the Appalachian-focused War on Poverty “associated poverty with systemic inequalities in political or economic structures” or advocated for “political re-structuring” in the region). See *infra* Part III.B.2 for CLR-modeled reform approaches with an explicitly systemic scope.

⁵ Appalachian-focused scholars from diverse disciplines are producing an ever-growing (and oftentimes intersecting) body of theoretical and empirical work on the region. See, e.g., Stephen L. Fisher, *Grass Roots Speak Back*, in BACK TALK FROM APPALACHIA: CONFRONTING STEREOTYPES 209 (Dwight B. Billings et. al. eds., 2013); SUZANNE E. TALLICHET, DAUGHTERS OF THE MOUNTAIN: WOMEN COAL MINERS IN CENTRAL APPALACHIA 9–18 (2010) (“I expanded [a gender- and class-based] interpretation to include race and the colonization process whereby working-class residents of the Appalachian region were further exploited and subordinated by outside capitalist interests, both economically and culturally.”); Debra Henderson & Ann Tickamyer, *The Intersection of Poverty Discourses: Race, Class, Culture, and Gender*, in EMERGING INTERSECTIONS: RACE, CLASS AND GENDER IN THEORY, POLICY AND PRACTICE 50, 56 (Bonnie Thornton Dill & Ruth Enid Zambrana eds., 2009) (“[W]e argue not only do the negative stereotypes fostered in Appalachia serve to control poor rural White women, but they sustain a broader system of welfare racism that impacts poor minority women.”).

⁶ See, e.g., Bryan C. Banks, *High Above the Environmental Decimation and Economic Domination of Eastern Kentucky, King Coal Remains Firmly Seated on Its Gilded Throne*, 13 BUFF. ENVTL. L.J. 125, 167–68 (2006) (“[S]tate and federal legislatures have failed to protect the residents of Appalachia. . . . Courts in the coal mining regions of Appalachia have a long history of favoring coal companies. . . . the judicial presumption that coal mines should be protected as superior to all other rights has contributed significantly to the environmental devastation [in Appalachia] . . .”).

⁷ The institutional capture phenomenon involves private industry exerting powerful influence—oftentimes tantamount to near-pervasive control—over those government institutions and officials charged with regulating that industry. See, e.g., MARY WOOD, NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 82 (2014) (“Industry’s capture of agencies remains a longstanding institutional problem.”). As Wood writes in the context of environmental law specifically, “armed with statutory power to legalize pollution and resource destruction, this captured bureaucracy becomes a deadly force against Nature and the public itself . . . the other two branches of government repeatedly fail to impose effective limits on agencies.” *Id.* at 53. Wood therefore concludes that “[t]he seams of democracy tore out a long time ago in environmental law.” *Id.*

⁸ See BARRY, *STANDING OUR GROUND*, *supra* note 3, at 25 (“[S]tate regulators in West Virginia, many of them former coal company employees, give various coal corporations carte blanche to conduct business in the state.”); see also STEPHEN L. FISHER & BARBARA ELLEN SMITH,

What though of Appalachian socio-legal reform through actions outside the formalized channels of contemporary democratic governance? In particular, what is the import of Appalachian civil disobedience? Traditionally situated between the poles of constitutionally protected protest and violent, revolutionary action,⁹ civil disobedience performs a vital and complex role across the full spectrum of modern liberatory¹⁰ and environmental movements.¹¹

Appalachian civil disobedience—already of a storied, rich, and robust tradition—ought, as both a tactical and normative matter, be more fully integrated into ongoing reform efforts. Such an infusion of the Appalachian civil disobedient work product¹² will produce the most just and genuinely effective

TRANSFORMING PLACES: LESSONS FROM APPALACHIA 254 (2012); Patrick C. McGinley, *Climate Change and the War on Coal: Exploring the Dark Side*, 13 VT. J. ENVTL. L. 255, 294 (2011) (“[T]he history of lax enforcement and regulatory politicization does not engender confidence that coal’s environmental externalities will be effectively minimized in the near future.”).

⁹ See JOHN RAWLS, A THEORY OF JUSTICE 363–68 (1971) [hereinafter RAWLS, JUSTICE] (“[C]ivil disobedience is separate[d] from other forms of opposition to [legal] authority. These range from legal demonstrations and infractions of law designed to raise test cases before the courts to militant action and organized resistance.”); Robin Celikates, *Civil Disobedience—Between Symbolic Politics and Real Confrontation*, CRITICAL LEGAL THINKING (Jul. 2, 2012), <http://criticallegalthinking.com/2012/07/02/civil-disobedience-between-symbolic-politics-and-real-confrontation/> [hereinafter Celikates, *Real Confrontation*] (“[C]ivil disobedience has to be distinguished from both legal opposition and revolutionary revolt. . . .”); Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 80 (1990) (“Civil disobedience represents a compromise between mere argument and revolution. By channeling even illegal protest into the stylized pattern of civil disobedience, Americans have brought the energy and ideas of those extremely dissatisfied with the status quo into the political process.”).

¹⁰ Critical-steeped liberatory projects generally involve combatting “systems of domination and oppression based on race, gender, sexuality or class.” Lisa A. Crooms, “*To Establish My Legitimate Name Inside the Consciousness of Strangers*”: Critical Race Praxis, Progressive Women-of-Color Theorizing, and Human Rights, 46 HOW. L.J. 229, 267 (2003) (quoting Cathleen L. Armstead, *Memorializing Racial Massacres: Faith versus Feminism in Florida*, in FEMINISM AND ANTIRACISM: INTERNATIONAL STRUGGLES FOR JUSTICE 326 (France Winddance Twine & Kathleen M. Blee eds., 2001)).

¹¹ See TONY MILLIGAN, CIVIL DISOBEDIENCE: PROTEST, JUSTIFICATION, AND THE LAW 20 (2013) (discussing contemporary civil disobedience in the context of the environmental movement and animal liberation); W. J. T. MITCHELL ET. AL., OCCUPY: THREE INQUIRIES IN DISOBEDIENCE 47 (2013) (“Occupy Wall Street is political disobedience in precisely this sense: It disobeys not only our civil structure of laws and political institutions, but politics writ large.”); Edward L. Glaeser & Cass R. Sunstein, *A Theory of Civil Disobedience* (Harvard Kennedy School Faculty Research Working Paper Series 15-036, 2015), <http://www.nber.org/papers/w21338> (exploring the role of Black Lives Matter-associated “disobedience in recent years in Ferguson, Missouri and Baltimore. . . .”); John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 115 (2007) (“Protests in modern times are often directed toward such issues as nuclear power, war, human rights violations, animal cruelty, and environmental pollution.”). Contestations at Standing Rock pertaining to the Dakota Access Pipeline constitute a recent and prominent act of civil disobedience. See, e.g., Sierra Crane-Murdock, *Standing Rock: A New Moment for Native American Rights*, THE NEW YORKER (Oct. 12, 2016), <http://www.newyorker.com/news/news-desk/standing-rock-a-new-moment-for-native-american-rights>.

¹² The term “civil disobedient work product” is the author’s own formulation and is intended as a broad catch-all: included are traditional written or oral work products by disobedients—like

socio-legal change for the embattled Appalachian region.

The Article will proceed in three Parts. Part I introduces the critical legal research framework (“CLR”). This analysis reveals the insidious mechanisms through which legal research outcomes are homogenized—and thus the doctrinal status quo maintained. Part I concludes with a summary of CLR strategies.¹³ The goal of the CLR project, as articulated by Professors Richard Delgado and Jean Stefancic, is demonstrated as “reinventing, modifying, flipping, and radically transforming legal doctrines and theories imaginatively. . . .”¹⁴

Part II unpacks the Rawlsian discourse on civil disobedience, followed by critically informed civil disobedience and its novel integration into the CLR framework. The Rawlsian model is divided into three components: the definition, justification, and sociopolitical role of civil disobedience in a “nearly just” society. In *A Theory of Justice*, Rawls advances civil disobedience as a non-ideal practice that nevertheless dovetails with liberal ideal theory.¹⁵

King’s *Letter From a Birmingham Jail*—but also more intangible “work products” stemming from the symbolic nature, physical contestations, etc. of the disobedient acts. The (admittedly) normatively loaded term “work product” was selected to convey the sheer *utility* of civil disobedience to would-be reformers. As is explored at length in this Article, all too often, civilly disobedient citizens are “siloe off” from members of the progressive legal elite—to the profound loss of all seeking transformative reform. See *infra* Part III.B.1 for a specific discussion on how would-be reformers in Appalachia have failed to capitalize upon disobedient Appalachian actors.

¹³ The discourse term “critical legal research” or CLR is the author’s own formulation. See Nicholas F. Stump, *Following New Lights: Critical Legal Research Strategies As A Spark for Law Reform in Appalachia*, 23 AM. U. J. GENDER SOC. POL. & L. 573, 574 (2015) [hereinafter Stump, *Following New Lights*]. However, for the full range of work pertaining to the critical exploration of the legal research process (or of legal information), see generally Yasmin Sokkar Harker, *Legal Information for Social Justice: The New ACRL Framework for Critical Information Literacy*, 2 LEGAL INFO. REV. 19 (2016-2017); Julie Graves Krishnaswami, *Critical Information Theory: A New Foundation for Teaching Regulatory Research*, in BOULDER STATEMENTS ON LEGAL RESEARCH EDUCATION (Susan Nevelow Mart ed., 2013); Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 L. LIBR. J. 307 (2007) [hereinafter Delgado & Stefancic, *Revisited*]; Jill Anne Farmer, *A Poststructuralist Analysis of the Legal Research Process*, 85 L. LIBR. J. 391 (1993); Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?*, 52 OHIO ST. L.J. 847, 853–54 (1991); Steven M. Barkan, *Response to Schanck: On the Need for Critical Law Librarianship, or Are We All Legal Realists Now?* 82 L. LIBR. J. 23 (1990); Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) [hereinafter Delgado & Stefancic, *Triple Helix Dilemma*]; Virginia Wise, *Of Lizards, Intersubjective Zap and Trashing: Critical Legal Studies and the Librarian*, LEGAL REFERENCE SERVICES Q., 1988; Steven M. Barkan, *Deconstructing Legal Research: A Law Librarian’s Commentary on Critical Legal Studies*, 79 L. LIBR. J. 617 (1987) [hereinafter Barkan, *Deconstructing Legal Research*].

¹⁴ Delgado & Stefancic, *Revisited*, *supra* note 13, at 328.

¹⁵ RAWLS, JUSTICE, *supra* note 9, at 363–68 (1971); see also Robin Celikates, *Civil Disobedience as a Practice of Civil Freedom*, in ON GLOBAL CITIZENSHIP: JAMES TULLY IN DIALOGUE 212 (James Yullt ed., 2014) [hereinafter Celikates, *Civic Freedom*] (“Rawls’s discussion on civil disobedience can be seen as a touchstone both for the critics and for the defenders of ideal theory. Rawls himself singles it out as the only case of non-ideal theory which he discusses at some

Rawlsian civil disobedience is thus defined and justified via a restrictive, liberal viewpoint.

Critically informed civil disobedience differs markedly from traditional Rawlsian theory. Civil disobedience is characterized as egalitarian, collectivist self-governance—which might *additionally* contribute to intra-systemic¹⁶ or systemic law reform efforts.¹⁷ Part II therefore provides an alternative definition, justification, and aim of civil disobedience, as derived from such intersecting strains of critical thought.

length in *A Theory of Justice*—a discussion that has proved to be highly influential. Furthermore . . . a theoretical account of civil disobedience is a necessary complement to any non-ideal theory which addresses forms of institutional injustice that are in principle avoidable.”); A. John Simmons, *Disobedience and Its Objects*, 90 B.U. L. REV. 1805, 1805 (2010) (“When John Rawls reinvigorated the contemporary philosophical debate about civil disobedience with his 1969 essay, ‘The Justification of Civil Disobedience,’ he also largely set the terms for subsequent discussions of that subject.”).

¹⁶ Intra-systemic denotes reform that occurs within the existing legal system: or traditional law reform. In contrast, systemic change involves socio-legal reformations—or “re-forms”—that actually transform the existing system. See Michael M’Gonigle & Louise Takeda, *The Liberal Limits of Environmental Law: A Green Legal Critique*, 30 PACE ENVTL. L. REV. 1005, 1113 (2013).

¹⁷ Note that such critical conceptualizations of civil disobedience have vital intersections with the ontological discourse on progressive law reform (and on broader socio-legal reform). Stated plainly, what *is* law, anyway, and how ought we to best go about reforming (and transforming) it? A theoretically inclusive approach is adopted in this Article. That is, radical systemic reformation is of course preferable, but in lacking the requisite sociopolitical conditions for such change, leftist intra-systemic reform is nevertheless acceptable. See *id.* In failing to enact wholesale ecofeminist or deep ecology-based societal reconstructions, for instance, ought we not to accept more substantial protections for non-human animals or the larger environment—as achieved through expanded liberal doctrine? See *infra* Part III for a full discussion on this topic.

Critically informed work on radical democracy also demands a fluid conception of law itself. In the least, we must acknowledge that the so-called “positive law” of modern constitutional democracies exists in a perpetual dialectic with shifting cultural normative values. See, e.g., Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in *LAW IN THE DOMAINS OF CULTURE* 10 (2009). But no clear dividing line exists between the two; surely such a facile binary of law versus non-law is not only overly reductive, but also contrary to common sense understandings of sociopolitical realities. See, e.g., Naomi Mezey, *Law As Culture*, 13 YALE J.L. & HUMAN. 35, 46 (2001) (“[P]erhaps we should not speak of the ‘relationship’ between law and culture at all, as this tends to reinforce the distinction between the concepts that my description here seeks to deny.”). Thus, notions of self-governance as derived from collectivist civil disobedience—and related “advocacy civil disobedience” on behalf of non-human entities etc.—must transcend such strict renderings of positive law.

In taking a step further, we must also recognize that the law versus non-law binary accounts for the systemic veiling of widespread structural subordination. Critical thought elucidates that law operates even (or perhaps especially) when it seemingly does not. Law thus extends to our “most intimate and non-legal relationships,” ultimately operating “all the more effectively for appearing not to be law.” See *id.* at 48, 51 (“[One aspect of] the critique offered by the realists and further developed by critical legal theorists is that virtually all human action, from going to bed to going to work, is either implicitly or explicitly defined and structured by law”); see also Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, in *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 83 (1993) (providing an example of how law governs seemingly non-legal interactions). Law’s insidious colonization of culture thus accounts for the often-invisible structural inequities we have collectively begun unveiling—and combatting—today.

Part II relies extensively on the contemporary work of Professor Robin Celikates.¹⁸ As Celikates writes, “from a liberal perspective, civil disobedience mainly appears as a form of protest of individual rights bearers against governments and political majorities . . . [whereas a critical perspective] views it rather as the expression of a democratic practice of self-determination.”¹⁹ Part II also relies on other seminal commentators, including theorists Hannah Arendt and Günter Frankenberg, who more explicitly position civil disobedience as a practice that, through various mechanisms, may inform the substance of legal-institutional reform efforts.²⁰

Part II concludes with the novel integration of synthesized critical civil disobedience theory into the CLR framework. CLR, as a legal research model largely defined by non-hegemonic, proceduralist reform practices (or including the voiceless in socio-legal reconstructions)²¹ is demonstrated to benefit immensely through such egalitarian theory expansion.

In Part III, the expanded CLR framework is applied to Appalachian civil disobedient practices. Appalachian anti-surface mining efforts are utilized as a case model, in the context of both the Surface Mining Control and Reclamation Act’s passage and contemporary mountaintop removal mining.²² Related and

¹⁸ Celikates is a Professor of Political and Social Philosophy at the University of Amsterdam and is the Director of the Transformations of Civil Disobedience Project.

¹⁹ Celikates, *Real Confrontation*, *supra* note 9; *see also* Celikates, *Civic Freedom*, *supra* note 15, at 223; *see also* Costas Douzinas, *Anomie: On Civil and Democratic Disobedience*, CRITICAL LEGAL THINKING (Feb. 7, 2011), <http://criticallegalthinking.com/2011/02/07/anomie-on-civil-and-democratic-disobedience/> (articulating a similar argument that the true “achievement of disobedience” is in “rais[ing] [structurally subordinated] people . . . into self-legislating *polites*, agents of democracy”). Hannah Arendt and Etienne Balibar authored early work on civil disobedience as a genuinely democratic practice. *See, e.g.*, Etienne Balibar, *Sur La Désobéissance Civique*, in DROIT DE CITÉ 17 (1998) (Fr.) (translation provided by Katherine O. Wilson): “Il ne s’agit pas seulement d’individus qui, en conscience, objecteraient à l’autorité. Mais de citoyens qui, dans une circonstance grave, recréent leur citoyenneté par une initiative publique de désobéissance à l’État [[Civil disobedience] does not only encompass individuals who, in good conscience, object to state authority. Rather, those citizens who, in desperate circumstances, reinvent their citizenship through public acts of disobedience against the State].” Such radical democratic approaches—from Balibar, Arendt, Celikates, etc.—deeply inform the CLR approach to civil disobedience.

²⁰ *See* HANNAH ARENDT, *CRISES OF THE REPUBLIC: LYING IN POLITICS, CIVIL DISOBEDIENCE ON VIOLENCE, THOUGHTS ON POLITICS, AND REVOLUTION* 83 (1972) (“[I]t would be an event of great significance to find a constitutional niche for civil disobedience—of no less significance, perhaps, than the event of the founding of the *constitutio libertatis*, nearly two hundred years ago.”); Frankenberg, *supra* note 1, at 30-31 (“[Lawyers] ought to ask themselves how ‘the law’ (in practice, this means the legal profession) can react appropriately to the burden of symbolization taken on by the disobedient.”); William Smith, *A Constitutional Niche for Civil Disobedience? Reflections on Arendt*, in HANNAH ARENDT AND THE LAW 134 (Marco Goldoni & Christopher McCorkindale eds., 2012) [hereinafter Smith, *Constitutional Niche*].

²¹ *See* Stump, *Following New Lights*, *supra* note 13, at 621–23. Richard Delgado and Jean Stefancic discuss at length the importance of incorporating subordinated voices within the law reform context. *See* Delgado & Stefancic, *Triple Helix Dilemma*, *supra* note 13, at 22–23.

²² *See generally* Robert T. Perdue & Christopher McCarty, *Unearthing a Network of Resistance: Law and the Anti-Strip Mining Movement in Central Appalachian*, in Vol. 66 STUD. IN

future-projected Appalachian reform projects are explored, including comprehensive coal site reclamation,²³ natural gas industry reform,²⁴ and broader regional socio-legal reform projects (with intersections of race, gender, class, etc.).²⁵

Part III re-envision the work of contemporary Appalachian civil disobedient coalitions such as Radical Action for Mountains' and People's Survival ("RAMPS"), Mountain Justice, Climate Ground Zero, and more spontaneous disobedient coalitions²⁶ as genuinely "self-legislating" democratic practices that, through novel integration into CLR modeled reform alliances, might indeed contribute to Appalachian socio-legal reform. Part III then discusses the Kayford Mountain civil disobedience, which occurred when Appalachian disobedients illegally planted trees on an unreclaimed mining site²⁷ within the context of the CLR framework.

L., POL., AND SOC'Y 40 (Austin Sarat ed., 2015) (chronicling anti-strip mining activism in Appalachia, including civil disobedience practices, from the mid-twentieth century through the present era). Perdue and McCarty's empirical study on the intersection of Appalachian grassroots resistance and law reform undergirds much of the analysis *infra* Part III.B.

²³ See *Innovative Reclamation*, APPALACHIAN MOUNTAIN ADVOCATES (2016), <http://www.appalmad.org/our-work/coal/innovative-reclamation/> ("[I]t is necessary for citizens and communities to reclaim the degraded land and polluted water left behind from destructive mining practices. Though the legacy of mountaintop removal mining will be with us for many decades, the mining industry . . . [has ignored its clean-up] obligations.").

²⁴ See Elizabeth E. Payne, *What's Coming Down The Natural Gas Pipeline*, APPALACHIAN VOICES, (Apr. 19, 2016), <http://appvoices.org/2016/04/19/natural-gas-infrastructure/> ("[Marcellus Shale] natural gas is now poised to surge into Virginia and North Carolina, bringing with it promises of a cheaper . . . energy infrastructure. But many citizens and economic experts are raising questions about just how 'green' a fossil fuel can really be. . . .").

²⁵ Professor Patrick C. McGinley, for example, provides a summary of potential (intersecting) projects for regional development: "[C]reating a sustainable economy in Central Appalachia [could involve] growing 'green collar' jobs . . . development of new industries focused on renewable energy . . . [In addition to fostering] economic diversification in 'the arts, education and workforce development, entrepreneurship, environmental restoration, health and community-based services, housing, infrastructure, philanthropy, sustainable agriculture, and telecommunications.'" Patrick C. McGinley, *Collateral Damage: Turning A Blind Eye to Environmental and Social Injustice in the Coalfields*, 19 J. ENVTL. & SUSTAINABILITY L. 305, 414–16 (2013); see also BARRY, *STANDING OUR GROUND*, *supra* note 3, at 149 (detailing ecofeminist-based reform approaches in Appalachia).

²⁶ See JOSEPH D. WITT, *RELIGION AND RESISTANCE IN APPALACHIA: FAITH AND THE FIGHT AGAINST MOUNTAINTOP REMOVAL COAL MINING* 38 (2016) ("[I]ncreased use of nonviolent direct action tactics and civil disobedience helped propel the issue of mountaintop removal to international attention.").

²⁷ See Zac Taylor, *Group Plants Trees in Mountaintop-Removal Protest*, CHARLESTON GAZETTE-MAIL (Oct. 24, 2010), <http://archive.li/RHBrH>. This collective Appalachian civil disobedience received national attention. See, e.g., Morgan Goodwin, *Risking Arrest to Plant Trees on a Mountaintop Removal Site*, HUFFINGTON POST (Oct. 24, 2010), http://www.huffingtonpost.com/morgan-goodwin/risking-arrest-to-plant-t_b_773036.html ("'[R]eclamation workers' (activists) illegally marched onto a supposedly reclaimed mine site to plant trees . . . [b]ecause the 'reclamation' efforts done by the mining company resulted in a barren hillside with sparse grass and baking sun—a far cry from the lush and diverse forest destroyed in the process.'").

Civil disobedience is a pivotal practice under late liberalism.²⁸ While the enduring legal-cultural agony of Appalachia is unquestionably relevant to a critical discourse on progressive reform, Appalachia's condition is concurrently a microcosm of the widespread structural inequities plaguing Western liberal democracies at large.²⁹ Therefore, Appalachian civil disobedience, while culturally distinct, is nevertheless inextricably linked to the profound socio-existential issues raised by Occupy Wall Street,³⁰ Black Lives Matter,³¹ FEMEN,³² broader climate change movements,³³ and the other multitudinous contestations of contemporary disobedient actors. Appalachian socio-reconstructions are indeed desirable (and necessary) ends-in-themselves. However, the theoretical framework explored in this Article has reformist implications from sub-regional to global scales.

II. CRITICAL LEGAL RESEARCH THEORY

A. Deconstruction of American Legal Research Regime

CLR has its genesis in critical law librarianship, which itself was an offshoot of the Critical Legal Studies movement of the 1980s³⁴ (i.e., the precursor to

²⁸ Late liberalism can be defined as the “shape that liberal governmentality has taken as it responds to a series of legitimacy crises in the wake of anti-colonial, new social movements, and new Islamic movements.” ELIZABETH A. POVINELLI, *ECONOMIES OF ABANDONMENT: SOCIAL BELONGING AND ENDURANCE IN LATE LIBERALISM* 24 (2011).

²⁹ See BRIAN T. MCNEIL, *COMBATING MOUNTAINTOP REMOVAL: NEW DIRECTIONS IN THE FIGHT AGAINST BIG COAL* 10 (2011) (“The controversies surrounding mountaintop removal and the mining industry reflect the shortcomings of neoliberalism to fully provide for communities.”); Stephen L. Fisher, *Introduction*, in *FIGHTING BACK IN APPALACHIA: TRADITIONS OF RESISTANCE AND CHANGE* 12 (Stephen L. Fisher ed., 2009) (“Linking local fights to national and global struggles is a difficult and slow process, but it is the only approach that has a chance of bringing about fundamental change in Appalachia.”).

³⁰ M. Patrick Yingling, *Civil Disobedience to Overcome Corruption: The Case of Occupy Wall Street*, 4 *IND. J. L. & SOC. EQUALITY* 121, 121-22 (2016).

³¹ See, e.g., Emily Badger, *Why Highways Have Become the Center of Civil Rights Protests*, *THE WASH. POST*, (Jul. 23, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/13/why-highways-have-become-the-center-of-civil-rights-protest/?utm_term=.7aba206aa2b8.

³² See, e.g., Jessica Zychowicz, *Performing Protest: Femen, Nation, and the Marketing of Resistance*, 1 *J. of UKRAINIAN POL. & SOC.* 74, 79, 85 (2015) (discussing FEMEN as an international women's group that engages in feminist-steeped protest methods to combat patriarchal forces).

³³ See, e.g., John Lemons & Donald A. Brown, *Global Climate Change and Non-Violent Civil Disobedience*, 11.1 *ETHICS IN SCI. & ENVTL. POL.* 3, 10 (2011) (“[T]hose affected by environmental problems must be included in the process of remedying those problems; that all citizens have a duty to engage in activism on behalf of environmental justice; and that in a democracy it is the people, not the government, that are ultimately responsible for fair use of the environment.”).

³⁴ See Delgado & Stefancic, *Triple Helix Dilemma*, *supra* note 13, at 210–16; Barkan, *Deconstructing Legal Research*, *supra* note 13, at 617–20.

contemporary critical legal theory).³⁵ Early critical librarianship scholars applied the theoretical insights of Critical Legal Studies to the American legal research regime. These commentators concluded that traditional legal resources and analysis methods are *not* normatively neutral. Rather, such resources and analysis methods function merely to homogenize research outcomes in a manner that benefits majoritarian societal interests. To disrupt this phenomenon, critical commentators put forth a number of alternative research strategies designed to transcend existing legal categories—and to ultimately catalyze the development of progressive socio-legal reform initiatives.³⁶

1. Critical Legal Theory Foundations

In *Deconstructing Legal Research*, Professor Stephen M. Barkan details how critical thought intersects with the legal research regime. Barkan posits that legal research and analysis traditionally taught in law school curriculums and practice is often approached in formalistic terms.³⁷ Law is viewed as a deterministic science—a so-called “seamless web”—that exists independently of the normative biases of legal decision-makers.³⁸ Thus, when faced with issues of first impression, judges merely endeavor to discover the “correct” *ratio decidendi* (the rule determining the case) in order to mechanically fill gaps in the common law.³⁹

³⁵ See Victoria Ortiz & Jennifer Elrod, *Construction Project: Color Me Queer*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 258, 262 (2011) (“What is often missing from CLS works is the acknowledgment that our experiences of the same circumstances may be very, very different . . . CLS as a critique of the legal system—without addressing the needs of the multiply diverse disempowered, without providing concrete, practical solutions—was, like Marxism, not sufficient.”).

³⁶ On the point of doctrinal reconstruction, John Hasnas has succinctly summarized certain strains of the critical project (especially as conceived in the 1990s): “[Critical commentators] claim that the indeterminacy argument demonstrates the need to employ the legal system to create a more democratic and egalitarian society. They assert that recognition of legal indeterminacy allows us to see the law for what it truly is, a political struggle in which [problematic] ideological values have triumphed. Accordingly, they advocate restructuring the legal system so as to ensconce [the alternative] nonhierarchical values of humaneness, democracy, community, personal, and collective liberation.” John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 100 (1995) (internal quotations removed) (citing Richard M. Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 524 (1987)).

³⁷ See Barkan, *Deconstructing Legal Research*, *supra* note 13, at 625.

³⁸ See *id.* For an extended treatment on legal formalism as a “seamless web,” see also Lauren B. Edelman & Mark C. Suchman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 907 n.9 (1996) (“By ‘legal formalism’ we refer here to the largely asocial treatment of law. . . This philosophy portrays law as an internally coherent and self-contained logical system—a ‘seamless web’ of tightly linked principles, free from class interests and other social influences.”).

³⁹ See Barkan, *Deconstructing Legal Research*, *supra* note 13, at 625, 630 (“Thus, the search for the *ratio decidendi*, the rule of the case, leads nowhere. . . Legislation, says CLS, is no more determinate than case law. Statutory language is frequently ambiguous, inconsistent, and

The role of legal research is exceedingly constrained under such a formalistic worldview. The researcher examines the closed universe of existing legal precedent—as housed in “neutral” print libraries or in Westlaw and Lexis equivalents—and then deductively reasons towards the “right answer” using existing precedent.⁴⁰

Influenced by Duncan Kennedy and other foundational Critical Legal Studies scholars, Barkan rejects legal formalism, instead adopting a critical-based understanding of legal research and analysis:

A [critical] analysis of legal research might start with the impression that there is something fundamentally wrong with the way modern legal thinking responds to social problems, and that the traditional methods and materials of legal research contribute to that unsatisfactory state of affairs. In . . . critiques of legal doctrine, legal reasoning, and legal categories, the relationships become more clear.⁴¹

Barkan characterizes law as largely indeterminate. After applying deconstruction tenets to legal doctrine, Barkan concludes that prior precedent does not mechanically determine issues of first impression, as existing doctrine is open to innumerable interpretations.⁴² Thus, as precedent cannot cover all conceivable factual scenarios, judges are not constrained by “controlling” doctrine.

If law is not formalistic (or a deterministic science), how then are legal outcomes determined? Through a critical lens, “neutral” legal reasoning is regarded essentially as a myth.⁴³ Because indeterminacy dictates that “novel fact patterns potentially could be ‘controlled’ by a veritable sea of competing (and often conflicting) precedent,” legal decision-makers are therefore “free to choose among a plethora of competing arguments, authorities,” and so on.⁴⁴ Legal reasoning is therefore a subjective, creative, and inherently political enterprise despite its deceptively neutral façade.⁴⁵

Legal formalism also masks the reality that, insofar as legal reasoning indeed reflects a “universal” guiding principle, the aim historically has involved perpetuating dominant societal interests at the expense of subordinated groups.⁴⁶

incomplete.”).

⁴⁰ See *id.* at 632; David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 BUFF. L. REV. 529, 578 (2014) (“Those who deny legal indeterminacy, such as Dworkin, usually argue that because the law rationally determines one right answer, the judge’s duty is to reason to that uniquely correct answer.”); Barkan, *Deconstructing Legal Research*, *supra* note 13, at 625.

⁴¹ See Barkan, *Deconstructing Legal Research*, *supra* note 13, at 625.

⁴² See *id.* at 629.

⁴³ *Id.*

⁴⁴ Stump, *Following New Lights*, *supra* note 13, at 131.

⁴⁵ See Barkan, *Deconstructing Legal Research*, *supra* note 13, at 629–30.

⁴⁶ *Id.* at 632 (“[L]egal resources can reinforce and reify dominant ideologies, can narrow perspectives, and can make contingent results seem inevitable.”).

Thus, consciously or otherwise, legal decision-makers traditionally have crafted outcomes that favor white, patriarchal, heteronormative, cisgender, able-bodied, anthropocentric, and atomistic-capitalist values, among others.⁴⁷ Such hegemonic normative outcomes are then clothed in the formalist fantasy—i.e., that a legal query’s “one right answer” (in Ronald Dworkin’s influential formalist conception) is somehow attained through an application of neutral legal reasoning.⁴⁸

Legal categories constitute the core of legal formalism—the individual strands in law’s “seamless web,” as it were—and, as such, have been targeted by critical scholars.⁴⁹ As Duncan Kennedy succinctly writes, “all such [categorization] schemes are lies.”⁵⁰ Moreover, the very existence of “historically legitimated doctrinal categories gives the law student, the teacher, and the practitioner a false sense of the orderliness of legal thought,” which ultimately assists in masking law’s (at least partial) indeterminacy.⁵¹

2. Homogenization of Research Outcomes in Practice

Professors Delgado and Stefancic, pivoting from Barkan’s initial contributions, argue that legal categories undergird the commercial legal research regime specifically. The West Topic & Key Number System (“West”), in particular, has categorized all of American case law for over a century.⁵² Indeed, the West commercial system is so influential that the Langdellian law school curriculum is in fact modeled on West legal categories: “The first-year courses Langdell established at the Harvard Law School track the [West] classification scheme. The major digest classifications—property, contracts,

⁴⁷ See Stump, *Following New Lights*, *supra* note 13, at 132.

⁴⁸ See Barkan, *Deconstructing Legal Research*, *supra* note 13, at 625; Wolitz, *supra* note 40, at 578.

⁴⁹ See Barkan, *Deconstructing Legal Research*, *supra* note 13, at 631–34.

⁵⁰ Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 209, 215 (1979).

⁵¹ *Id.* See also Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 251–52 (2000) (“An example of a functionalist explanation of law’s organizational claims is the argument that the traditional legal categories are an inevitable product of the relations of production in a capitalist society; more specifically, that the traditional categories exist to fulfill the necessary function of obscuring the exploitative nature of capitalism behind an elegant neutral façade.”).

⁵² See Delgado & Stefancic, *Triple Helix Dilemma*, *supra* note 13, at 214–16; see also Robert C. Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189, 191 (1997) (“Founded in St. Paul, Minnesota by the West brothers in 1876, West brought entrepreneurial energy to legal publishing, rather than the scholarly inclinations or official sponsorship that had cloaked other legal publishers.”). In more recent times, the transformation of the (once reasonably diversified) legal publishing industry into a transnational publishing oligopoly has been criticized. See, e.g., Stump, *Following New Lights*, *supra* note 13, at 578 (“[I]n confluence with the rise of free market globalization, a triumvirate of legal publishers (i.e., Thomson Reuters, Reed-Elsevier, and Wolters Kluwer) have neutralized most third-party competitors, thereby creating a transnational legal publishing oligopoly.”).

torts, and crimes—are the subject matter of introductory law school courses. Individual topics are the subject matter of other law school courses.”⁵³ Thus, in a general sense, West’s categorization system pervades and largely defines American legal research culture.

West legal categories also play an instrumental role in reflecting and reifying majoritarian societal interests. As Professor Richard Haigh summarizes, “[commercial legal] classification systems can also be biased or insensitive because they may reflect Eurocentric or other dominant ideologies and values and ignore other cultures, races, genders, etc.”⁵⁴ West’s problematic legal categories thus pervade the entire commercial taxonomy.

Turning to the technical mechanics of West’s influence on legal research, West categories perform a fundamental role in constraining and in homogenizing concrete research outcomes. When all published (or precedential) U.S. judicial decisions are made, West corporate editors analyze those decisions, extract what they deem to be points of law, restate those points of law in standardized West vocabulary (which become the West headnotes)—and then categorize those headnotes via the legal taxonomic categories inherent in the West Topic & Key Number System.⁵⁵

The West system is exceedingly vast: it is comprised of four hundred main categories (“topics”) and over one hundred thousand nestled sub-topics (“key numbers”) classified beneath the topics.⁵⁶ In short, the commercial West classification system is the most comprehensive and influential concrete manifestation of American legal categories.⁵⁷

Practitioners are continuously guided by the West categories contained in

⁵³ Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 L. LIBR. J. 285, 287 (2001); see also Bruce A. Kimball, *Young Christopher Langdell, 1826-1854: The Formation of an Educational Reformer*, 52 J. LEGAL EDUC. 189, 189 (2002) (“Christopher Columbus Langdell (1826-1906) is arguably the best-known and most influential figure in the history of legal education in the United States, having shaped the modern law school by introducing significant reforms during his tenure as dean of Harvard Law School from 1870 to 1895.”).

⁵⁴ Richard Haigh, *What Shall I Wear to the Computer Revolution? Some Thoughts on Electronic Researching in Law*, 89 L. LIBR. J. 245, 261 (1997); see also Robert C. Berring, *Full-Text Databases and Legal Research: Backing into the Future*, 1 HIGH TECH. L.J. 27, 36 (1986) (“[I]t is interesting that American legal literature of the last century was controlled by a paradigm that was naturally both conservative and orthodox during a time when many ascribed these characteristics to the law itself.”).

⁵⁵ See Bast & Pyle, *supra* note 53, at 289; see also Susan Nevelow Mart, *The Relevance of Results Generated by Human Indexing and Computer Algorithms: A Study of West’s Headnotes and Key Numbers and LexisNexis’s Headnotes and Topics*, 102 L. LIBR. J. 221, 223 (2010).

⁵⁶ See Joshua M. Silverstein, *Using the West Key Number System as a Data Collection and Coding Device for Empirical Legal Scholarship: Demonstrating the Method Via a Study of Contract Interpretation*, 34 J. L. & COM. 203, 217 (2016).

⁵⁷ Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 309 (2000) (noting that the West “system sets out a subject classification system that purports to describe every possible legal situation that can exist.”).

judicial headnotes; headnotes precede the actual text of judicial opinions and are tantamount to (corporate-authored) mini-synopses of entire cases.⁵⁸ Additionally, the West online headnote functionality is central to the “one good case” method: a core research strategy that involves utilizing one “discovered” headnote to quickly locate all U.S. primary mandatory and persuasive authority classified under that same West category.⁵⁹ Thus, contemporary online case law research is necessarily guided and informed through the West categorization system.

The West system also has a more insidious effect in channeling research outcomes. In a much-analyzed development, WestSearch, the powerful new Westlaw algorithm, now has the categories of the West Topic & Key Number system embedded as a core coding element.⁶⁰ Therefore, every search performed on Westlaw is now filtered (and homogenized) via the problematic categories inherent in the West system.

Numerous commentators predicted, with notable alarm, such an algorithm enhancement as early as the 1990s. As Delgado and Stefancic stated: “[a] number of observers suggest adding subject indexing to the Lexis and Westlaw systems, thus interposing another human being’s subjective judgment between researcher and text—the very thing that computer-assisted legal research was designed to replace.”⁶¹ That this eventuality has now come to pass indicates that “West’s doctrinal categorizations now *directly* influence every search performed on the database.”⁶²

The critique of WestSearch extends beyond the novel West Topic & Key Number System coding. As another example, like the Google algorithm, WestSearch relies upon “crowdsourcing.” With crowdsourcing, the WestSearch algorithm responds to—i.e., continuously adjusts its universal relevancy dictates based upon—the research patterns of “expert” users (or a select group of firm practitioners).⁶³

Commentators critique such crowdsourcing attributes, because empirical literature demonstrates that crowdsourcing tends to designate documents that reflect dominant societal viewpoints to be “more relevant.” Indeed, by its very design, crowdsourcing favors majoritarian preferences: “[for example,]

⁵⁸ See Nevelow Mart, *supra* note 55, at 223.

⁵⁹ Austin Martin Williams, *Researching Georgia Law (2015 Edition)*, 31 GA. ST. U. L. REV. 741, 819–20 (2015) (“Researchers can use the One Good Case method if they have already found one case opinion that is applicable to their legal issue. Case opinions located in Thomson West reporters and on WestlawNext include headnotes, which will provide researchers with Topics and Key Numbers.”).

⁶⁰ Ronald E. Wheeler, *Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research*, 103 L. LIBR. J. 359, 365–68 (2011).

⁶¹ Delgado & Stefancic, *Triple Helix Dilemma*, *supra* note 13, at 221–22.

⁶² Stump, *Following New Lights*, *supra* note 13, at 610.

⁶³ See Wheeler, *supra* note 60, at 365.

WestlawNext capitalizes on the wisdom of its users”;⁶⁴ accordingly, “popular, mainstream, and middle of the road ideas will almost certainly find a voice, one that is likely to be very loud.”⁶⁵ Correspondingly, crowdsourcing generally deems documents reflecting radical or marginalized viewpoints as less relevant.⁶⁶ Thus, in addition to the West indexing system, crowdsourcing creates another algorithm-based structural bias that favors hegemonic interests.

Perhaps most distressingly, in a macro sense, West legal categories homogenize research outcomes through what we might term the “insidious epistemological shaping” of the legal research and analysis process. Because West’s century-long corporate hegemony is so well established, American law students and practitioners quite literally learn, understand, and internalize the law based on the West commercial system. Therefore, at a foundational level, West categories define the very universe of legal research possibilities.⁶⁷ Delgado and Stefancic discuss this phenomenon at length in *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*:

[T]he straitjacket of conventional categories now limits the questions one may ask the computer and the searches one may devise. The terms and concepts—familiar from the old digest and index categories and reinforced by disciplinary habits, bar examination requirements, and the legal curriculum—that formerly steered searchers in predictable directions reappear in more insidious form. Now inscribed in our minds, they limit the questions a researcher can ask.⁶⁸

West’s conceptual hegemony necessarily extends to all research mediums practitioners utilize such as Westlaw, Lexis, Bloomberg Law, and Fastcase, in addition to free online resources such as Google and Wikipedia (which are increasingly utilized in practice).⁶⁹ West legal categories are therefore pervasive and serve to constrain novel legal research outcomes.

⁶⁴ *Id.*

⁶⁵ WEB SEARCH: MULTIDISCIPLINARY PERSPECTIVES 17 (Amanda Spink & Michael Zimmer eds., 2008) (citing MANUEL G. GONZALEZ & RICHARD DELGADO, *THE POLITICS OF FEAR* (2006)).

⁶⁶ *See id.*

⁶⁷ Berring has similarly explored this phenomenon: “The confluence of Blackstone’s categorization structure, the American Digest System, legal education, and all of those trained within it have created a conceptual universe of thinkable thoughts that has enormous power.” Berring, *supra* note 57, at 311. As Berring has noted: “The Key Number System provided a paradigm for thinking about the law itself. Lawyers began to think according to the West categories.” Berring, *supra* note 54, at 33. However, Berring has previously argued that advances in information technology might degrade the hegemony of commercial categorizations. *See* Berring, *supra* note 57, at 313.

⁶⁸ Delgado & Stefancic, *Revisited*, *supra* note 13, at 318.

⁶⁹ *See id.*

B. Newfound Practitioner Reliance Upon Alternative Resources

A central tenet of the CLR project is that progressive-minded attorneys ought not to merely deconstruct—but ought also to reconstruct the American legal research regime.⁷⁰ As Delgado and Stefancic argue: “[C]ategories contained in current [commercial] systems are like eyeglasses we have worn a long time. They enable us to see better, but lull us into thinking our vision is perfect and *that there may not be a still better pair.*”⁷¹ In other words, deconstructing the research regime by unveiling its often-invisible structural biases is only a first potential step, a launch point towards more ambitious reform initiatives; these may involve thinking “outside the box” in “reinventing, modifying, flipping, and radically transforming legal doctrines and theories imaginatively.”⁷²

A critical approach demonstrates that the law is not a seamless web: the law is in fact incoherent and indeterminate—at least in part—and legal decision-makers (particularly judges) should not be formalistically constrained by the dictates of prior precedent.⁷³ Utilizing such notions as a starting point, critical scholars from the 1980s onwards engaged in a re-envisioning of the legal research process. Most basically, commentators examined new legal research and analysis methodologies beyond practitioners formalistically examining the closed universe of black letter law.

In *A Poststructuralist Analysis of the Legal Research Process*, Librarian Jill Anne Farmer explores such novel legal research vistas. Pivoting from the critical analysis of the legal research process above, Farmer’s broad prescriptive recommendations are for legal information professionals—and we can explicitly extend this recommendation to legal practitioners and other would-be reformers⁷⁴—to actively and creatively “look outside of the system box in which we are conceptually housed.” Most basically, this involves venturing beyond the standard, practitioner-based primary and secondary legal resources housed in print libraries and online legal databases.⁷⁵

Traditionally, legal theorists have exercised a veritable monopoly over the utilization of scholarly legal information—and perhaps especially over scholarly information from disciplines other than law, which legal practitioners rarely make use of or have paid access to. The end result is that “practitioners are often

⁷⁰ See Stump, *Following New Lights*, *supra* note 13, at 618–23.

⁷¹ See Delgado & Stefancic, *Triple Helix Dilemma*, *supra* note 13, at 209 (emphasis added).

⁷² See Delgado & Stefancic, *Revisited*, *supra* note 13, at 328.

⁷³ Contemporary commentators, in contrast to foundational CLS literature, tend to posit that doctrine is only partially indeterminate. See, e.g., Mark Tushnet, *Survey Article Critical Legal Theory (without Modifiers) in the United States*, 13 J. POL. PHIL. 99, 105, 108 (2005) (“[C]laims that all results were underdetermined were replaced by [claims] that many results were underdetermined, or that results in many interesting cases were, or . . . that enough results were underdetermined to matter.”).

⁷⁴ See Stump, *Following New Lights*, *supra* note 10, at 576.

⁷⁵ See Farmer, *supra* note 13, at 403.

insulated from external questions.”⁷⁶ However, practitioners ought to look “beyond the usual” legal resources and should “join legal theorists” in using “material[s] that reflect on social, political, and cultural theory.”⁷⁷

We might think of such an approach as a critically expanded “legal research and analysis process,” wherein reformist-minded attorneys routinely utilize scholarship from diverse disciplines when endeavoring to change law. Reformist-minded attorneys might place special emphasis on incorporating critical scholarship in practitioner-based research (such as discourses on critical race theory, feminism, queer theory, ableism, class theory, critical environmental theory, etc.).⁷⁸ Thus, in disrupting the artificial binary of “academic scholarship” versus “practitioner black letter law”—i.e., by desiloing and integrating the work of key progressive legal actors—we might best succeed in achieving genuinely effective reform.⁷⁹

Deep theoretical foundations are often required for such an unconventional approach to the legal research and analysis process.⁸⁰ Thus, the radical re-

⁷⁶ *Id.*

⁷⁷ *Id.* (summarizing arguments put forth Michael S. Moore); see Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 956 (1989) (“[T]he lawyers and judges who are internal to our interpretive practices must also ask these same evaluative, descriptive, and explanatory questions. They too must ask how well their interpretive practices serve the point that justifies their engaging in such practices and thus join the legal philosopher in asking . . . metaphysical and epistemological questions.”).

⁷⁸ See Stump, *Following New Lights*, *supra* note 13, at 619–20. Delgado and Stefancic provide an example of critical scholarship explicitly providing practitioners with novel reform approaches. That is, they discuss how the then-new intersectionality discourse added crucial dimensions to employment discrimination law: “[C]onsider the situation of Black women wishing to sue for job discrimination directed against them as Black women. Attorneys searching for precedent [at that time found] a large body of [law] . . . under the headings of ‘race discrimination’ and ‘sex discrimination.’” Delgado & Stefancic, *Triple Helix Dilemma*, *supra* note 13, at 219. However, “[n]o category combine[d] the two types of discrimination,” and thus “Black women [lost] if the employer [demonstrated] that it ha[d] a satisfactory record for hiring and promoting women generally (including White women) and similarly for hiring Blacks (including Black men).” *Id.* at 220. Therefore, to fill that gap, “legal scholars . . . created the concept of intersectionality [that] . . . urged that Black women’s unique situation be recognized, named, and addressed.” *Id.*; see also Kimberlè Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Anti-Racist Policies*, 1989 U. CHI. LEGAL F. 139 (establishing foundational work on critical intersectionality). Note that subsequent work has expanded substantially upon this discourse. See, e.g., Nancy Levit, *Separate Silos: Marginalizing Men in Feminist Theory and Forgetting Females in Masculinities Studies* 17 (Oct. 22, 2014) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550365 (“Since [the 1980s] feminists and critical race theorists have built on intersectionality ideas. . . . [beyond] interrelations of various facets of identity, such as gender, race, ethnicity and class. . . . [to a] model that considers individuals and their identity characteristics, their environments, and normative practices and institutions, across time and cultures.”). See *infra* Part III for an extended treatment on the ecofeminist approach to intersectionality.

⁷⁹ See Stump, *Following New Lights*, *supra* note 13, at 619–20.

⁸⁰ Peggy Cooper Davis, *Casebooks, Learning Theory, and the Need to Manage Uncertainty*, in LEGAL EDUCATION IN THE DIGITAL AGE 230, 239 (Edward Rubin ed., 2012).

envisioning of the legal research process should likely involve a holistic reform approach to the law school curriculum, the bar, and other crucial professional sites.⁸¹ Specifically, in the context of a critical-reformist approach to the law school curriculum, Professor Peggy Cooper Davis explains: “Few among us speak clearly or coherently to our students about indeterminacy, and many of us postpone the discussion until students have been entrapped by illusions of certainty.”⁸² Therefore, widespread adoption of a critically expanded legal research process would indeed likely benefit from structural reform to crucial professional sites.

What is more, in the age of the “open access” movement, practitioners increasingly have free online access to academic information previously locked behind paywalls. Through resources like SSRN, BePress Digital Commons, Academia.edu, and Google Scholar, practitioners and the general citizenry have unprecedented access to law review articles and also to academic literature from other disciplines.⁸³ Thus, not only is an expanded, re-envisioned legal research process desirable, it is also readily attainable since legal practitioners now have such scholarly information available via the internet.⁸⁴

C. *Adoption of Non-Hegemonic Reform Alliances*

Thus far, Part I has proffered a deconstruction of the American legal research regime and, as one potential reconstructive strategy, the notion of a newfound practitioner reliance upon alternative resources has been put forth. This Section

⁸¹ See generally Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61 (1988); Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 BERKELEY LA RAZA L.J. 137 (2001).

⁸² Peggy Cooper Davis, *Casebooks, Learning Theory, and the Need to Manage Uncertainty*, in LEGAL EDUCATION IN THE DIGITAL AGE 230, 239 (Edward Rubin ed., 2012).

⁸³ Olufunmilayo B. Arewa, *Open Access in A Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 808–11 (2006).

⁸⁴ Brianna L. Schofield, Jennifer M. Urban, *Takedown and Today's Academic Digital Library*, 13 I/S: J.L. & POL'Y 125, 127 (2016). Some commentators posit, more sweepingly, that rapid advances in information technology (of which the open access movement is just one part) may ultimately assist in dismantling the neoliberal global order—and in ushering in (a more egalitarian) post-capitalist era. As Paul Mason writes: “[T]he thing that is corroding capitalism, barely rationalised by mainstream economics, is information. . . . The equivalent of the printing press and the scientific method is information technology and its spillover into all other technologies, from genetics to healthcare to agriculture to the movies, where it is quickly reducing costs The internet, French economist Yann Moulier-Boutang says, is ‘both the ship and the ocean’ when it comes to the modern equivalent of the discovery of the new world. In fact, it is the ship, the compass, the ocean and the gold.” Paul Mason, *The End of Capitalism Has Begun*, THE GUARDIAN (Jul. 17, 2015), <https://www.theguardian.com/books/2015/jul/17/postcapitalism-end-of-capitalism-begun>. Such suppositions are well beyond the scope of this Article, and indeed, as a counterargument, we might speculate on how the internet perpetuates and reifies dominant societal interests through insidious means. Nevertheless, such work is pertinent to any discourse on how information technology might help or hinder progressive socio-legal change.

will focus upon a second (and as we shall see, interconnected) reconstructive legal research strategy: the cultivation of non-hegemonic reform alliances. This strategy involves an exploration of *who* is involved in law reform initiatives, and *how*, from a social dynamics perspective, such initiatives ought to be constituted.

Such an approach involves an expanded research and analysis process, extending beyond finding the law (in the formalistic sense) and also beyond the novel reliance upon alternative resources discussed above. That is, an explicitly people-centered approach to legal research and analysis is adopted with CLR. As Delgado and Stefancic elucidate:

One possibility that we must entertain is that when searching for a new legal remedy, we should turn our computers off. Lawyers interested in representing clients who (unlike corporations) do not find a ready-made body of developed law in their favor need to spend time with the computer shut down, mulling over what an ideal legal world would look like from the client's perspective.⁸⁵

Delgado and Stefancic add: "The decision to put [legal concepts] together in a novel way must come from a human researcher"—and this analytical process can be very creative indeed.⁸⁶

But what of the role of non-hegemonic alliances in such a people-centered approach to legal research and analysis? Broadly speaking, third and fourth wave critical commentators⁸⁷ posit that the means of law reform are inseparable

⁸⁵ Delgado & Stefancic, *Revisited*, *supra* note 13, at 328.

⁸⁶ *Id.* at 321. Note that contemporary commentators posit there exists no binary divide between "legal research" and "legal analysis" *per se*. See, e.g., Boulder Conference Signatories, *Boulder Statement on Legal Research* (2016), http://lawlibrary.colorado.edu/sites/default/files/images/2016_boulder_statement_on_legal_research.pdf ("Legal research is the analysis, search process, information evaluation, and reasoning necessary to ethically solve problems and provide legal advice.").

⁸⁷ Feminist theory is generally divided into three (established) historical waves: the first wave (early 1800s-1920s), the second wave (1960s-1980s), and the third wave (1990s-present). For a discussion on the general characteristics of these waves, see, for example, Barbara Ann White, *Traversing 2nd and 3rd Waves: Feminist Legal Theory Moving Forward*, 39 U. BAL. L.F. at iv (2008). Many commentators now believe we have entered a fourth wave of feminist theory. See, e.g., Kira Cochrane, *The Fourth Wave of Feminism: Meet the Rebel Women*, THE GUARDIAN (Dec. 10, 2013), <https://www.theguardian.com/world/2013/dec/10/fourth-wave-feminism-rebel-women>. The fourth wave appears largely within the tradition of third wave postmodern- and post-postmodern-influenced critical theory, in that crucial strains focus on intersectionality, micro-sites of power, local forms of activism, and systemic reform approaches. See, e.g., ASTRID HENRY, NOT MY MOTHER'S SISTER: GENERATIONAL CONFLICT AND THIRD WAVE FEMINISM 35-36 (2004). Perhaps a primary distinguishing characteristic of the fourth wave, however, is its emphasis on the transformative potential of the internet, and of social media, particularly. See, e.g., Kira Cochrane, *The Fourth Wave of Feminism: Meet the Rebel Women*, THE GUARDIAN (Dec. 10, 2013), <https://www.theguardian.com/world/2013/dec/10/fourth-wave-feminism-rebel-women> ("[T]he fourth wave of feminism . . . [is] defined by technology: tools that are allowing women to build a strong, popular, reactive movement online."). As a potential illustrative example, see generally, Victoria A.

from the ends; this is a proceduralist-based approach to socio-legal reform. While constituents in hegemonic or traditional law reform initiatives tend only to include the progressive legal elite—e.g., reformist-minded attorneys, academics, leftist policymakers, etc.—non-hegemonic reform alliances instead involve the incorporation of more marginalized parties, such as grassroots activists, community organizers, and the portion of the citizenry most affected by the legal scheme at issue.⁸⁸

Including marginalized groups within reform alliances is imperative for two reasons. First, such arrangements are procedurally just. These are the very citizens who often have the most at stake in significant reform.⁸⁹ Second, incorporating such marginalized citizens oftentimes produces the most substantively effective reform. As Delgado and Stefancic have said, would-be reformers within the progressive elite rarely “break free from the constraints of preexisting thought” and proffer “effective new approaches.”⁹⁰ Rather, it is those “members of marginal groups, or persons who are in other ways separated from the mainstream” that tend to produce the most innovative results.⁹¹

Newsom & Lara Lengel, *Arab Women, Social Media, and the Arab Spring: Applying the Framework of Digital Reflexivity to Analyze Gender and Online Activism*, 13, J. OF INT’L. WOMEN’S STUD. 5, 31 (2012).

⁸⁸ See E. Tammy Kim, *Lawyers As Resource Allies in Workers’ Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 219 (2009) (“[The] epistemic legal indeterminacy thesis . . . reoriented public interest attorneys [effectively] bringing community members, community organizers, and social and political factors into daily practice concerns.”); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2189 (2013) (“Some critical race theorists ‘acknowledg[e] and affirm[] . . . that rights may be unstable and indeterminate’ but still provide a limited defense of them. Patricia Williams, for example, maintains that ‘rights rhetoric has been and continues to be an effective form of discourse for blacks.’”) (quoting Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 409 (1987)). In keeping with theoretical inclusiveness, an explicit anti-rights viewpoint, naturally, is not adopted in this Article; rights as progressively constructed or reconstructed (and that effect *real* change in the world) are a vital component to a nimble and multifaceted reform agenda. See sources *supra* note 17 and accompanying text; see also MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 311 (1990) (“What happens after the law, after official legal pronouncements good or bad, to rights? . . . Legal language, like a song, can be hummed by someone who did not write it and changed by those for whom it was not intended.”). We must always, however, keep in mind Mark Tushnet’s warning: “[T]he critique of rights says primarily that lawyers should not expect too much from what they do, and that they should not be surprised if things turn out rather differently from what they expected when they urged courts to adopt some progressive formulation of the rights we have.”). Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 34 (1993).

⁸⁹ See Susan E. Keefe, *Introduction: What Participatory Development Means for Appalachian Communities*, PARTICIPATORY DEVELOPMENT IN APPALACHIA CULTURAL IDENTITY, COMMUNITY, AND SUSTAINABILITY 1–2 (Susan E. Keefe ed., 2009).

⁹⁰ See Delgado & Stefancic, *Triple Helix Dilemma*, *supra* note 13, at 222.

⁹¹ *Id.* at 223; see also ANNA WILSON, PERSUASIVE FICTION: FEMINIST NARRATIVE AND CRITICAL MYTH 20 (2001) (discussing “collective form[s] of opposition” beyond “the atomized individual” which are “capable of producing alternative self-definitions, values, and cultural produces that reflect those values.”). Cultivating non-hegemonic formations in the context of law reform alliances has a similar diversifying impact. See Jim Freeman, *Supporting Social Movements:*

In the specific context of CLR-modeled non-hegemonic alliances, while “mulling over what an ideal legal world would look like from the client’s perspective,”⁹² actual synergistic collaborations could occur among attorneys, the public interest client base, and other marginalized “outsiders” within the alliances. Essentially, this is a collective, grassroots approach to legal research and analysis.⁹³

Additionally, from a social dynamics perspective, another element of non-hegemonic CLR reform alliances involves disrupting status quo internal hierarchies. Traditional hierarchies tend to privilege progressive legal elites and correspondingly subordinate the public interest client base and participating grassroots activists.⁹⁴ Thus, in contrast to traditional hegemonic (and thus hierarchical) structures, consciously egalitarian arrangements are favored in non-hegemonic reform approaches like CLR.

Such egalitarian reform alliances have been explored through certain strains of the “cause lawyering” discourse. As Professor Avi Brisman notes: “[C]lient voice lawyering . . . attempts to empower the client further and eliminate the hierarchical differences in the client-lawyer relationship.”⁹⁵ Brisman goes on to provide a rich summary of this multifaceted discourse:

[Commentators] situate ‘cause lawyering’ directed toward serving *unmet legal needs* . . . at the ‘conventional end’ and ‘radical cause lawyering’ (which endeavors to make changes in the basic structures of society and join forces with the social movements and their transformative interests and values) and post-structurally-inspired ‘critical cause lawyering’ (which focuses less on large-scale transformative politics than on rejecting hierarchy at micro-sites of power, e.g., the workplace, family, community, lawyer-client relationship) at the ‘transgressive end.’ In between ‘unmet legal needs’ and ‘radical-critical,’ [there are] ‘civil liberties’ and ‘civil

A Brief Guide for Lawyers and Law Students, 12 HASTINGS RACE & POVERTY L. J. 191, 193 (2015) (“[M]ore lawyers are coming to the conclusion that rather than seeking to drive the change themselves, they should be helping oppressed communities become the leaders of large-scale, systemic change.”); Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 CLINICAL L. REV. 255, 256 (2014) (“[C]ause lawyers have considered the ways in which adopting a particular methodology based upon critical reflection—be it client-centered-, community-, rebellious-, or collaborative lawyering—might empower communities and serve their clients’ visions of justice.”).

⁹² Delgado & Stefancic, *Revisited*, *supra* note 13, at 328.

⁹³ As is discussed *infra* Part III.C., the *ABA Model Rules of Professional Conduct* limit non-traditional attorney-client interactions and analytical processes. Practicing attorneys interested in non-hegemonic approaches must therefore be wary of such limitations. To be sure, however, we have not reached the “end of history” with the current incarnation of the *ABA Rules*. As innumerable commentators have noted, the rules should be amended to permit more creative and collaborative approaches to law reform. *See* sources cited *infra* note 186.

⁹⁴ *See* Hoffman & Vahlsing, *supra* note 91, at 258–60.

⁹⁵ Avi Brisman, *The Criminalization of Peacemaking, Corporate Free Speech, and the Violence of Interpretation: New Challenges to Cause Lawyering*, 14 CUNY L. REV. 289, 296 (2011).

rights' lawyering (which is court-focused and seeks to protect and/or extend legal and constitutional rights) and 'public policy' cause lawyering . . . conducted in legislature and administrative agencies . . .⁹⁶

Thus, in addition to disrupting internal hierarchies within progressive reform initiatives, cause lawyering discourse more broadly explores both intra-systemic reform approaches (e.g., civil liberties and civil rights lawyering) and systemic reform approaches (e.g., radical cause lawyering and, arguably, critical cause lawyering as well).⁹⁷

The CLR framework intersects with cause lawyering (or, alternatively, can be conceptualized, at least in part, as a niche approach to cause lawyering). As discussed above, CLR focuses on how the legal research and analysis process can benefit from the novel input of outsiders to the progressive status quo—i.e., a collective, grassroots approach to legal research and analysis. Thus, through an egalitarian, non-hegemonic expansion of the legal research and analysis process, outsiders might indeed assist in catalyzing novel socio-legal reform.⁹⁸

III. CIVIL DISOBEDIENCE IN CRITICAL LEGAL RESEARCH THEORY

Now that this Article has provided a synopsis of CLR, as an expansionist project, Part II will examine how critically informed civil disobedience theory can enhance CLR by incorporating civil disobedient work product within CLR reform alliances. The critical approach to civil disobedience has largely been formulated in direct response to the foundational Rawlsian liberal conception.⁹⁹ Accordingly, this Part will briefly outline Rawls's framework before discussing the intersecting strains of critical civil disobedience theory. The final Section in this Part will then synthesize the existing CLR framework with applicable strains of critical civil disobedience theory.

⁹⁶ *Id.* at 297 (emphasis in original).

⁹⁷ *See id.* Recent scholarship also explores cause lawyering in the specific context of attorney-disobedient relationships. *See* Louis Fisher, *Civil Disobedience as Legal Ethics: The Cause-Lawyer and the Tension Between Morality and "Lawyering Law,"* 51 HARV. C.R.-C.L. L. REV. 481, 484 (2016) (exploring why "a constrained exercise of civil disobedience by cause lawyers in the context of professional ethics might be normatively desirable as a means of enhancing democratic deliberation and fostering the political influence of marginalized client populations.").

⁹⁸ Note that creative, non-hegemonic reform initiatives ultimately are characteristic of many intersecting strains of third wave critical theory. *See, e.g.,* Sumi Cho & Robert Westley, *Historicizing Critical Race Theory's Cutting Edge: Key Movements That Performed the Theory, in* CROSSROADS, DIRECTIONS, & A NEW CRITICAL RACE THEORY 51 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002) ("Synergism is a vitally important possibility for a project, such as CRT, that attempts to affect the political world through discursive intervention. Such a project is necessarily collective and collaborative, requiring analysis of information and exchange of insights gleaned from the experiences of [many] movements . . .").

⁹⁹ *See* Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 37.

A. Liberal Approach to Civil Disobedience

John Rawls is among the most notable political philosophers of the twentieth century.¹⁰⁰ In *A Theory of Justice*, Rawls proffers a short but vastly influential treatment on civil disobedience.¹⁰¹ *A Theory of Justice* is essentially preoccupied with ideal theory (i.e., the institutional arrangements within a purportedly just society). However, for Rawls, the exploration of civil disobedience constitutes a version of non-ideal theory—a practice permitted only in “nearly just” societies.¹⁰² While seminal commentators such as Ronald Dworkin, Jürgen Habermas, and Joseph Raz have contributed significantly to the discourse,¹⁰³ Rawls’s treatment of civil disobedience remains the touchstone liberal defense of the practice. Rawls’s treatment of civil disobedience is divided into three primary components. These include the definition, justification, and sociopolitical role of civil disobedience in a democratic society.¹⁰⁴

1. Rawlsian Definition

The Rawlsian definition of civil disobedience is as follows: “[A] public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”¹⁰⁵ Rawls adds that through such acts “one addresses the sense of justice of the majority of the community,”¹⁰⁶ that civil disobedients must accept the “legal consequences” of their conduct, and that ultimately disobedients must act “within the limits of fidelity to law.”¹⁰⁷ This means that civil disobedients must “recogniz[e] the fundamental legitimacy of the existing system.”¹⁰⁸

¹⁰⁰ See VILLE PÄIVÄNSALO, *BALANCING REASONABLE JUSTICE: JOHN RAWLS AND CRUCIAL STEPS BEYOND* xiii (2016) (“Rawls’s pioneering book of political philosophy, *A Theory of Justice*, was published in 1971. This theory rested on traditional social contract theory ‘as represented by Locke, Rousseau, and Kant,’ which Rawls revised with updated philosophical tools. . . . Rawls’s *Theory* became world-famous in the late twentieth century and it will remain influential for a long time to come . . . [as will his subsequent works] *Political Liberalism* . . . *The Law of Peoples* . . . [and] *Lectures on the History of Moral Philosophy*.”).

¹⁰¹ See RAWLS, *JUSTICE*, *supra* note 9, at 363–91.

¹⁰² See Celikates, *Civic Freedom*, *supra* note 15, at 212.

¹⁰³ See Ronald Dworkin, *Civil Disobedience*, in *TAKING RIGHTS SERIOUSLY* 206 (1977); Jürgen Habermas, *Civil Disobedience: Litmus Test for the Democratic Constitutional State*, 30 *BERK. J. OF SOCIO.* 95, 103 (1985); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 266–75 (1979). Interestingly, for Raz, civil disobedience is unacceptable in a liberal society: “[Raz] thinks that the right to civil disobedience is confined to illiberal societies. In such societies, this right is derived from the right to participation. He contends that in liberal democracies people can exercise their right to participation without resort to civil disobedience.” Vinit Haksar, *The Right to Civil Disobedience*, 41 *OSGOODE HALL L.J.* 407 (2003).

¹⁰⁴ See RAWLS, *JUSTICE*, *supra* note 9, at 363–64.

¹⁰⁵ *Id.* at 364.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 366.

¹⁰⁸ Celikates, *Civic Freedom*, *supra* note 15, at 213.

Rawls further elaborates on several elements. As an illustrative example, civil disobedience is public in that it must be “engaged in openly with fair notice; it is not covert or secretive.”¹⁰⁹ This is to ensure communication of the injustices to the societal majority (and ultimately to governmental elites). Additionally, non-violence is required to ensure non-degraded communication—i.e., “interference with the civil liberties of others tend to obscure the civilly disobedient quality of one’s act.”¹¹⁰ The non-violence requirement otherwise ensures that the civil disobedience comports with fidelity to the existing legal system.¹¹¹

2. Rawlsian Justification

The Rawlsian justification for civil disobedience is complex; thorough understanding requires familiarity with Rawls’s theoretical framework, particularly its two principles of justice: The liberty principle (the first principle) and the difference principle (the second principle).¹¹² Rawls posits that civil disobedience is justified when “serious infringements of the first principle of justice [occur] . . . and [for] blatant violations of the second part of the second principle,” which pertains to the fair equality of opportunity.¹¹³ Violations of the first part of the second principle—the difference principle—are not legitimate grounds for civil disobedience.¹¹⁴ Additionally, civil disobedience must be used only as a “last resort” (legal-institutional channels must be explored, although not necessarily exhausted per se),¹¹⁵ and civil disobedients must also coordinate their actions with other potential dissenters in order to avoid “serious disorder.”¹¹⁶

Most basically, then, Rawlsian civil disobedience is concerned with fundamental rights.¹¹⁷ When serious violations of civil rights and liberties occur in a “nearly just” society—and note that Rawls, writing in the early 1970s, likely

¹⁰⁹ See RAWLS, JUSTICE, *supra* note 9, at 366.

¹¹⁰ *Id.*; see also John Simmons, *Disobedience and Its Objects*, 90 B.U. L. REV. 1805, 1807–08 (2010) (“Rawls’s assumptions [are that] disobedience in a near-just state must always be non-violent. Rawls’s own commitment to this view is not motivated by any prior commitment to pacifism (like that of Gandhi or King). It is motivated rather by his other requirements that legal disobedience be a political act, addressed to the public. One cannot, Rawls thinks, address the public with violence . . .”).

¹¹¹ See RAWLS, JUSTICE, *supra* note 9, at 366 (“[Civil disobedience] is nonviolent for another reason. It expresses disobedience to the law with the limits of fidelity to the law, although it is of the outer edge thereof.”).

¹¹² For a concise overview of Rawls’s theory of justice—particularly his two principles of justice—see John Stick, *Turning Rawls into Nozick and Back Again*, 81 NW. U. L. REV. 363, 365–66 (1987).

¹¹³ See RAWLS, JUSTICE, *supra* note 9, at 372.

¹¹⁴ See *id.* at 372–73.

¹¹⁵ *Id.* at 373.

¹¹⁶ *Id.* at 374.

¹¹⁷ See Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 40.

had the Civil Rights Movement in mind as a paradigmatic example—civil disobedience is therefore justified.¹¹⁸ As Robin Celikates argues: “[Rawls’s] focus on fundamental rights . . . is characteristic for the discussion of civil disobedience within the liberalism tradition of political philosophy.”¹¹⁹

3. Rawlsian Aim

Rawls’s social and political aim of civil disobedience also comports with his overarching liberal framework. For Rawls, the central role of civil disobedience is in communicating to the societal majority:

By engaging in civil disobedience one intends, then, to address the sense of justice of the majority and to serve fair notice that in one’s sincere and considered opinion the conditions of free cooperation are being violated. We are appealing to others to reconsider, to put themselves in our position, and to recognize that they cannot expect us to acquiesce indefinitely in the terms they impose upon us.¹²⁰

The Rawlsian aim of civil disobedience has therefore been popularized as the “communication thesis.”¹²¹ This is because “for Rawls, secularization and the emphasis upon dialogue went hand in hand” in that “[c]ivil disobedience was a *plea* for basic liberties, a plea that was addressed to the shared rationality of the audience.”¹²² Theorist Jürgen Habermas similarly focuses on the essentially communicative nature of civil disobedience—and thus has been characterized as quasi-Rawlsian in his approach.¹²³

¹¹⁸ See WILLIAM SMITH, CIVIL DISOBEDIENCE AND DELIBERATIVE DEMOCRACY 37 (2013) (“The liberal theory of civil disobedience, exemplified by Rawls, is based on the idea that this form of protest can be a morally justified means of expressing opposition to clear and serious infringements of equals rights and liberties of citizens.”); MOULIN-DOOS, CIVIC DISOBEDIENCE: TAKING POLITICS SERIOUSLY, A DEMOCRATIC THEORY OF POLITICAL DISOBEDIENCE 95 (2015) (“[T]he exemplary case of ‘justice-based civil disobedience is the American civil rights movement of the 1960s which inspired the theorization of Rawls. . .”).

¹¹⁹ Celikates, *Civic Freedom*, *supra* note 15, at 222.

¹²⁰ See RAWLS, JUSTICE, *supra* note 9, at 382–83.

¹²¹ MILLIGAN, *supra* note 11, at 18 (“A majority of contemporary commentators . . . have agreed with [Rawls’s] *communication thesis*, the view that civil disobedience is a form of address.”) (emphasis in original). For Rawls’s explicit formulation of the “communication thesis,” see RAWLS, JUSTICE, *supra* note 9, at 364 (“[Through civil disobedience] *one addresses the sense of justice of the majority of the community* and declares that in one’s considered opinion the principles of social cooperation among free and equal men are not being respected.”) (emphasis added).

¹²² MILLIGAN, *supra* note 11, at 18.

¹²³ For Jürgen Habermas’s take on the communication thesis, see the following: “The disobedient then may assume the plebiscitary role of the citizen in his directly sovereign capacity only *within the bounds of an appeal to the existing majority*. In contrast to resistance proper, he recognizes the democratic legality of the existing order. . . . The constitutional state . . . [is not] a finished product, but rather . . . a susceptible, precarious undertaking which is . . . under constantly changing circumstances. Because this project is incomplete, the constitutional organs [*Verfassungsorgan*] themselves are by no means exempt from this precariousness [and thus

Through the communication thesis, Rawls posits that civil disobedience largely functions as a stabilizing mechanism for liberal democracies; a release valve for legal-institutional correction of individual rights violations. As Rawls writes, through “resisting injustice within the limits of fidelity to law” civil disobedience “introduces stability into a well-ordered society, or one that is nearly just.”¹²⁴ Ultimately, then, from the Rawlsian standpoint, civil disobedience utilized with “due restraint and sound judgment helps to maintain and strengthen just institutions.”¹²⁵

B. *Critical Approach to Civil Disobedience*

This Article adopts a critical approach to civil disobedience as a more effective and just alternative to the Rawlsian model. Such a critical approach differs markedly from the Rawlsian liberal conception and its progeny. A core notion of critical civil disobedience theory is that the Rawlsian view is arbitrarily limited by merely reflecting the traditional liberal worldview.¹²⁶ Therefore, in this Section, an alternative, largely radical democratic approach to civil disobedience is outlined, as reflected by contemporary critical theory. This critical approach to civil disobedience is associated mostly notably with the work of Professor Robin Celikates. Indeed, Celikates has put forth an alternative definition, justification, and aim of civil disobedience—which will comprise the majority of the three Sub-Sections below.

Celikates re-envision civil disobedience as a form of egalitarian and collective self-determination;¹²⁷ however, this Section also relies upon the work

disobedient correction] . . .” Habermas, *supra* note 95, at 103–104 (emphasis added); *see also* Elias Jose Palti, *Patroklos’s Funeral and Habermas’s Sentence*, 23 LAW & SOC. INQUIRY 1017, 1042 (1998) (“[Habermas] adopt[s] a weakened, Rawls-like, definition of . . . ‘civil disobedience,’ which is already inscribed within the frameworks and institutional channels of [our] existing legal norms . . .”). Habermas’s complete definition of civil disobedience is as follows—note the remarkable similarities to Rawls’s definition: “Civil disobedience is a morally *justified* protest which may not be founded only on private convictions or individual self-interests; it is a *public* act which, as a rule, is announced in advance and which the police can control as it occurs; it includes the *premeditated transgression* of legal norms without calling into question obedience to the rule of law as a whole; it demands the readiness to *accept* the legal *consequences* of the transgression of those norms; the infraction by which civil disobedience is expressed has an exclusively *symbolic character*—hence is derived the restriction to *nonviolent* means of protest.” Habermas, *supra* note 95, at 100 (emphasis in original). For additional work on the communicative aspects of civil disobedience, *see* David Lefkowitz, *On a Moral Right to Civil Disobedience*, 117 ETHICS 202, 218–23 (2007); Kimberley Brownlee, *The Communicative Aspects of Civil Disobedience and Lawful Punishment*, 1 CRIM. L. & PHIL. 179, 189–91 (2007).

¹²⁴ *See* RAWLS, JUSTICE, *supra* note 9, at 383.

¹²⁵ *Id.*

¹²⁶ *See* Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 37–42.

¹²⁷ *See id.* at 40. Note, however, that while Celikates is a leading contemporary commentator, he draws upon prior radical democratic work on civil disobedience put forth by Arendt and Etienne Balibar, among others. *See id.* at 40–41.

of such foundational commentators as Hannah Arendt and Günter Frankenberg (among others)—who variously posit that civilly disobedient citizens ought to be incorporated more formally into legal-institutional channels.¹²⁸ Thus, such an “institutional formalization” approach to civil disobedience will be synthesized with Celikates’ more explicitly radical democratic vision.¹²⁹

Celikates emphasizes that his approach relies upon “the non-ideal theorizing in the tradition of critical theory, feminism and pragmatism.”¹³⁰ Central to Celikates’ approach is starting with contemporary, “real world” practices of dissent, and thereafter working backwards towards an explanatory framework. Such a critical approach to civil disobedience is therefore egalitarian, pluralistic, and perhaps above all else practice-based.¹³¹

1. Alternative Definition

Celikates puts forth an alternative definition of civil disobedience that is “less normatively loaded and therefore less restrictive” than Rawls’ definition.¹³² Celikates’ alternative definition of civil disobedience is as follows: “[A]n intentionally unlawful and principled collective act of protest . . . [that has] the political aim of changing [a set of] laws, policies or institutions.”¹³³ As Celikates states, this “minimalist definition deliberately leaves open whether civil disobedience is public, nonviolent, conscientious, appealing to the majority’s sense of justice, and restricted to transforming the system within its existing limits.”¹³⁴

In working towards this definition, Celikates problematizes the core elements of Rawls’s liberal definition. His specific methodology represents a practice-based approach that “start[s] from a critical analysis of current political practices

¹²⁸ See ARENDT, *supra* note 20, at 99–101 (“It is an altogether different question whether it would not be possible to find a recognized niche for civil disobedience in our institutions of government The establishment of civil disobedience among our political institutions might be the best possible remedy for the failure of judicial review.”); Frankenberg, *Disorder is Possible*, *supra* note 1, at 27.

¹²⁹ The notion of “institutional formalization” is the author’s own formulation. This is simply intended as a broad catch-all for any commentator interested in incorporating civil disobedients—or, at the least, the civil disobedient work product—within any mechanism for socio-legal reform.

¹³⁰ Celikates, *Civic Freedom*, *supra* note 15, at 227.

¹³¹ See *id.* at 217–20. Celikates draws heavily upon the work of philosopher James Tully. What follows is an illustrative passage on Tully’s foundational work: “[D]iverse citizenship is associated with a diversity or multiplicity of different *practices* of citizenship in the West and non-West. The language of diverse citizenship, both civic and global presents citizenship as a situated or ‘local’ practice that takes countless forms in different locales. It is not described in terms of universal institutions and historical processes but in terms of grassroots democratic or civic *activities* of the governed. . . .” James Tully, *On Global Citizenship*, in ON GLOBAL CITIZENSHIP: JAMES TULLY IN DIALOGUE 8-9 (James Tully ed., 2014) (emphasis in original).

¹³² See Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 39.

¹³³ *Id.*

¹³⁴ *Id.*

and struggles, the injustices and social pathologies they address, and the expectations and hopes they express, for example, from the different forms of actually existing civil disobedience and the different modes of its conceptualization and justification.”¹³⁵

In deploying this critical methodology, it becomes clear that “[numerous] elements of [Rawls’s] definition” prove too limited by “counterexamples from what are usually considered paradigmatic” contemporary examples of civil disobedience.¹³⁶ For example, modern, “well-established” acts of civil disobedience include clandestine animal liberation efforts, blocking intersections, and “obstructing the deportation of so-called illegal immigrants.”¹³⁷ By very design, such practices often cannot occur publicly in the Rawlsian sense—that is, “openly with fair notice”—as authorities with prior knowledge would likely thwart the acts.¹³⁸

Other elements of Rawls definition also prove insufficiently narrow. For example, the non-violence requirement is problematic because many contemporary acts of civil disobedience involve: (1) some reasonable measure of self-defense on the part of protestors, or (2) the destruction of property.¹³⁹ The conscientious requirement of the Rawlsian definition is also an arbitrary limitation. Environmental justice issues, for instance, often are contested for reasons of simple self-preservation; such “not in my backyard” (“NIMBY”) acts of civil disobedience are not, in the Rawlsian sense, conducted “out of reasons of conscience.”¹⁴⁰ Such is merely an illustrative sampling of the ways in which contemporary, real world practices of dissent violate Rawls’s definitional elements—and yet, under a more inclusive critical framework, might nevertheless constitute important exemplars of modern civil disobedience.¹⁴¹

Additionally, and of particular interest to the CLR framework, Celikates posits that civil disobedience ought not necessarily be “place[d] within the limits

¹³⁵ Celikates, *Civic Freedom*, *supra* note 15, at 226.

¹³⁶ *Id.* at 213.

¹³⁷ *Id.*

¹³⁸ See RAWLS, JUSTICE, *supra* note 9, at 366. Online civil disobedience also complicates notions of public contestations. *A Theory of Justice*, after all, was published decades before the internet took its currently recognizable form. As Celikates writes: “[A] further question how the emphasis on publicity would accommodate more recent forms of digital disobedience, as practiced, for example, by Anonymous, and more generally what ‘public’ is supposed to mean here.” Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 38. See also MOLLY SAUTER, THE COMING SWARM: DDOS ACTIONS, HACKIVISM, AND CIVIL DISOBEDIENCE ON THE INTERNET 8 (2014) (“The internet is a vibrant outlet for innovative political speech, and civil disobedience is a valuable and well-respected tool of activism.”).

¹³⁹ See Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 41 (“What about violence against property . . . violence against oneself, or minimal violence in self-defense?”).

¹⁴⁰ Celikates, *Civic Freedom*, *supra* note 15, at 214–15.

¹⁴¹ See *id.* at 213–18.

of *fidelity to law*.¹⁴² Many contemporary dissenters engage in acts that, while falling well short of revolutionary action, are nevertheless geared towards achieving systemic (rather than intra-systemic) change.¹⁴³ As Celikates points out, for Martin Luther King and other Civil Rights era activists, “[i]t is not clear that they were only aiming at more or less local corrections within the existing system or that their disobedience was an expression of their recognition of the system’s general legitimacy.”¹⁴⁴ As King once said: “The thing to do is to get rid of the system.”¹⁴⁵ What is more, other foundational civil disobedience commentators, such as Gandhi and Thoreau, did not necessarily regard their respective “prevailing system[s] as ‘reasonably just.’”¹⁴⁶

2. Alternative Justification

Celikates posits that Rawls’s justification for civil disobedience is also arbitrarily restrictive.¹⁴⁷ Rawls’s focus on violations of the liberty principle and of the second part of the difference principle (the fair equality of opportunity) essentially centers on violations of fundamental rights.¹⁴⁸ This fixation on fundamental rights places Rawls’s discussion squarely within the liberalism tradition, which “tends to exclude from view certain forms of socio-economic inequality, as well as procedural and institutional democratic deficits that systematically prevent citizens from effectively engaging in collective self-determination.”¹⁴⁹ Thus, in response to Rawls, Celikates greatly expands the potential justification for civil disobedience.

Certain structural democratic deficits associated with our contemporary sociopolitical landscape constitute the first aspect of Celikates’s expanded

¹⁴² See Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 38 (emphasis in original). Arendt herself discusses the potentially radical aim of civil disobedience—i.e., essentially disrupting the binary division between constitutionally protected protest and true insurrectionism: “[T]he civil disobedient shares with the revolutionary the wish ‘to change the world,’ and the changes he wishes to accomplish can be drastic indeed . . .” ARENDT, *supra* note 20, at 77.

¹⁴³ See Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 38.

¹⁴⁴ *Id.* at 39.

¹⁴⁵ Martin Luther King, Jr., *Love, Law, and Civil Disobedience*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 47 (1991); see also ARENDT, *supra* note 20, at 77 (“Did Gandhi accept the ‘frame of established authority,’ which was British rule of India? Did he respect the ‘general legitimacy of the systems of laws’ in the colony?”).

¹⁴⁶ David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 PHIL. & PUB. AFF. 31, 32 (1998); Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 39. Note that while “Henry David Thoreau has significantly influenced American thinking on nonviolent civil disobedience,” he did not “present a full-blown, scholarly theory of civil disobedience.” Stephen Altan, *In the Wake of Thoreau: Four Modern Legal Philosophers and the Theory of Nonviolent Civil Disobedience*, 24 LOYOLA UNIV. L. J. 39, 40 (1992). Thoreau’s views are most aptly characterized though as “highly individualistic and libertarian.” *Id.* at 41.

¹⁴⁷ See *id.* at 39–40.

¹⁴⁸ See *id.* at 40.

¹⁴⁹ *Id.*

justification for civil disobedience. One prominent example includes “semi-oligarchic party structures” that preclude meaningful citizen participation in public policy formulation.¹⁵⁰ Indeed, recent empirical studies characterize the U.S. political system at large as oligarchic, despite the apparent veneer of genuine democratic governance.¹⁵¹ A justification for civil disobedience can therefore extend to such democratic deficits:

Protestors often claim that their civil disobedience is justified on account of procedural and institutional democratic deficits that may leave the principle of equal liberty intact while restricting the effective participation of citizens in democratic self-government (the development of semi-oligarchic party structures, the problem of agenda-setting [etc.]) . . . [Rawls’s] ideal theory [is] without concern for the social and political reality of protest that a contemporary and historical survey would have uncovered.¹⁵²

Therefore, from a critical perspective, contemporary instances of structural democratic deficits, excluded from Rawls’s framework, may constitute an expanded justification for civil disobedience.

The second aspect of Celikates’s expanded justification for civil disobedience pertains to the first part of the difference principle. Rawls generally excludes violations of the difference principle—which regulates socioeconomic inequalities—from the justification for civil disobedience.¹⁵³ But “violations of the difference principle will, if they exceed a certain measure, affect the fair value of basic liberties.”¹⁵⁴ Thus, those who are “systematically disadvantaged” may have “grounds for resistance.”¹⁵⁵ On this point, we might add that staggering wealth disparities have led directly to modern civil disobedience movements such as Occupy Wall Street and its progeny.¹⁵⁶

3. Alternative Aim

As compared to Rawls’s liberal framework, Celikates envisions civil

¹⁵⁰ Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 40.

¹⁵¹ See, e.g., Martin Gilens & Benjamin L. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12.03 PERSPECTIVES ON POL. 564, 576-77 (2014) (“Despite the seemingly strong empirical support in previous studies for theories of majoritarian democracy, our analyses suggest that majorities of the American public actually have little influence over the policies our government adopts.”).

¹⁵² Celikates, *Civic Freedom*, *supra* note 15, at 217–18.

¹⁵³ See RAWLS, JUSTICE, *supra* note 9, at 372–73. Celikates elaborates: “The reason for this is that, according to Rawls, civil disobedience should be restricted to easily detectable violations of clear and basic demands of justice that can also be formulated in terms of individual basic rights.” Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 39.

¹⁵⁴ Celikates, *Civic Freedom*, *supra* note 15, at 220.

¹⁵⁵ *Id.*

¹⁵⁶ See MANUEL CASTELLS, NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE 196 (2013).

disobedience with a radically different aim. Celikates writes that “from a liberal perspective, civil disobedience mainly appears as a form of protest of individual rights bearers against governments and political majorities.” However, from a radical democratic perspective, the role of civil disobedience becomes “the expression of a democratic practice of collective self-determination.”¹⁵⁷ The focus shifts away from civil disobedients communicating to societal majorities and governmental elites toward the disobedient citizens themselves.¹⁵⁸ In short, civil disobedience becomes a genuinely democratic practice of collective self-determination.

This formulation relies upon the “tension between ‘constituent power’ and ‘constitutional form’”:

[W]e can also describe the role of civil disobedience in more general terms as the illegal but ‘legitimate dramatizing of the tension between the poles of positive law and existing democratic processes and institutions on the one hand, and the idea of democracy as self-government on the other, which is not exhausted by established law and the institutional status quo. . . .’¹⁵⁹

It is through this tension of existing law and processes at one pole, and grassroots self-determination at the other, that Celikates locates the true transformative potential of civil disobedience: “[C]ivil disobedience thus emerges as an essentially collective and political practice of contestation—as one form the struggles *of* and *for* democratic freedom. . . to challenge and modify the non-democratic ways [civil disobedients] are governed.”¹⁶⁰

Celikates has thus largely focused on the collective self-determination aspect of civil disobedience. However, other commentators have explicitly posited that civil disobedients ought to be incorporated more formally into legal-institutional channels. Political theorist Hannah Arendt’s groundbreaking work on civil disobedience is explicitly concerned with the institutionalization of what we

¹⁵⁷ Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 41.

¹⁵⁸ *See id.*

¹⁵⁹ Celikates, *Civic Freedom*, *supra* note 15, at 223 (quoting ULRICH RÖDEL, GÜNTER FRANKENBERG, & HELMUT DUBIEL, *DIE DEMOKRATISCHE FRAGE* 46 (1989)). Celikates draws upon a rich tradition of theorists in making such radical democratic arguments—including Arendt and Balibar: “[Rawls] seems to underestimate the transformative effects that civil disobedience can have as a specifically extra-institutional form of political practice, the democratic and democratizing potential of which has been stressed by theorists from Hannah Arendt to Etienne Balibar. From such a more radically democratic perspective we can also describe the role of civil disobedience in more general terms as . . . [in Balibar’s words] ‘an indefinite oscillation . . . between two obviously antinomical forms of politics: an insurrectional politics and a constitutional politics’” Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 40 (quoting Etienne Balibar, ‘Rights of Man’ and ‘Rights of the Citizen’: *The Modern Dialectic of Equality and Freedom*, in *MASSES, CLASSES, IDEAS: STUDIES ON POLITICS AND PHILOSOPHY BEFORE AND AFTER MARX* 39, 51 (1994)).

¹⁶⁰ Celikates, *Civic Freedom*, *supra* note 15, at 223–24 (emphasis in original).

might call the civil disobedient work product.¹⁶¹ As philosopher William Smith summarizes in *Reclaiming the Revolutionary Spirit: Arendt on Civil Disobedience*:

[T]he urge to institutionalize civil disobedience—or at least to ensure that civilly disobedient citizens are brought into the ebb and flow of government—is surely born of a fear that this unexpected and spontaneous echo of the revolutionary spirit will . . . disappear without concerted efforts to preserve it.¹⁶²

Arendt argues that “civilly disobedient citizens should be given access to the very heart of law-making”¹⁶³ so that “the moribund institutions of representative democracy may once again recapture some of the political energy that is manifest in the annals of the revolutionary tradition.”¹⁶⁴

Arendt’s broad prescriptive recommendations are that disobedients could influence Congress directly through persuasive argument.¹⁶⁵ However, Arendt provides scant detail on the mechanism of such Congress-disobedient interactions.¹⁶⁶ In filling this gap, Smith’s recommendations include the following:

The most ambitious suggestion [is] that a permanent body could be set up [in Congress] for the purpose of hearing complaints of representatives from among the ranks of the groups whose members engage in civil disobedience. The permanent body would provide a stage for a confrontation between activists and government representatives. . . The idea behind this suggestion is to create a space for genuine dialogue between disobedient citizens and government representatives.¹⁶⁷

¹⁶¹ See *supra* note 12 and accompanying text defining a civil disobedient “work product” as a broad catch-all term for any tangible text or symbolic action produced by disobedients.

¹⁶² Smith, *Constitutional Niche*, *supra* note 20, at 141. Smith explicitly links the Arendtian “revolutionary spirit” with Arendt’s separate work on civil disobedience: “Although she does not wish to sever the tie between civil disobedience and the revolutionary spirit, Arendt clearly believes that the former can be compatible with established institutions of government.” *Id.* at 137. Smith adds: “[Arendt] argu[es] that civil disobedience, despite its illegality, is compatible with the ‘spirit’ of the laws. And on the basis of this compatibility, she argues that the republic should find ‘a recognized niche for civil disobedience in [its] institutions of government.’” *Id.*

¹⁶³ *Id.* at 134.

¹⁶⁴ *Id.* at 150.

¹⁶⁵ ARENDT, *supra* note 20, at 101. Arendt adds: “These minorities of opinion would thus be able to establish themselves as a power that is only ‘seen from afar’ during demonstrations and other dramatizations of their viewpoints, but is always present and reckoned with in the daily business of government.” *Id.*

¹⁶⁶ Smith, *Constitutional Niche*, *supra* note 20, at 142.

¹⁶⁷ *Id.* at 143. Smith adds more detail to this proposal: “The dialogue between activist and government representatives in the permanent body could be moderated and adjudicated by a panel that is, as far as possible, impartial between the two sides. . . . The culmination of the confrontation could be a summary document, which presents the collective judgment of the panel and its non-

Smith, in building upon Arendt's framework, therefore focuses on standing civil disobedient bodies within the federal legislature.

Smith's emphasis on a dialogue between citizens and governmental elites is admirable; that said, such an approach is perhaps not ideal given the contemporary political landscape in the U.S. Justice-based appeals to the societal majority and to governmental elites often fail not for lack of sufficient communication—but simply because neoliberal elites are indifferent (at best) to such appeals. As Celikates points out: "It is often failures of this sense of justice that make civil disobedience necessary in the first place. In fact it is difficult to see why one should appeal to it at all when the majority's sense of justice is taken to be systematically distorted. . . and has shown itself largely immune to critical challenges."¹⁶⁸

Therefore, a more practical, "real world" approach likely involves a progressive attorney and disobedient citizen reflective relationship as explored by Professor Günter Frankenberg. As Frankenberg writes, "civil disobedience [is] critical legal theory in practice" in that "[t]he practice of protest. . . suggests that lawyers sensitize their strategically trained eye. . . to symbolic phenomena and events."¹⁶⁹ More specifically, progressive "[a]ttorneys ought to ask themselves how 'the law' (in practice, this means the legal profession) can react appropriately to the burden of symbolization taken on by the disobedient."¹⁷⁰ Attorneys should consider "civil disobedience as the starting point of any theoretical and practical legal work. This reflexive relation actualizes the fundamental fallibility of the law, [and] its malleability and openness to new rights (or duties). . . ."¹⁷¹ Thus, Frankenberg formulates a reflective-based approach to civil disobedient-attorney relationships. The next Section of the Article will explain how this approach can be explicitly cultivated at the grassroots level.

C. Incorporation of Critical Civil Disobedience in CLR Theory

This Section will expand upon the existing CLR framework through an incorporation of select, synthesized civil disobedience theory. Recall that the existing CLR framework is comprised of three main tenets: (1) the deconstruction of the American legal research regime, (2) a newfound

binding recommendations." *Id.*

¹⁶⁸ Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 38.

¹⁶⁹ Frankenberg, *Disorder is Possible*, *supra* note 1, at 30; *see also* Charles R. DiSalvo, *The Fracture of Good Order: An Argument for Allowing Lawyers To Counsel the Civilly Disobedient*, 17 GA. L. REV. 109, 149–50 (1982) ("At bottom, civil disobedients are lawmakers. Perhaps those lawmakers who call themselves lawyers have refused, so far, to recognize civil disobedience as a way of making law because they do not understand that disobedients share their appreciation of the law.").

¹⁷⁰ *Id.* at 30–31.

¹⁷¹ *Id.* at 31.

practitioner reliance upon alternative resources, and (3) the incorporation of grassroots activists and other outsiders within reform initiatives.¹⁷²

The CLR discourse to date excludes discussion about the potential special role of civil disobedients within the third tenet above: progressive outsider-inclusion within alliances. For instance, Delgado and Stefancic argue generally that “members of marginal groups, or persons who are in other ways separated from the mainstream” may produce the most innovative reform results;¹⁷³ however, no explicit analysis exists regarding disobedients. Thus, as a CLR expansionist project, this Section posits that civil disobedients indeed might be uniquely situated to proffer novel reform ideas. Moreover, CLR, with its core emphasis on procedural-based reform, is the ideal model through which to incorporate civil disobedient viewpoints within reform alliances.

CLR is fundamentally concerned with innovative and egalitarian reform approaches: it is the *who* and the *how* of socio-legal reform as much, if not more, than the final *what* of legal-institutional change.¹⁷⁴ Moreover, CLR is theoretically inclusive: its progressive methodologies can be brought to bear on incremental as well as radical (or institutional-transformative) change.¹⁷⁵

Synthesizing critical civil disobedience theory and CLR is ideal for three reasons: its critically informed definition, justification and aim of civil disobedience. First, the definition of critical civil disobedience comports well with CLR. Celikates’ pluralist, practice-based definition of civil disobedience facilitates the cultivation of an open-ended (and thus more radical) reform agenda. Rawls’s definition demands fidelity to existing socio-legal structures (intra-systemic reform only) whereas Celikates explicitly challenges the notion that disobedience must be “restricted to transforming the system within its existing limits.”¹⁷⁶ Therefore, critical civil disobedience potentially permits practices aimed at systemic reform. Because the CLR framework is also concerned with both incremental and more radical socio-legal change, a CLR-based critical civil disobedience approach could promote such diverse modes of reform.

Second, regarding the justification of critical civil disobedience, Rawls’s liberal justification pertains only to violations of fundamental rights.¹⁷⁷ However, the critical justification extends to inequities like structural democratic deficits and socioeconomic disparities.¹⁷⁸ A focus on such structural inequities

¹⁷² See Stump, *Following New Lights*, *supra* note 13, at 618–23.

¹⁷³ Delgado & Stefancic, *Triple Helix Dilemma*, *supra* note 13, at 223. Delgado and Stefancic add: “We should heed these divergent individuals. Their ideas offer the possibility of legal transformation and growth. . . .” *Id.*

¹⁷⁴ See Stump, *Following New Lights*, *supra* note 13, at 621–23.

¹⁷⁵ See *id.* at 656.

¹⁷⁶ Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 39.

¹⁷⁷ *Id.* at 39–40.

¹⁷⁸ *Id.*

(which Rawls's fundamental rights-based discourse largely eschews) is similarly a core concern of CLR; like many third and fourth wave critical schools, CLR focuses on identifying structural inequities and in seeking holistic means of amelioration.¹⁷⁹ Thus, the justification for critical civil disobedience also dovetails with that of CLR.

Third, and perhaps most importantly, the aim of critical civil disobedience stands to dramatically enhance the CLR project. Whereas the Rawlsian aim of civil disobedience is merely to communicate to the societal majority, the critical aim differs in both nature and scope. The critical aim, derived from the work of Celikates, Arendt, and Frankenberg, among others, is collectivist, grassroots self-determination; accordingly, this aim could contribute to grassroots legal-institutional reform efforts. As Delgado and Stefancic write, CLR's overarching aim is in "reinventing, modifying, flipping, and radically transforming legal doctrines and theories imaginatively . . ."¹⁸⁰ Moreover, a core CLR methodology to accomplish such ends involves the cultivation of non-hegemonic reform alliances, which favor marginalized-outsider perspectives in catalyzing novel approaches to legal research and analysis.

Civil disobedience is extraordinarily well-suited—perhaps singularly well-suited—to add a creative spark to CLR alliances. Because a critical approach to civil disobedience often focuses on collective self-determination, civil disobedients are interacting with the "law" in an exceedingly ambitious manner. Through "symbolic politics" paired with "real confrontation" against the intra-systemic status quo,¹⁸¹ critical civil disobedients create a normatively rich space on the very borderlines dividing the existing legal order from what that order might become. In such extra-legal spaces, alternative socio-legal frameworks are not abstractly imagined—but rather physically constituted (and thus collectively lived in) by disobedient citizens. This distinguishes disobedients even from grassroots activists who engage in protest from within the existing order.

Thus, civil disobedients are unique in that they create concretely novel socio-frameworks in such extra-legal spaces: what we might think of, in at least some ways, as a tangible promulgation of collective "self-law."¹⁸² This disobedient work product is wholly transformative. It captures or *re*-captures the Arendtian "revolutionary spirit" through such radically democratizing practices of dissent.¹⁸³

¹⁷⁹ See, e.g., Luke W. Cole, *Empowerment As the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L. Q.* 619, 641 (1992) ("Many third wave environmentalists take a holistic view, seeing structural societal change as a way to alleviate [pressing social and legal] problems . . .").

¹⁸⁰ Delgado & Stefancic, *Revisited*, *supra* note 13, at 328.

¹⁸¹ See Celikates, *Real Confrontation*, *supra* note 9.

¹⁸² See sources cited *supra* note 17 (providing a discussion on how civil disobedience—from a critically informed ontological perspective—might indeed be best conceptualized as "law" *per se*).

¹⁸³ See Smith, *Constitutional Niche*, *supra* note 20, at 141. As Smith posits, a close reading of

CLR is the ideal procedural-based model for channeling the civil disobedient work product. As Frankenberg suggests in *Disorder is Possible*, attorney-disobedient reflective relationships, especially at the grassroots level, could benefit disobedients seeking institutional change. This is because progressive attorneys can “sensitize their strategically trained eye” to civil disobedience as “the starting point of any theoretical and practical legal work.”¹⁸⁴ Contemporary political majorities are often indifferent (if not outright hostile) to disobedients—but progressive attorneys, theoreticians, etc. could become beneficial institutional allies.¹⁸⁵

What might the explicit incorporation of critical civil disobedience into CLR entail? From the outset, note that in the U.S., the current *ABA Model Rules of Professional Conduct* limit (and otherwise provide a chilling effect upon) potential attorney-disobedient interactions.¹⁸⁶ However, reformist-minded attorneys and other CLR constituents could—in an ethically unproblematic fashion—creatively engage with the written or oral work product of disobedient citizens after the disobedience has occurred. Alternatively, would-be reformers could also engage in synergistic public panel discussions with disobedients in a similar post-contestatory setting.

CLR alliances could strive to explore, from the civil disobedient standpoint, *why* the disobedience occurred and *what* the disobedience signifies (or more concretely constitutes) from a normative legal perspective. Civil disobedients, then, through their uniquely generated work product and worldviews—i.e., their collective promulgation of tangible “self-law”—could very closely inform CLR reform strategies and outcomes.

Of course, many commentators might argue that the formalization of civil disobedient work product through legal channels—at least in the intra-systemic

On Revolution and Arendt’s larger oeuvre suggests “Arendt regards civil disobedience as the manifestation of the revolutionary spirit.” *Id.* Arendt identifies the revolutionary spirit as “the principles which, on both sides of the Atlantic, originally inspired the men of revolutions . . . public freedom, public happiness, public spirit.” HANNAH ARENDT, *ON REVOLUTION* 221 (1963).

¹⁸⁴ Frankenberg, *Disorder is Possible*, *supra* note 1, at 30–31.

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2017) (discussing the limitations on the scope of representation and allocation of authority between client and lawyer); see also Maury C. Doherty, *Fearless Counsel: Being an Attorney for the Civil Disobedient*, 5 NOTRE DAME J. OF L., ETHICS & PUB. POL. 1043, 1065 (2014) (“The Disciplinary Rule(s) require revision to support moral conduct of attorneys who counsel clients to pursue true acts of civil disobedience.”); Louis Fisher, *Civil Disobedience As Legal Ethics: The Cause-Lawyer and the Tension Between Morality and “Lawyering Law,”* 51 HARV. C.R.-C.L. L. REV. 481, 482 (2016) (“Scholars have traditionally focused on the perceived failure of the standard conception of legal ethics to preserve space for moral reasoning in the face of power imbalances; numerous theorists of legal ethics have criticized the standard conception for promoting ‘literalistic adherence to what appears to be the letter of ethics codes’ over more attentive moral deliberation.”). For a discussion on how grassroots organizations must also be wary of losing tax-exempt status vis-à-vis disobedient collaborations, see *infra* note 271 and accompanying text.

reform context—is largely anathema to the contemporary critical project. This is because the current regime of vigorous neoliberalism permits only superficial intra-systemic change: that all attempts at progressive reform from within the existing system, even if apparently “successful,” ultimately serve only to reinforce the existing status quo.¹⁸⁷ Much of the critical community has thus “turn[ed] away from reform” and toward a focus on radical systemic change.¹⁸⁸

This inquiry bears scrutiny, and it could perhaps be said that one potential aim of critical civil disobedience is collective self-determination per se. That is, the promulgation of “self-law” via collective contestations is an admirable end-in-itself, and that a direct institutional formalization in the intra-systemic reform context should be met with considerable skepticism.¹⁸⁹ Alternatively, the civil disobedient work product could be directed toward systemic reform approaches exclusively—eschewing intra-systemic reform as a desirable aim.¹⁹⁰

The intuition of the author, however, suggests rather the opposite: lacking the means and political will for radical socio-legal change, progressive intra-systemic reform ought to be pursued.¹⁹¹ Much could be accomplished—either incrementally or more radically—through the incorporation of civil disobedients within CLR modeled alliances or similar non-hegemonic formations.

IV. APPALACHIAN CIVIL DISOBEDIENCE IN CLR MODELED REFORM

The Appalachian region of the U.S. has long faced a range of intersecting environmental, social, political, and economic issues. Prominent among these include socio-economic issues, inadequate infrastructure and services, lack of economic diversification, extraction-based environmental degradation, related environmental justice concerns, wide-ranging problems pertaining to public health, and complex race and gender-based issues.¹⁹²

¹⁸⁷ See M’Gonigle & Takeda, *supra* note 16, at 1111 (“This turning away from reform seemingly makes no sense and yet it is obvious . . . what reforms are permitted increasingly only reinforce the contradictions that pervade their implementation . . . [u]nder [our present regime of] vigorous neoliberalism . . .”); see also David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2015) (providing an overview of neoliberalism in the context of law and policy).

¹⁸⁸ See *id.*

¹⁸⁹ Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 41 (“[I]nstitutions and channels themselves [can] become obstacles to democratic action . . . Rather than as a defensive act of individual rights bearers, civil disobedience thus emerges as an essentially collective and political practice of contestation—as a form of struggle in which the vertical form of state authority is confronted with the horizontal power of the association of citizens or the governed . . .”).

¹⁹⁰ See M’Gonigle & Takeda, *supra* note 16, at 1111.

¹⁹¹ See sources cited *supra* note 16 for further discussion on this point.

¹⁹² See sources cited *supra* note 4; see also W. VA CTR. ON BUDGET & POL’Y, 2016 THE STATE OF WORKING WEST VIRGINIA: WHY IS WEST VIRGINIA SO POOR?, 50 (Dec. 12, 2016), <https://www.afsc.org/sites/afsc.civicactions.net/files/documents/The%20State%20of%20Working%20West%20Virginia%202016.pdf> (“[P]olicymakers need to focus on improving health, workforce

At the heart of Appalachia's condition is the phenomenon of the "natural resource curse." A resource curse "denotes a pattern of . . . problems in areas rich in natural resources," through which extractive industries "wield[] power over the [region] at the expense of its citizens and the natural environment,"¹⁹³ For the prior century, largely unregulated extractive industries—especially the coal extraction industry or "Big Coal"—have undermined the regional economy, obliterated the land, and poisoned the Appalachian citizenry and greater environment alike.¹⁹⁴

Bereft of legitimate institutional mechanisms to combat the natural resource curse—due to wholesale governmental capture, among other reasons—the Appalachian citizenry has long engaged in diverse and robust civil disobedience.¹⁹⁵ Part III will first trace historical and contemporary Appalachian civil disobedience practices. Second, this Part will provide a brief, retrospective analysis detailing how, to date, progressive reform alliances have failed to adequately capitalize upon civil disobedience. Finally, this Part will demonstrate how, through the CLR model, future-projected sites of Appalachian resistance and reform—e.g., enhanced coal site reclamation, natural gas industry reform, and broader socio-legal reform efforts (which, among other things, explore intersections of class, race, sex, etc.)—could benefit immensely from the egalitarian cultivation of the Appalachian civil disobedient work product.

A. *The Surface Mining Control and Reclamation Act and Mountaintop Removal: Appalachian Civil Disobedience*

For much of the past century, the coal extraction industry has been the primary negative actor in the unfolding Appalachian natural resource disaster; Appalachian disobedients have thus predominantly contested surface mining-related practices.¹⁹⁶ This Section will focus on Appalachian civil disobedience associated with two distinct coal resistance periods: (1) the period preceding the Surface Mining Control and Reclamation Act's ("SMCRA") passage, and (2) more contemporary disobedient practices targeting mountaintop removal mining.

participation, education, and job skills while also building top-notch infrastructure and encouraging innovation and entrepreneurship."); APPALACHIAN REG. COMM'N, APPALACHIAN THEN AND NOW: EXAMINING CHANGES TO THE APPALACHIAN REGION SINCE 1965 2 (Feb. 2015), https://www.arc.gov/assets/research_reports/AppalachiaThenAndNowCompiledReports.pdf ("It has now been 50 years since the passage of the ARDA. Appalachia has experienced significant progress since then, but still faces persistent challenges.").

¹⁹³ BARRY, *STANDING OUR GROUND*, *supra* note 3, at 23–24.

¹⁹⁴ *See id.* at 4–5.

¹⁹⁵ *See* Perdue & McCarty, *supra* note 22, at 40.

¹⁹⁶ *See id.* at 39–43; WITT, *supra* note 26, at 218 (discussing anti-mining civil disobedience in Appalachia from the 1960s until the present era).

1. 1960s: Civil Disobedience Preceding SMCRA's Passage

Appalachian surface mining increased dramatically at the mid-century point due to factors such as enhanced national energy demand, shifts in the labor landscape, and rapid technological developments.¹⁹⁷ Appalachian surface mining practices, however, were essentially unregulated.¹⁹⁸ Consequently, by the early 1960s, the Central Appalachian region faced widespread, mining-induced environmental degradation.¹⁹⁹

Such ecological devastation directly impacted the Appalachian citizenry—not least of all because broad-form deeds commonly ceded subsurface mineral rights to coal operators.²⁰⁰ Thus, Appalachian mining quite literally occurred—and, in fact, still occurs—in landowners' backyards.²⁰¹ Adverse mining effects—e.g., toxins in water, airborne particles, blasting vibrations, and ground subsidence—are inseparable from the Appalachian citizenry.²⁰²

Early legal efforts to abolish surface mining practices or to minimize its worst effects were both insufficient and ineffective.²⁰³ Federal legislative action was nonexistent; furthermore, the limited state-based legislation that actually passed was largely unenforced.²⁰⁴ So too were common law remedies ineffective, as Appalachian state courts are traditionally biased towards extractive industries.²⁰⁵

Due in part to such legal-institutional failures, Appalachian grassroots actions increased substantially.²⁰⁶ Indeed, it was members of the Appalachian citizenry

¹⁹⁷ See Perdue & McCarty, *supra* note 22, at 40.

¹⁹⁸ See Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 ENVTL. L. 21, 54 (2004).

¹⁹⁹ See *id.* ("In the quarter century since enactment of SMCRA, the environmental degradation and attendant adverse social and economic impacts on coalfield communities continue, albeit not at the catastrophic levels that existed in the pre-SMCRA years when coal mining was essentially unregulated."). For an extremely influential treatment of the pre-SMCRA state of the region, see generally HARRY M. CAUDILL, *NIGHT COMES TO THE CUMBERLANDS* (1963).

²⁰⁰ See Perdue & McCarty, *supra* note 22, at 40.

²⁰¹ See Molly Moore, *Blasted: Homeowners Near Mine Seek Recourse for Property Damage*, APPALACHIAN VOICES (Feb. 18, 2016), <http://appvoices.org/2016/02/18/blasting-homeowners-property-damage-coal/#sthash.4AV7bGZN.dpuf> ("[A]lthough . . . production has declined sharply in recent years, residents near active mine sites still feel each blast just as powerfully as during coal's boom years.").

²⁰² See Laura M. Kurth et al., *Atmospheric Particulate Matter Size Distribution and Concentration in West Virginia Coal Mining and Non-Mining Areas*, 24.4 J. OF EXPOSURE SCI. & ENVTL. EPIDEMIOLOGY 405 (2014) ("People who live in Appalachian areas where coal mining is prominent have increased health problems compared with people in non-mining areas of Appalachia."); Melissa M. Ahern et al., *The Association Between Mountaintop Mining and Birth Defects Among Live Births in Central Appalachia*, 1996–2003, 111.6 ENVTL. RES. 838 (2011).

²⁰³ See Perdue & McCarty, *supra* note 22, at 40.

²⁰⁴ See *id.*

²⁰⁵ See Sara Gersen, *The Potential of State Coal-Purchasing Legislation to Decrease Mountaintop Removal Mining*, 18 N.Y.U. ENVTL. L. J. 455, 477 (2011) ("state court judges [have been] predisposed to rule for coal companies for political reasons. . .").

²⁰⁶ *Id.*

who sought “stricter enforcement of mining laws and even outright abolition of the practice” who ultimately became most “disillusioned while seeking change through political and judicial channels.”²⁰⁷ Civil disobedience therefore emerged as a tactic of necessity in Appalachia, and “[t]he 1960s witnesse[d] some of the most militant direct resistance to strip mining.”²⁰⁸ Diverse instances of anti-strip mining civil disobedience occurred, which broadly included coal operations being “occupied, blockaded, and sabotaged.”²⁰⁹

For example, in 1965, Appalachian resident Ollie Combs, aiming to halt the destruction of her home by a coal operation, “with . . . only the aid of her two sons . . . sat down in front of a bulldozer.”²¹⁰ Combs was arrested, and her act of dissent garnered substantial public support for the anti-strip mining cause.²¹¹ In 1967, Appalachian community members, led by residents Don Branham and Carl West, halted coal bulldozing operations by standing in front of a bulldozer pushing boulders towards their path.²¹² As a direct result of these collective actions, the coal operator “voluntarily agreed to abandon its operations on [that] property.”²¹³ Finally, in 1972, after strip-mining operations facilitated lethal flash flooding, more than “two hundred [Kentucky] residents” occupied a site and “forced the offending strip mining operation to shut down.”²¹⁴ These examples are only a sampling of wide-ranging 1960s era Appalachian disobedience.²¹⁵

More intense forms of civil unrest—not classified as civil disobedience per se—also transpired, often pertaining to property-directed violence. For example, by the late 1960s, “sabotage with explosives had been employed a number of times by opponents of stripping.”²¹⁶ The aim of such property damage was to cause “financial hardship to coal companies.”²¹⁷ Periodic gunfire exchanges between Appalachian citizens and coal operations were also common.²¹⁸

Due in part to the prolonged civil unrest that essentially defined Appalachian surface coal extraction throughout the mid-century, the beleaguered region

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ CHAD MONTRIE, TO SAVE THE LAND AND PEOPLE: A HISTORY OF OPPOSITION TO SURFACE COAL MINING IN APPALACHIA 91–92 (2003).

²¹¹ BARRY, STANDING OUR GROUND, *supra* note 3, at 116.

²¹² *See* Montrie, *supra* note 210 at 91–92.

²¹³ *Id.* at 92.

²¹⁴ *Id.* at 149.

²¹⁵ *See* Perdue & McCarty, *supra* note 22, at 40; *see generally* Mary Beth Bingman, *Stopping the Bulldozers: What Difference Did It Make?*, in FIGHTING BACK IN APPALACHIA: TRADITIONS OF RESISTANCE AND CHANGE 17, 22–28 (Stephen L. Fisher ed., 2009).

²¹⁶ *See* Montrie, *supra* note 212, at 87.

²¹⁷ *Id.*

²¹⁸ *Id.* at 87–88.

finally received national attention.²¹⁹ Consequently, popular media and scholarly treatment chronicled Appalachia's condition and national policymakers took notice.²²⁰

Appalachian anti-strip mining efforts were, from the outset, led by community activists and regional groups (like then-prominent organizations Appalachian Group to Save the Land and People and Save Our Cumberland Mountains).²²¹ However, once attention focused on the region, the "Big Greens"—national environmental organizations like the Sierra Club and the Environmental Policy Center—essentially co-opted the mining reform movement, thereby subordinating Appalachian regional actors.²²²

The Big Greens were instrumental in lobbying efforts and negotiations leading to SMCRA in 1977, the first federal act to regulate surface mining.²²³ As a result, however, they denied Appalachian citizens and grassroots groups a substantive place at the legislative bargaining table.²²⁴ Although many Appalachian grassroots activists favored the outright abolition of mining practices, the Big Greens "convinc[ed] many strip mining opponents with deeper roots in Appalachia to lend their influence and resources to passage of a regulatory legislation rather than an abolition bill."²²⁵ It was the Big Greens, then, who "commandeer[ed] . . . negotiations over strip mining legislation."²²⁶

SMCRA provided some measure of legislative and regulatory oversight to the surface mining industry—but the act's flaws were apparent.²²⁷ Many activists and coalfield residents "called the legislation a 'blatant travesty' and a 'betrayal' . . . [contending] that SMCRA failed to protect property owners and, prophetically, foresaw the dangers of legitimating [mountaintop removal mining]".²²⁸ Thus, SMCRA, a "watered down" act, created a schism between regional activists and the Big Greens—the reverberations of which persist to this day.²²⁹

2. 1990s to Present: Civil Disobedience and Mountaintop Removal Mining

Mountaintop removal, an extraordinarily destructive variant of surface mining, rose in prominence in the early 1990s and has continued, with disastrous

²¹⁹ See Perdue & McCarty, *supra* note 22, at 41.

²²⁰ See *id.*

²²¹ See *id.* at 40.

²²² See *id.* at 41.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ MONTRIE, *supra* note 212, at 156.

²²⁶ Perdue & McCarty, *supra* note 22, at 41.

²²⁷ See *id.* at 42.

²²⁸ *Id.* at 41–42.

²²⁹ *Id.* at 42.

effects, into the contemporary era.²³⁰ Multiple factors drove mountaintop removal's rise. First, the 1990 amendments to the Clean Air Act ("CAA") caused the energy sector to favor the low-sulfur coal endemic to Central Appalachia.²³¹ Second, technological advancements facilitated the creation of massive mining equipment, such as "draglines," required for mountaintop removal mining.²³² Third, and finally, statutory loopholes in SMCRA—contested by regional activists during SMCRA's very passage—permitted operators to engage in the mining process in a profoundly under-regulated fashion.²³³

Mountaintop removal mining is a radically destructive practice. Mining operators utilize explosives to remove up to one thousand feet of mountain peaks, revealing rich coal seams beneath.²³⁴ The tons of blasted refuse, commonly termed "overburden," is then dumped in valleys adjacent to mining operations—creating "valley fills."²³⁵ These vast valley fills, which often reach one hundred feet, obliterate ecologically crucial headwater streams; over two thousand miles of Appalachian headwater streams have been buried to date.²³⁶ Moreover, valley fills contain contaminants that are harmful to human populations and the greater environment.²³⁷ Thus, decades of mountaintop removal practices have created a scarred and severely degraded Appalachian landscape.²³⁸

Legal efforts to halt or to otherwise curtail the worst effects of mountaintop removal mining were met with failure for much of the prior two decades.²³⁹

²³⁰ See *id.*

²³¹ See Mark Baller & Leor J. Pantilat, *Defenders of Appalachia: The Campaign to Eliminate Mountaintop Removal Coal Mining and the Role of Public Justice*, 37 ENVTL. L. 629, 631 (2007) ("Mountaintop removal coal mining flourished in the 1990s . . . Its use expanded after amendments to the Clean Air Act in 1990.").

²³² See *id.* at 631.

²³³ See Perdue & McCarty, *supra* note 22, at 42.

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See Jedediah Purdy, *The Violent Remaking of Appalachia*, THE ATLANTIC (Mar. 21, 2016), <http://www.theatlantic.com/technology/archive/2016/03/the-violent-remaking-of-appalachia/474603/>.

²³⁷ See *id.* ("In the study region, streams emerging from valley fills are as much as an order of magnitude more alkaline than neighboring streams, and also show high levels of toxic selenium.").

²³⁸ Michael Corkery & Michael Wines, *A Curious Plan to Fight Climate Change: Buy Mines, Sell Coal*, N.Y. TIMES (Oct. 1, 2016), <http://www.nytimes.com/2016/10/02/business/energy-environment/a-curious-plan-to-fight-climate-change-buy-mines-sell-coal.html> ("The industry's decline is forcing states to deal with how to clean up the mines and who should pay for it. In West Virginia alone, 300,000 acres of forest—an area half the size of Rhode Island—have been damaged by mountaintop mining, by one estimate.").

²³⁹ See James B. Stewart, *King Coal, Long Besieged, Is Deposed by the Market*, N.Y. TIMES (Aug. 5, 2015), https://www.nytimes.com/2015/08/07/business/energy-environment/coal-industry-wobbles-as-market-forces-slug-away.html?_r=0 ("Market forces have accomplished in just a few years what environmentalists and social advocates have struggled for decades to achieve.").

State-based curtailment legislation, often cleverly conceived, failed to pass in Appalachian states.²⁴⁰ Environmental organizations, like the Southern Appalachian Mountain Stewards and Kentuckians for the Commonwealth, continuously sought federal court enforcement of applicable federal acts like SMCRA, the Clean Water Act (“CWA”), and the National Environmental Policy Act (“NEPA”).²⁴¹ However, in the conservative Fourth Circuit especially, a long “history of adverse outcomes for environmental plaintiffs [has] marked the pursuit of ‘court enforcement of federal environmental laws.’”²⁴² Reprehensible decisions, including *Kentuckians for Commonwealth Inc. v. Rivenburgh*²⁴³ and *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*,²⁴⁴ were illustrative of this era. In such decisions, the Fourth Circuit “couched its approval of extractive activities as judicial deference to Corps expertise”²⁴⁵—often in blatant disregard for the plain statutory language of acts like the CWA and NEPA.²⁴⁶

Echoing the mid-century institutional failures and accompanying turn towards direct citizen resistance, Appalachian disobedience increased in scope and intensity from the 1990s onwards.²⁴⁷ By the mid-2000s, a constellation of groups such as RAMPS, Mountain Justice (“MJ”), United Mountain Defense, Climate Ground Zero (which was international in scope), and more spontaneous coalitions were engaging in collective acts of disobedience.²⁴⁸ MJ, for example, was “founded to bring nonviolent direct action and civil disobedience to

²⁴⁰ See Gersen, *supra* note 205, at 455 (“Mountain preservation activists have also pushed change in the political branches. . . . [B]ans on MTR coal represent an innovative legislative strategy that may allow states [to end MTR] . . .”).

²⁴¹ See, e.g., *S. Appalachian Mountain Stewards v. Red River Coal Co.*, No. 2:14CV00024, 2015 WL 1647965, at *1 (W.D. Va. Apr. 14, 2015), *appeal dismissed* (Dec. 11, 2015).

²⁴² Gersen, *supra* note 205, at 471.

²⁴³ *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) (holding that the Corps did not violate CWA § 404 in issuing a mining permit).

²⁴⁴ *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009) (holding that the Corps did not violate the CWA or NEPA).

²⁴⁵ Jason Rapp, *Coal and Water: Reclaiming the Clean Water Act for Environmental Protection*, 25 TUL. ENVTL. L.J. 99, 118 (2011).

²⁴⁶ See *id.* (“Even in instances where the Corps has granted permits in a manner that directly contradicts the statutory and regulatory commands of NEPA and the CWA, the Fourth Circuit has deferred to the Corps’ decision.”).

²⁴⁷ See Perdue & McCarty, *supra* note 22, at 48–50; MCNEIL, *supra* note 29, at 173 (“[D]ifferent forms of [anti-MTR] grassroots activism took [place] between 2005 and 2010. The more community-oriented, non-confrontational organizing persisted in many forms, while civil disobedience and the countercultural flare increased.”).

²⁴⁸ See WITT, *supra* note 26, at 37–38. Such groups were deeply cognizant of the broader American disobedient tradition and its intersections with Appalachian struggles: “The name ‘Mountain Justice Summer’ was chosen specifically to reference both the Freedom Summer, the 1964 voter registration drive through southern states during the struggle for civil rights, and Redwood Summer, a series of Earth First!-sponsored protests against deforestation . . .” *Id.* at 37.

Appalachia in aid of the fight against strip mining.”²⁴⁹

Anti-mountaintop removal resistance practices typically involve occupy-type civil disobedience.²⁵⁰ As a representative example, in 2009, activists from a coalition of such groups “locked themselves to mining equipment on a . . . mountaintop removal mine . . . [while others] floated a 20-by-60-foot banner on the surface of . . . a coal slurry impoundment.”²⁵¹ In 2011, as part of the popularly termed “Second Battle of Blair Mountain,” another representative act of MTR-related civil disobedience occurred. Protestors climbed the historic mountain and “erect[ed] a homemade monument to commemorate the original battle for Blair and congratulate the crowd for their long journey.”²⁵² Thereafter, approximately “100 marchers [broke] off from the larger group as part of a planned act of civil disobedience” and “walk[ed] out to the edge of a mountaintop removal site” located on Blair Mountain.²⁵³

Lastly, an extraordinarily poignant act of Appalachian civil disobedience occurred in 2011, when over forty “volunteer ‘reclamation workers’ (activists) illegally marched onto a supposedly reclaimed mine site to plant trees . . . [because] the ‘reclamation’ efforts done by the mining company resulted in a

²⁴⁹ TRICIA SHAPIRO, *MOUNTAIN JUSTICE: HOMEGROWN RESISTANCE TO MOUNTAINTOP REMOVAL, FOR THE FUTURE OF US ALL* 290 (2010).

²⁵⁰ See WITT, *supra* note 26, at 37–38.

²⁵¹ Sparki Ran, *10 Arrested in Civil Disobedience at WV Mountaintop Removal and Coal Sludge Impoundment Sites*, THE UNDERSTORY (May 23, 2009), http://www.ran.org/10_arrested_in_civil_disobedience_at_wv_mountaintop_removal_and_coal_sludge_impoundment_sites.

²⁵² Soledad O’Brien & Robert Howell, *Environment vs. Jobs in New Battle of Blair Mountain*, CNN (June 14, 2011), <http://www.cnn.com/2011/US/06/14/soledad.blair.mountain/>. The Battle of Blair Mountain—whose early twentieth century “belligerents” included Appalachian miners combatting a state-backed coal corporation—is a singularly significant act of mass dissent. See, e.g., Anne Marie Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL’Y REV. 87, 94 (2011) (“Between 1912 and 1913, as the West Virginia coal mines were becoming organized, coal mine operator resistance to the UMWA’s demands resulted in a series of violent strikes . . . [F]ederal troops [were dispatched] to end the unrest, resulting in the infamous and bloody Battle of Blair Mountain.”). This uprising is categorically excluded from the liberal definition of the practice: Rawls, in the tradition of Tolstoy, Gandhi, and King (but from a secular perspective), explicitly forbids violence. A. John Simmons, *Disobedience and Its Objects*, 90 B.U. L. REV. 1805, 1807–08 (2010) (“Rawls’s assumptions [are that] disobedience in a near-just state must always be non-violent. Rawls’s own commitment to this view is not motivated by any prior commitment to pacifism (like that of Gandhi or King). It is motivated rather by his other requirements that legal disobedience be a political act, addressed to the public. One cannot, Rawls thinks, address the public with violence . . .”). But as viewed through a more inclusive critical framework, aspects of this modern-foundational act of Appalachian collective contestation may indeed be explored via a civil disobedience lens. Note also that commentators have linked Blair Mountain’s spilled blood (in addition to subsequent, more “successful” coalfield uprisings) with the eventual enactment of New Deal-era labor legislation such as the National Industrial Recovery Act and Wagner Act. See, e.g., Lofaso, *supra* note 252, at 95 (quoting 29 U.S.C. § 151 (2011)) (“Labor unrest such as violence accompanying the Battle of Blair Mountain led members of Congress to draw the conclusion [in the NLRA] that: The inequality of bargaining power between employees . . . and employers . . . burdens and affects the flow of commerce . . .”) (internal quotation marks omitted).

²⁵³ O’Brien & Robert Howell, *supra* note 252.

barren hillside with sparse grass and baking sun—a far cry from the lush and diverse forest destroyed in the process.”²⁵⁴ This act of civil disobedience—one among many that occurred at the Kayford Mountain site in southern West Virginia²⁵⁵—will be utilized as a case model in this article’s final Section.²⁵⁶

B. Civil Disobedience in CLR: Innovative Approach to Appalachian Reform

This Section explores the intersection of Appalachian civil disobedience with CLR modeled reform approaches. First, a brief retrospective analysis demonstrates that disobedient work products have, to date, been insufficiently incorporated into reform efforts—i.e., Appalachian disobedience has often been contextualized from a Rawlsian (and therefore mere communicative) standpoint. Second, through the expanded CLR model articulated in Part II.C., this Section explores potential new sites for Appalachian resistance and reform. Specifically, the tree-planting instance of Kayford Mountain civil disobedience will be utilized as the Appalachian CLR case model.²⁵⁷ This Article will conclude by examining how CLR alliances, as infused with civil disobedience, might contribute to broader Appalachian reformist efforts—in addition to related socio-legal change at regional, national, and global levels.

1. Retrospective Analysis of Civil Disobedience in Appalachian Reform

This Article has examined two distinct eras of Appalachian civil disobedience: that associated with SMCRA’s passage and more contemporary mountaintop removal civil disobedience. Empirical literature—most notably, *Unearthing a Network of Resistance*²⁵⁸—suggests that regional civil disobedient practices associated with both eras have not been sufficiently leveraged into reformist opportunities; rather, civil disobedience is often “siloe off” from legal-institutional reform efforts. Thus, for more than half a century, would-be reformers in Appalachia have not sufficiently benefitted from the procedural and substantive value potentially added by civilly disobedient citizens.

²⁵⁴ See Goodwin, *supra* note 27.

²⁵⁵ See, e.g., Ran, *supra* note 251 (detailing a separate occupy-type civil disobedience act at Kayford Mountain). The celebrated Appalachian activist Larry Gibson was closely involved with anti-MTR efforts at Kayford Mountain. See Matt Schudel, *Larry Gibson, W.Va. Activist who Fought Mountaintop Mining, Dies at 66*, WASH. POST (Sep. 13, 2012), https://www.washingtonpost.com/local/obituaries/larry-gibson-w-v-a-activist-who-fought-mountain-mining-dies-at-66/2012/09/13/93af1cf6-fdbe-11e1-a31e-804fcb658f9_story.html?utm_term=.810933a62796.

²⁵⁶ Note that this Section’s synopsis of anti-mountaintop removal civil disobedience practices was partial and illustrative only. For example, notable acts of Appalachian-centered disobedience occurred outside of Appalachia itself: “In the fall of 2010, over two thousand people participated in the ‘Appalachia Rising’ rally in Washington, D.C., where 114 people were eventually arrested for nonviolent civil disobedience in front of the White House.” WITT, *supra* note 26, at 38.

²⁵⁷ See Goodwin, *supra* note 22.

²⁵⁸ See Perdue & McCarty, *supra* note 22, at 50–53.

Pre-SMCRA Appalachian disobedients and grassroots activists were largely excluded from negotiations regarding the act's passage.²⁵⁹ While the 1960s "witnessed some of the most militant direct resistance to strip mining," and while many of these activists favored an "outright ban" on surface mining, the Big Greens nevertheless "ill served local activists."²⁶⁰ They accomplished this by limiting their role at the bargaining table and by ultimately securing "passage of regulatory legislation rather than an abolition bill."²⁶¹ Thus, in addition to the procedural denial of a negotiation role, Appalachian activists also were substantively "betrayed" by SMCRA, a deeply flawed act.²⁶²

The relationship between the Big Greens and Appalachian disobedients, then, constituted the very antithesis of a CLR modeled alliance—which is, in stark contrast, marked by symbiotic egalitarianism.²⁶³ More aptly, the Appalachian civil disobedience of the pre-SMCRA era constituted—or was approached by the Big Greens as—a Rawlsian practice; that is, in a purely communicative sense, the "heartbreaking stories of personal loss due to strip mining hoisted the issues into the American collective consciousness."²⁶⁴ Thus, from the standpoint of the era's prime legal actors, the purpose of Appalachian disobedients was to communicate injustices to the societal majority.²⁶⁵ The disobedients and related activists were *not* to take part in reform efforts.²⁶⁶

The mountaintop removal era is in many ways distinguishable from the pre-SMCRA era. While SMCRA's prime legal actors largely eschewed local activists, the mountaintop removal era was marked by rich coordination efforts between grassroots regional groups and prime legal actors (e.g., the Natural Resources Defense Council).²⁶⁷ Indeed, by the late 2000s, there existed a "cohesive and dense anti-strip mining movement with a core of groups joined together by their joint engagement in litigation."²⁶⁸

The literature, however, indicates that disobedient-centered Appalachian groups (e.g., MJ and RAMPS), while active during the mountaintop removal era and certainly embedded in the broader movement, were often "siloe off" from explicit legal-institutional reform sites. This "siloeing off," though, is largely expected—given current legal and professional ethics constraints on disobedient collaborations. The following anecdote illustrates this resulting structural divide separating Appalachian civil disobedients from explicit legal-institutional

²⁵⁹ *See id.* at 40.

²⁶⁰ *Id.* at 40.

²⁶¹ *Id.*

²⁶² *Id.* at 41.

²⁶³ *See* Stump, *Following New Lights*, *supra* note 13, at 621–23.

²⁶⁴ *See* Perdue & McCarty, *supra* note 22, at 41.

²⁶⁵ *See id.*

²⁶⁶ *See id.*

²⁶⁷ *See id.* at 54.

²⁶⁸ *Id.* at 55.

reform sites:

Ricki Draper, an activist arrested with four others on May 24, 2012, for locking herself to a coal barge on the Kanawha River, sums this perspective: ‘I have broken the law because the legal system is broken. I have broken the law because [mountaintop removal] is destroying our health, our mountains, and our futures.’ *Nevertheless, many Appalachian activists have chosen to work within the legal system to redress its failures to regulate the coal industry.*²⁶⁹

Thus, direct action-focused organizations have typically “tak[en] a less central position” in the grassroots “network structure” and with legal actors generally.²⁷⁰ And, any time a network of organizations is forced to operate under conditions of such a “core-periphery structure,” this can limit “stimulating innovation as information tends to be controlled.”²⁷¹ Mountaintop removal era civil disobedience, then, like SMCRA era civil disobedience, was often approached and categorized from a Rawlsian liberal perspective: the effect was to “call[] attention to the terrible injustice going on in Appalachia,” not to catalyze direct, egalitarian, and synergistic collaboration with prime legal actors.²⁷²

2. New Futures: Civil Disobedience in CLR Modeled Appalachian Reform

In recent years, mountaintop removal mining—and indeed, Big Coal at large—has declined dramatically.²⁷³ The predominant factor in coal’s seeming collapse has been energy market transitions towards low-priced natural gas (and,

²⁶⁹ *Id.* at 53 (emphasis added).

²⁷⁰ *Id.* at 50.

²⁷¹ *Id.* at 51. This is not to, in any way, disparage the practices and policies of would-be legal reformers and regional grassroots organizations, which have, of course, collectively performed extraordinary work for the region—and which are wholly dedicated to inclusiveness, intersectional-steeped approaches, etc. In the first place, civil disobedients are not uniformly dedicated to collaborative intra-systemic reform efforts. What is more, similar to the chilling effect upon attorney-disobedient interactions produced by the *ABA Model Rules of Professional Conduct* discussed *supra* note 186, non-profit organizations must be wary of disobedient actions or relationships jeopardizing their tax-exempt status. See BURTON ALLEN WEISBROD, *THE NONPROFIT ECONOMY* 120 (2009) (“Another constraint faced by charitable nonprofits is that they may not commit, encourage, or induce acts that are illegal or are contrary to public policy . . . for example, the IRS maintained that an organization formed to promote world peace and disarmament was not a charitable organization because it encouraged civil disobedience at protest demonstrations”). Thus, like the issues produced by the *ABA Rules*, structural change is required to facilitate more robust disobedient collaborations.

²⁷² SHAPIRO, *supra* note 249, at 292.

²⁷³ See generally Rory McIlmoil et al., *The Continuing Decline in Demand for Central Appalachian Coal: Market and Regulatory Influences*, DOWNSTREAM STRATEGIES (2013), http://www.downstreamstrategies.com/documents/reports_publication/the-continuing-decline-in-demand-for-capp-coal.pdf (explaining that coal has declined primarily due to steep market competition).

increasingly, towards now-viable renewables like wind and solar).²⁷⁴ As a lesser contributing factor, the EPA has pursued “tighter enforcement of the Clean Water Act in regard to [mountaintop removal] and greater regulation of the mining permit process”²⁷⁵ Despite coal’s decline (and in some instances, precisely because of it—or rather, because of the unexpected nature of its decline),²⁷⁶ the Appalachian region is beset by multitudinous and truly dire challenges. Therefore, this final Sub-Section will briefly detail several of the most prominent (and intersecting) contemporary Appalachian issues—which range from the environmental to the cultural and socioeconomic. This Sub-Section will then conclude by exploring how CLR modeled reform alliances can contribute to the transformative socio-legal reform required for the region.

The coal extraction industry remains an active and destructive force in Appalachia. As commentators have noted: “While coal-fired power plants have been closing with the rise of cheap natural gas, the marketplace could easily shift back, and watchful environmentalists report that companies continue to apply for permits for mountaintop operations.”²⁷⁷ Thus, mountaintop removal and other mining operations continue to wreak environmental and public health harms on the Appalachia region.²⁷⁸

Further, a century’s worth of mining practices has left Appalachia an extraordinarily denuded landscape. These mining pollutant-based harms will persist long after the ebb of the coal extraction industry:

²⁷⁴ *Coal Production Using Mountaintop Removal Mining Decreases by 62% Since 2008*, TODAY IN ENERGY (July 7, 2015), <https://www.eia.gov/todayinenergy/detail.cfm?id=21952> (“Coal production from mines with mountaintop removal (MTR) permits has declined since 2008 Lower demand for U.S. coal, primarily used to generate electric power, driven by competitive natural gas prices, increasing use of renewable generation, flat electricity demand, and environmental regulations, has contributed to lower U.S. coal production.”).

²⁷⁵ BARRY, *STANDING OUR GROUND*, *supra* note 3, at 7. See also Sean Cockerham, *Obama and Coal Industry Battle over Mountaintop Removal*, MCCLATCHY DC (July 16, 2015), <http://www.mcclatchydc.com/news/nation-world/national/article27437149.html>.

²⁷⁶ As Evan Hansen (among a great many others) predicted a half decade ago: “[M]ost alarming is that the governor and many legislators are not putting the issue of coal decline and transition at the top of their legislative agenda.” . . . I’ve not seen a public acknowledgement that Central Appalachian coal production is declining by political leaders, nor have I seen any bold plans to address this decline.” Ken Ward Jr., *Coal’s Decline Forewarned*, CHARLESTON-GAZETTE MAIL (Oct. 13, 2012) (quoting Evan Hansen), https://www.wvgazettemail.com/news/special_reports/coal-s-decline-forewarned/article_fcce5d6-3655-5434-91f2-1f44c29872fb.html (Evan Hansen is a water and energy expert with Downstream Strategies, a West Virginia-based environmental consulting group).

²⁷⁷ Editorial Board, *How the Coal Industry Flattened the Mountains of Appalachia*, N.Y. TIMES (Feb. 16, 2016), http://www.nytimes.com/2016/02/16/opinion/how-the-coal-industry-flattened-the-mountains-of-appalachia.html?_r=0.

²⁷⁸ See Elizabeth E. Payne, *Mountaintop Removal Limited—Not Stopped—In Tennessee*, APPALACHIAN VOICES (Dec. 20, 2016), <http://appvoices.org/2016/12/20/mountaintop-removal-limited-not-stopped-in-tennessee/> (“Many mountain ridges, including in East Tennessee, are still vulnerable to the destructive practice of mountaintop coal removal mining.”).

Poisons continuously leach into Appalachian waterways via, among other multitudinous sources, abandoned coal slurry ponds, decades-old acid mine drainage, and endless [mountaintop removal] valley fills (which have obliterated over two thousand miles of Appalachian headwater streams). This coal extraction-produced 'environment degradation . . . will remain despite the reduction in the production of coal.'²⁷⁹

The toxic remnants of Appalachian mining—empirically linked to public health harms such as increased cancer rates and birth defects—will therefore long endure.²⁸⁰ Recent studies also demonstrate that mountaintop removal mining is truly geologic in scope. Duke University researchers found that “[t]he physical effects of mountaintop mining are much more similar to volcanic eruptions, where the entire landscape is fractured . . . [Mountaintop removal] completely resets the geomorphology of the landscape, and how that landscape will be shaped into [the] future.”²⁸¹

Such ecological conditions are exacerbated by the fact that coal corporations in bankruptcy have sought to avoid environmental cleanup requirements. Federal regulators have “wran[gl]ed with bankrupt coal companies to set aside enough money to clean up Appalachia’s polluted rivers and mountains . . . [R]egulators worry that coal companies will use the bankruptcy courts to pay off their debts to banks and hedge funds, while leaving behind . . . environmental cleanup obligations.”²⁸² Thus, the coal industry may sidestep even minimal coal site reclamation duties.²⁸³

Aside from coal’s legacy, new extraction-based ecological issues are unfolding in Appalachia. The recent decline in mountaintop removal mining is directly linked to the natural gas boom.²⁸⁴ However, Appalachian shale gas

²⁷⁹ Nicholas F. Stump, *Appalachia in Crisis: A Human Rights Approach to Environmental Justice in the U.S.*, OXFORD HUMAN RIGHTS HUB (Apr. 18, 2016), <http://ohrh.law.ox.ac.uk/appalachia-in-crisis-a-human-rights-approach-to-environmental-justice-in-the-u-s/> (quoting James Kent Pugh, *Down Comes the Mountain: Coal Mining and Health in Central Appalachia from 2000 to 2010* (May 2014) (on file with the University of Louisville); see also Purdy, *supra* note 236 (“[When] Congress passed the Clean Water Act in 1972, waterways that had been devastated by pollution recovered rapidly. . . . But Appalachian streams will be flowing from the broken, heaped stone of valley fills for millions of years.”)).

²⁸⁰ See sources cited *supra* note 201.

²⁸¹ Matthew R.V. Ross et al., *Deep Impact: Effects of Mountaintop Mining on Surface Topography, Bedrock Structure, and Downstream Waters*, 50.4 ENVTL. SCI. TECH. 2064, 2074 (2016) (“The physical effects from mountaintop mining are . . . similar to volcanic eruptions, where the entire landscape is fractured, deepened, and decoupled from prior landscape evolution trajectories, effectively resetting the clock on landscape and ecosystem coevolution.”).

²⁸² Michael Corkery, *Regulators Fear \$1 Billion Coal Cleanup Bill*, N.Y. TIMES (June 6, 2016), <http://www.nytimes.com/2016/06/07/business/dealbook/regulators-fear-1-billion-coal-cleanup-bill.html>.

²⁸³ *Id.*

²⁸⁴ See *Coal Production Using Mountaintop Removal Mining Decreases by 62% Since 2008*, *supra* note 274.

extraction and the construction of regional natural gas infrastructure are deeply problematic. Similar to coal extraction externalities, natural gas extraction degrades the Appalachian environment.²⁸⁵ The construction of vast natural gas infrastructure—such as the pending and controversial Mountain Valley and Atlantic Coast Pipelines, set to span multiple states in the Appalachian region—pose regional ecological threats stemming from leaks and wilderness destruction.²⁸⁶ The construction of natural gas-fired energy plants—as compared to utility-scale renewables, deliberately and unconscionably eschewed in the region²⁸⁷—will also contribute to global climate change.²⁸⁸

Aside from explicit energy sector-based harms, more broadly speaking, the socio-economic state of Appalachia is greatly imperiled. Academic and popular literature have cataloged Appalachia's contemporary issues at length—while noting that such issues ultimately stem from the catastrophic “natural resource curse” wrought by the coal extraction industry (and are thus structural in nature):

Nearly 150 years and some 13 billion tons of coal later, it's strikingly obvious that the great wealth of natural resources in West Virginia has been anything but a blessing. Rather than bringing riches, it has brought poverty, sickness, environmental devastation, and despair. By virtually every indicator of a state's economic and social well-being—educational achievement, employment rate, income level—West Virginia remains at or near the bottom of the list.²⁸⁹

Economists have recently declared that numerous counties in West Virginia are in legitimate “Great Depression” conditions—and West Virginia's condition, while perhaps especially dire, nevertheless serves as a microcosm for the full range of issues facing Appalachia at large.²⁹⁰ Therefore, the project of

²⁸⁵ To extract natural gas, “the industry relies on an inherently dangerous and environmentally damaging process called hydraulic fracturing, or ‘fracking’ The process itself is proven to be devastating to the environmental and public health.” *Natural Gas*, APPALACHIAN MOUNTAIN ADVOC. (2016), <http://www.appalmad.org/our-work/natural-gas/>; see also U.S. EPA, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES: EXECUTIVE SUMMARY 2 (2016) (finding that fracking harms drinking water in some circumstances).

²⁸⁶ See APPALACHIAN MOUNTAIN ADVOC., *supra* note 285 (“The direct impacts of each pipeline are considerable. Each would cut through mountains and fragment prime forest habitat. . .”).

²⁸⁷ See *id.* (“[N]atural gas poses a grave climate risk because investing in natural gas delays investments in affordable clean energy.”).

²⁸⁸ See *id.*; see also Lorne Stockman, *A Bridge Too Far: How Appalachian Basin Gas Pipeline Expansion Will Undermine U.S. Climate Goals*, OIL CHANGE INTERNATIONAL 32 (July 2016), http://priceofoil.org/content/uploads/2016/08/bridge_too_far_report_v6.3.pdf (The focus on “gas-fired power generation . . . is not an inevitable or needed feature of our nation's future power market . . . [as] clean energy technologies are surging ahead at this time and are projected to become a leading source of energy in the coming decade.”).

²⁸⁹ JEFF GODDELL, *BIG COAL: THE DIRTY SECRET BEHIND AMERICA'S ENERGY FUTURE* 28 (2007).

²⁹⁰ See Christopher Williams, *WVU Economists Say Six West Virginia Counties in Great*

“[r]eimagining central Appalachia”—of transcending the resource curse and of catalyzing economic and cultural diversification—will be a massive and prolonged one indeed.²⁹¹

Lastly, the Appalachian region also faces complex identity-related issues along lines of race, ethnicity, gender, class, and so forth. According to Appalachian Studies scholar Steven L. Fisher: “[C]lass, race, and gender conflicts express themselves today in cultural and political formations in Appalachia. . . . [All too often grassroots organizers] fail[] to challenge the cultural conservatism and racism of their constituency.”²⁹² Thus, any meaningful and truly comprehensive reform in Appalachia—socioeconomic or otherwise—must address such problematic cultural issues.²⁹³ To be sure, identity politics are intrinsically linked with environmental concerns in Appalachia and beyond: all must be combatted in a genuine, critical, and holistic fashion. At the same time, however, it is imperative to note that these issues must also be explored in the broader U.S. context as well—as structural class-, gender-, and race-related issues are endemic to the U.S. as a whole, not just in Appalachia (a point that prestige commentators all too often ignore).²⁹⁴

Depression, WCHS (Aug. 30, 2016), <http://wchstv.com/news/local/wvu-economists-say-six-west-virginia-counties-in-great-depression>.

²⁹¹ Sheryl G. Stolberg, *Beyond Coal: Imagining Appalachia's Future*, N.Y. TIMES (Aug. 17, 2016), <http://www.nytimes.com/2016/08/18/us/beyond-coal-imagining-appalachias-future.html>.

²⁹² Fisher, *supra* note 5, at 209.

²⁹³ See sources cited *supra* note 5; see also Barbara Ellen Smith, *De-Gradations of Whiteness: Appalachia and the Complexities of Race*, 10 J. APPALACHIAN STUD. 38, 53 (2004) (“We can claim a race-conscious perspective that critically examines the history and contemporary experiences of *all* Appalachians through the lens of race, a perspective that explores the ways that race intersects with class to ‘color’ depictions of white working class Appalachians even as it reaches across boundaries and creates linkages between people in Appalachia and others resisting race and class oppression.”) (emphasis in original). Smith notes, however, that many regional Appalachian organizations “grant race a place of prominence in their activism,” which includes “strategies for addressing the emotionally charged and potentially divisive realities of white privilege and racial prejudice.” *Id.* at 38. The Appalachian Community Fund (“ACF”) is one such organization: “ACF’s focus on racism does not diminish the importance of, or our efforts to address sexism, classism, heterosexism and homophobia, able-ism or any other form of discrimination. ACF believes that all issues of oppression and privilege are linked and that all must be challenged.” *Anti-Racism Work*, APPALACHIAN COMMUNITY FUND (2014), <http://www.appalachiancommunityfund.org/anti-racism-work/>. ACF adds: “ACF believes that racism is the most critical barrier to building effective coalitions for social change.” *Id.* Many other Appalachian organizations, however, are similarly steeped in an explicitly intersectional approach. See William Schumann, *Introduction: Place and Place-Making in Appalachia*, in APPALACHIA REVISITED: NEW PERSPECTIVES ON PLACE, TRADITION, AND PROGRESS 8 (William Schumann & Rebecca Adkins Fletcher eds., 2016) (“The region can boast of a long history of inclusive progressive politics, such as the Highlander Education Research Center in New Market, Tennessee, Kentuckians for the Commonwealth, and several environmental movements organized around overcoming racial, class, and gender barriers to participation.”).

²⁹⁴ Indeed, as the 2016 U.S. presidential election so aptly demonstrated, prestige commentators routinely use Appalachia—in its entirety—as a scapegoat for race- and gender-related issues that are in fact endemic to the entire country (including in coastal elite regions). For work deconstructing this

This Article will now address how incorporating civil disobedience into CLR modeled reform alliances can contribute to the socio-legal reform so desperately required in Appalachia. Most importantly, the CLR approach to civil disobedience constitutes an exceedingly flexible model. Through this expansive lens, we can re-envision Appalachian civil disobedience as the following: (1) a grassroots, radical democratic end in-and-of-itself, (2) a direct contributor to intra-systemic reform (or “classic” law reform), or (3) a direct contributor to systemic reform (i.e., transformations beyond the existing legal order).²⁹⁵ A relatively recent act of collective Appalachian civil disobedience—the tree-planting at Kayford Mountain civil disobedience introduced above—will constitute the case model for CLR exploratory purposes.²⁹⁶

First, we can imagine Appalachian civil disobedience as a largely radical democratic end-in-itself. Appalachian civil disobedience has traditionally been approached from an essentially Rawlsian liberal perspective.²⁹⁷ During both the pre-SMCRA and mountaintop removal eras, the role of Appalachian civil disobedients has been conceptualized as communicating injustices to the societal majority (and to legal-institutional elites), who thereafter effect change—or more often, fail to do so—on behalf of Appalachian disobedients and their communities.²⁹⁸

A critical approach, however, would enhance both the significance and agency of Appalachian civil disobedients because the focus shifts *away* from the societal majority and *toward* the Appalachian disobedient citizens themselves.²⁹⁹ In short, we could view Appalachian civil disobedience as a genuinely “self-legislating” democratic practice, wherein the Appalachian disobedients engage in the promulgation of collective “self-law” by challenging the intra-systemic status quo.³⁰⁰

In line with Celikates’s pluralist, practice-based approach,³⁰¹ the collective Appalachian civil disobedience at the Kayford Mountain site serves as a real world example through which we might re-envision Appalachian contestations along radical democratic lines. We can now take a more detailed look at the specifics of the Kayford Mountain disobedient actions:

Dozens of activists planted trees on a Kayford Mountain mine . . . in

problematic phenomenon, *see, e.g.*, Elizabeth Catte, *The Mythical Whiteness of Trump Country*, THE BOSTON REV., (Nov. 7, 2017), <http://bostonreview.net/race-politics/elizabeth-catte-mythical-whiteness-trump-country>.

²⁹⁵ See Stump, *Following New Lights*, *supra* note 13, at 655–66; M’Gonigle & Takeda, *supra* note 16, at 1111.

²⁹⁶ See Taylor, *supra* note 27.

²⁹⁷ See, *e.g.*, Perdue & McCarty, *supra* note 22, at 41.

²⁹⁸ See *id.*

²⁹⁹ See Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 41.

³⁰⁰ See sources cited and accompanying discussion *supra* note 17.

³⁰¹ See Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 41.

protest of mountaintop removal coal mining. . . . About 20 protesters carried hemlock, walnut, red oak, and tulip poplar sprouts. They planted them into a hill on top of the site John Johnson, one of the leaders of the demonstration, said he picked tulip poplar because it is the state tree of his native Tennessee. He picked hemlock because their roots help keep streams clean. . . .³⁰²

Whereas a Rawlsian approach would view the Kayford Mountain disobedients as mere communicators, from an alternative critical approach, we can explore this collective act as a self-legislating practice.³⁰³ That is, the Kayford Mountain disobedients created a new, concrete socio-legal framework regarding the proper regulation of mountaintop removal mining and its after-effects.

The Kayford Mountain disobedients indicated that the trees were planted to emphasize how the existing cooperative federalism scheme failed utterly to incentivize or mandate mining site reclamation.³⁰⁴ Thus, the act of illegal tree planting—and the collective disobedient discussions on the *how* and the *why* of the planting—constitute the self-legislating practices. Disobedients determined that mining sites in their communities should be ecologically restored.³⁰⁵ Such disobedient actions, in-and-of-themselves, carry great normative weight and deserve considered treatment through a radical democratic lens. As Celikates writes, “institutions and channels themselves [can] become obstacles to democratic action”; however, the Kayford disobedient acts can ultimately be re-envisioned as a “struggle in which the vertical form of state authority is confronted with the horizontal power of the association of citizens or the governed.”³⁰⁶

We can then explore how critically informed Appalachian civil disobedience could be incorporated within intra-systemic focused CLR alliances. As discussed above, CLR modeled reform alliances constitute non-hegemonic, egalitarian arrangements, wherein activists, reformist-minded attorneys, academics, and the like engage—through an expanded, grassroots-focused legal research and analysis process— “[in] reinventing, modifying, flipping, and radically transforming legal doctrines and theories imaginatively.”³⁰⁷ This

³⁰² See Taylor, *supra* note 27.

³⁰³ See Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 41.

³⁰⁴ See Zac Taylor, *Group Plants Trees in Mountaintop-Removal Protest*, CHARLESTON GAZETTE-MAIL, (Oct. 24, 2010), <http://archive.li/RHBrH>.

³⁰⁵ See *id.*

³⁰⁶ Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 41 (“[I]nstitutions and channels themselves [can] become obstacles to democratic action. . . . Rather than as a defensive act of individual rights bearers, civil disobedience thus emerges as an essentially collective and political practice of contestation—as a form of struggle in which the vertical form of state authority is confronted with the horizontal power of the association of citizens or the governed . . .”).

³⁰⁷ Delgado & Stefancic, *Triple Helix Dilemma*, *supra* note 13, at 328.

constitutes a collective and grassroots approach to legal research and analysis.

Moreover, by incorporating critical civil disobedience theory within the CLR framework, we might privilege the substantively ambitious work product of civil disobedients: the disobedient work product could, in many instances, form the creative nucleus of CLR alliances.³⁰⁸ Recall that, in an Arendtian sense, channeling civil disobedience practices into legal-institutional nodes allows us to recapture the “revolutionary spirit” often required for innovative results.³⁰⁹

The intra-systemic approach to CLR alliances focuses on progressive reform limited to change *within* the existing legal order, or “classic” law reform.³¹⁰ An illustrative example of substantial intra-systemic law reform includes the corpus of federal environmental acts passed in the late 1960s and 1970s (and subsequently expanded upon in future decades)—such as the CAA, CWA, SMCRA, NEPA, and so forth.³¹¹ Such environmental legislative achievements occurred within the existing legal-institutional framework, thus demonstrating that intra-systemic reform approaches can indeed effect tangible change.³¹²

In the context of Appalachian law reform, disobedients could contribute to a vast, interconnected array of current and future-projected sites of sought-after progressive reform. Examples include continued anti-mountaintop removal efforts, enhanced coal mine reclamation, natural gas-centered reform, and broader development work.³¹³

Recall that federal litigation-based collaboration among reformist-minded attorneys and grassroots activists featured prominently in the mountaintop removal era.³¹⁴ Although such collaborative work suffered near-constant setbacks—due to profound structural legal-institutional disadvantages³¹⁵—these efforts did succeed in notable intra-systemic ends. An example includes the environmental victory in *Southern Appalachian Mountain Stewards v. A & G Coal Corp.*, wherein the Fourth Circuit held that a mining operator violated the

³⁰⁸ Frankenberg, *Disorder is Possible*, *supra* note 1, at 30; Kim, *supra* note 88, at 219; *see also supra* Part II.C. for an expanded discussion on the role of civil disobedients in critical legal research-focused non-hegemonic reform alliances.

³⁰⁹ *See* sources cited *supra* note 183.

³¹⁰ *See* M’Gonigle & Takeda, *supra* note 16, at 1111.

³¹¹ *See* Claire Riegelman, *Environmentalism: A Symbiotic Relationship Between A Social Movement and U.S. Law?*, 16 MO. ENVTL. L. & POL. REV. 522, 536 (2009) (detailing how modern environmental law was first enacted in the 1970s “in response to public and political awareness of environmental issues affecting the U.S.”).

³¹² *But see* Steven Stoll, *No Man’s Land*, ORION MAGAZINE 24 (Jan. 2016), <https://orionmagazine.org/article/no-mans-land/> (“Of course, in the era of climate change, those invaluable [environmental] laws and the agencies they created now seem too limited in their scope and powers to take on the spectacular collision between Economy and Ecology now in motion.”).

³¹³ *See* McGinley, *supra* note 25, at 416 (providing a summary of potential intersecting projects for regional development); *see also* sources cited *supra* note 192 (detailing additional projects and policy recommendations).

³¹⁴ *See* Perdue & McCarty, *supra* note 22, at 52–55.

³¹⁵ *See id.* at 43; Gersen, *supra* note 240, at 471.

CWA in failing to disclose selenium discharges.³¹⁶

A CLR modeled alliance privileging³¹⁷ the Appalachian civil disobedient work product could potentially add depth and breadth—and perhaps the Arendtian “revolutionary spirit”—to Appalachian reform alliances.³¹⁸ Indeed, the disobedient work product could be cultivated in innumerable ways. As an illustrative example, disobedients could engage in synergistic public panel discussions with would-be reformers (i.e., in non-problematic settings; discussions could occur post-disobedience). Likewise, potential reformers could consult civil disobedient-authored literature more often and more vigorously.³¹⁹

Returning to the Kayford Mountain civil disobedience, we can envision the egalitarian incorporation of such Appalachian disobedience within CLR modeled alliances. Legal reformers are currently pursuing enhanced coal site reclamation—especially as the collapsing coal industry seeks to avoid restoration duties via bankruptcy.³²⁰ Incorporating the Kayford Mountain disobedient work product into such efforts would be, to begin with, procedurally just. From a third wave critical theory standpoint, institutional reformers should always incorporate (to the extent possible) the viewpoints of the “actually affected” local citizenry.³²¹

³¹⁶ S. Appalachian Mountain Stewards v. A & G Coal Corp., 758 F.3d 560, 569 (4th Cir. 2014). The collaborative groups involved included the Appalachian Mountain Advocates, Appalachian Voices, the Sierra Club, and the Southern Appalachian Mountain Stewards. Brief of Appellees at 7, S. Appalachian Mountain Stewards v. A & G Coal Corp (2014) (No. 13-2050).

³¹⁷ The term “privileging” denotes the civil disobedient work product in some instances occupying primacy of place in normative discussions among alliance constituents on how and why law ought to change. Typically, the perspectives grassroots activists can be subordinated within collaborative law reform initiatives. See, e.g., Perdue & McCarty, *supra* note 22, at 41 (detailing how powerful environmental interests excluded local Appalachian activists from legislative negotiations on SMCRA).

³¹⁸ See sources cited *infra* note 183.

³¹⁹ King’s powerful and vastly influential *Letter from a Birmingham Jail* stands out as an exemplar. To be sure, his observations remain exceedingly pertinent to any critically informed discourse on reform: “I am cognizant of the interrelatedness of all communities and states. . . . Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny.” Dr. Martin Luther King, Jr., “Letter from a Birmingham Jail” (letter published for the public, Birmingham, Alabama, Apr. 16, 1963), http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

³²⁰ See APPALACHIAN MOUNTAIN ADVOCATES, *supra* note 23 (“In the wake of the recent coal bankruptcies, it is necessary for citizens and communities to reclaim the degraded land and polluted water left behind from destructive mining practices.”).

³²¹ See Kim, *supra* note 88, at 218. The notion that each community is uniquely situated—and thus has niche needs—has been explored very fruitfully by contemporary critical commentators. For instance, as Yamamoto and Lyman write: “Racializing environmental justice goes beyond treating race as fixed and biological. It acknowledges the construction of race and racial categories through politics and culture. It also entails expanding environmental justice to recognize that each racial group is differently situated according to its specific socio-economic needs, political power, cultural values, and group goals. In doing so, racializing environmental justice enables scholars and activists to better grapple with varying forms of subordination and to tailor specific remedies for the harms that are specific to each racial community.” Eric K. Yamamoto & Jen-L W. Lyman, *Racializing*

Incorporating the Kayford Mountain disobedient work product would also be substantively enriching. The Kayford Mountain disobedients, through their real contestations against the intra-systemic status quo, created alternative legal vistas within their extra-legal space: Appalachian citizens “promulgated” a new socio-legal framework in which their community’s toxic mining sites were “required” to be (at least partially) restored.³²² Earth-sustaining trees, after all, appeared where they weren’t before.³²³

More specifically, the illegal Kayford Mountain act of planting “hemlock, walnut, red oak, and tulip poplar sprouts” was designed—through well-suited root structures and functions—to “help keep streams clean.”³²⁴ As such, these are intellectually rich actions worthy of a considered unpacking and of a close analysis via existing legal-institutional restoration efforts (in terms of both legal doctrine and strategy). Thus, an egalitarian cultivation of the substance of Appalachian disobedience—or the *what*, *how*, and the (collectively determined) *why* of such practices—could indeed produce an Arendtian spark for intra-systemic Appalachian reform efforts.

Finally, Appalachian civil disobedience could be incorporated within CLR modeled alliances focusing on systemic reformations beyond the existing legal order.³²⁵ Both global and western democracy-specific phenomena (e.g., climate change and Black Lives Matter) have engendered new and urgent discussions regarding the need for progressive systemic change beyond mere incremental reform.³²⁶

The Appalachian region in many ways exists at the nexus of such phenomena, as is demonstrated by, among other things, Appalachian coal’s role in climate change and the centrality of Appalachia in the 2016 presidential election.³²⁷ Appalachia is therefore an ideal site for exploring systemic reform approaches. For instance, due to Appalachian coal’s role in the current global environmental catastrophe (coal-fired power plants being a leading contributor to climate change) the Climate Ground Zero group targeted Appalachia for nonviolent civil disobedience. Disobedience participants included “NASA Climatologist and Columbia University Professor James Hansen . . . and former West Virginia Secretary of State Ken Hechler—all of whom were arrested.”³²⁸

Environmental Justice, 72 U. COLO. L. REV. 311, 359 (2001).

³²² See Taylor, *supra* note 27.

³²³ See *id.*

³²⁴ *Id.*

³²⁵ See M’Gonigle & Takeda, *supra* note 16, at 1111.

³²⁶ See *id.*; Stroll, *supra* note 312; Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541, 555 (2016) (“[Black Lives Matter] tak[es] political action toward anti-subordination, anti-racism, and systemic reform.”).

³²⁷ See, e.g., Catte, *supra* note 294.

³²⁸ Isaac Forman, *The Uncertain Future of NEPA and Mountaintop Removal*, 36 COLUM. J.

More recently, the deeply problematic outcome of the 2016 U.S. presidential election has thrust Appalachia—long ravaged by neoliberal economics³²⁹ (while, at the same time, combatting persistent race-, gender-, and nativism-based issues endemic not just to Appalachia but to the entire U.S.)—into the center of discussions on class, identity politics, and transformative socioeconomic change.³³⁰ Thus, due to a range of interconnected issues, Appalachia is certainly implicated in any discussion on systemic socio-legal change.

Rawlsian liberal civil disobedience permits intra-systemic reform only,³³¹ however, a critically informed approach to civil disobedience includes an expanded, systemic reform aim as well. Celikates writes:

[Rawls's requirement] that civil disobedience takes place within the limits of fidelity to law . . . is supposed to distinguish it from more radical and revolutionary forms of protest and resistance that put into question the political system itself Although the distinction between civil disobedience and more radical forms of dissent is not useless, the way Rawls builds it into his definition certainly obscures its gradual and contested nature. [For] Thoreau, Gandhi, and King, none of these three regarded the prevailing system as reasonably just Under these conditions, the requirement that civil disobedience has to stay within the limits of fidelity to law, in order to count as civil disobedience, ceases to be

ENVTL. L. 163, 191 (2011).

³²⁹ See Melissa Ooten & Jason Sawyer, *From the Coal Mine to the Prison Yard*, in APPALACHIA REVISITED: NEW PERSPECTIVES ON PLACE, TRADITION, AND PROGRESS 175 (William Schumann & Rebecca A. Fletcher eds., 2016) (“[I]t is not central Appalachia’s isolation but rather its very economic connectedness and interdependency with national and global markets that has led to many of its current economic struggles.”).

³³⁰ See McNEIL, *supra* note 29; Paul Krugman, *The Populism Perplex*, N.Y. TIMES (Nov. 25, 2016), <https://www.nytimes.com/2016/11/25/opinion/the-populism-perplex.html> (examining the supposed impact of white working-class Appalachian voters on Trump’s successful candidacy). Brian Sewell provides a more expanded analysis of the Appalachian fallout of the election: “In Appalachia, the electorate’s anxieties—whether stemming from economic, demographic or social change—were often viewed through the lens of coal and manufacturing job losses and economic stagnation. . . . [Yet] for all the attention paid to distressed Appalachian communities during the campaign, Trump has yet to address the growing need for targeted federal investments to stimulate economic activity and job opportunities in the region.” Brian Sewell, *Trump’s Would-Be Coal Comeback Faces Long Odds*, APPALACHIAN VOICES (Dec. 15, 2016), <http://appvoices.org/2016/12/15/trump-energy-coal-appalachia/>. Note also that neoliberalism has impacted Appalachia through exceedingly diverse and insidious means. See Eric Eyre, *Drug Firms Poured 780M Painkillers into WV Amid Rise of Overdoses*, CHARLESTON GAZETTE-MAIL (Dec. 17, 2016), <http://www.wvgazettemail.com/news-health/20161217/drug-firms-poured-780m-painkillers-into-wv-amid-rise-of-overdoses#sthash.7nqG2S43.dpuf>; Nicholas F. Stump, *Food Deserts in Appalachia: A Socio-Economic Ill and Opportunities for Reform*, OXFORD HUMAN RIGHTS HUB (Nov. 15 2016), <http://ohrh.law.ox.ac.uk/appalachia-in-crisis-a-human-rights-approach-to-environmental-justice-in-the-u-s/>; see also sources cited *supra* note 25. For work on the prestige media’s often problematic fixation on the Appalachian region before and after the election, see Catts *supra* note 294.

³³¹ See RAWLS, JUSTICE, *supra* note 9, at 366.

plausible³³²

Further, recall that such an expanded approach to civil disobedience also dovetails with many third wave critical schools at large, where there is a focus “beyond intra-systemic ‘reform’ and toward larger ‘re-forms.’”³³³

In the context of CLR modeled alliances, a shift to more radical systemic reform objectives would likely involve a more varied set of allies, strategies, discourses, etc. Systemic reform discourses—as explored through alternative legal research resources and ally specialists, as discussed above in Part I³³⁴—would likely be of great benefit to such efforts. More specifically, in a time when the peril posed by climate change has permeated the public consciousness, a renewed and intense focus on ecological discourses that explore explicitly systemic bases for reform are very pertinent indeed.³³⁵ Prime examples include reform discourses within the deep ecology and ecofeminism schools.

Both deep ecology and ecofeminism reject late capitalism’s unsustainable economic growth model.³³⁶ Deep ecology-based systemic reform, which is based on an “explicit rejection of reform environmentalism that arose as a concession to the market strategies of the Reagan years,”³³⁷ entails “assigning value to the global ecological system as such, with humans just one species within this integrated whole.”³³⁸ Deep ecology reform generally calls for a radical restructuring of institutional sites to achieve “strong sustainability”³³⁹—the aim being not growth maximization, but rather “reach[ing] an ecologically sustainable future in the long-term.”³⁴⁰

³³² Celikates, *Beyond the Liberal Paradigm*, *supra* note 2, at 39.

³³³ M’Gonigle & Takeda, *supra* note 16, at 1111.

³³⁴ See *supra* Part I.B. for an expanded CLR discussion on a newfound practitioner reliance upon alternative resources.

³³⁵ See Stroll, *supra* note 312.

³³⁶ See, e.g., The Keith Hirokawa, *Some Pragmatic Observations About Radical Critique in Environmental Law*, 21 STAN. ENVTL. L.J. 225, 237–40 (2002) (providing a theoretical overview of the tenets of ecofeminism and deep ecology, leading radical environmental frameworks); see also *id.* at 237 (“Ecofeminism, also known as ecological feminism, calls for a revolution in natural resource management that challenges the biases inherent in social gender constructions.”); ARNE NAESS, *ECOLOGY, COMMUNITY AND LIFESTYLE* 45 (David Rothenberg trans., 1989) (“[T]he aim of the deep ecology movement is not a slight reform of our present society, but a substantial reorientation of our whole civilization.”). But see Hirokawa, *supra* note 336, at 280 (“[I]t is imperative that [approaches to] environmental protection include a willingness to modify, or even discard, radical environmental theories in an effort to secure far-reaching results.”); sources cited *supra* note 17 and accompanying text.

³³⁷ JENNIE C. STEPHENS, *CLIMATE CHANGE: AN ENCYCLOPEDIA OF SCIENCE AND HISTORY* 585 (2013).

³³⁸ PETER LAWRENCE, *JUSTICE FOR FUTURE GENERATIONS: CLIMATE CHANGE AND INTERNATIONAL LAW* 60 (2014).

³³⁹ *Id.*

³⁴⁰ HAYDN WASHINGTON, *DEMISTIFYING SUSTAINABILITY: TOWARDS REAL SOLUTIONS* 42 (2015).

Ecofeminism is also an extraordinarily pertinent discourse for systemic reform approaches. Indeed, Women's Studies scholar Joyce M. Barry has already applied ecofeminist principles to the Appalachian region.³⁴¹ Like deep ecology, ecofeminism rejects the late capitalist world order, instead favoring strongly sustainable local systems as an alternative to the current global economic regime.³⁴²

In addition to such economic principles, ecofeminism's core feature is its focus on critical intersectionality. In the existing hegemonic regime "the dynamic of oppression is similar (though not identical or interchangeable) among oppressed peoples"—and "most women experience this dynamic in more than one way (that is, through the dynamics of racism, classism, heterosexism, and ageism, as well as sexism)." Accordingly, ecofeminist theorists posit that "in order to fight the oppression of women and nature, [we] must look at more than just the ways in which sexism is related to naturism."³⁴³ Thus, ecofeminism is a supremely multi-vocal movement.

For many ecofeminists, a focal point in examining potential systemic reform approaches is strongly sustainable local systems (i.e., reconstructed, ecologically sound systems that also account for historic inequities pertaining to race, gender, class, etc.).³⁴⁴ Notable ecofeminist theorist Vandana Shiva characterizes such a

³⁴¹ BARRY, *STANDING OUR GROUND*, *supra* note 3, at 149 (detailing ecofeminist-based reform approaches in Appalachia).

³⁴² See VANDANA SHIVA, *EARTH DEMOCRACY: JUSTICE, SUSTAINABILITY, AND PEACE* 318–322 (2015); CATRIONA SANDILANDS, *THE GOOD-NATURED FEMINIST: ECOFEMINISM AND THE QUEST FOR DEMOCRACY* 136 (1999) (detailing how Shiva and related ecofeminists "reject[] . . . what capitalism offers as universal [instead favoring] a collection of local economic and cultural sites collected around the common theme of subsistence [which forms] the new horizon of sustainable universality toward which ecological politics should be oriented."); see also Greta Gaard, *Toward New EcoMasculinities, EcoGenders, and EcoSexualities*, in *ECOFEMINISM: FEMINIST INTERSECTIONS WITH OTHER ANIMALS & THE EARTH* 225 (Carol J. Adams & Lori Gruen eds., 2014) ("For any egalitarian socioeconomic and eco-political transformation, such as that advocated by ecofeminism to be possible, both individuals and institutions need to shift away from overvaluing exclusively white, male, and masculinized attributes and behaviors, jobs, environments, economic practices, laws and political practices, in order to recognize and enact eco-political sustainability and ecological genders.").

³⁴³ Ellen O'Loughlin, *Questioning Sour Grapes: Ecofeminism and the United Farm Workers Grape Boycott*, in *ECOFEMINISM: WOMEN, ANIMALS, NATURE* 148 (Greta Gaard ed., 2010). On application of intersectionality discourses in Appalachia, see also Anna R. Terman, *Intersections of Appalachian Identity*, in *APPALACHIA REVISITED: NEW PERSPECTIVES ON PLACE, TRADITION, AND PROGRESS* 75 (William Schumann & Rebecca A. Fletcher eds., 2016) ("People across Appalachia tend to have some commonalities. . . . [H]owever, the ways people experience these issues depend on gender, race, class, sexuality, age, and perhaps other relevant identities like religion and rural or urban identity. Awareness of the way intersectionality influences identity helps us understand that being an Appalachian is not a singular experience based on a stereotypical norm that relies on sexism, racism, classism, and heterosexism for legitimacy . . ."). Such an intersectional approach to Appalachian identities dovetails very effectively with an explicitly ecofeminist analysis of the region.

³⁴⁴ See SHIVA, *supra* note 342, at 136.

holistic reform model as follows:

Living economies rejuvenate ecological processes while reactivating people's creativity, solidarity, and interdependence. Robust living economics are people-centered, decentralized, sustainable, and livelihood-generating. They are based on co-ownership and coproduction, on sharing and participation. Living economies are not mere concepts; they exist and continue to emerge in our times. Living economies are being shaped by ordinary people in their everyday lives.³⁴⁵

Joyce M. Barry adds: "Living economies are not mere concepts: they exist and continue to emerge in our times. . . . Many women in West Virginia promote living economies through the sustainable development of the area's natural resources."³⁴⁶ Ecofeminism therefore constitutes a potent and extremely versatile reform school, which provides a critically just, egalitarian, local-centered, and strongly sustainable alternative to global neoliberal capitalism.³⁴⁷

Ecofeminism then is one of potentially many pertinent reform schools for exploring CLR alliances with a systemic reform focus. This is because, as covered above, Appalachia's environmental and socioeconomic issues implicate a full range of critical issues, both regional and global.³⁴⁸ In other words, as Barry suggests, a genuinely intersectional approach to ecological issues would likely produce the most just and effective systemic reform for Appalachia.

In returning to Kayford Mountain, we can again imagine such disobedient citizens contributing to explicitly systemic reform. One imagines, for instance, reflective synergies among the Appalachian disobedients, reformist-minded attorneys (who would likely favor more radical socio-legal reform approaches), and discourse participants from such schools as ecofeminism, deep ecology, etc. The essential difference between intra-systemic and systemic focused CLR alliances, after all, is simply the scope and nature of the sought-after reform.³⁴⁹

The Appalachian disobedient work product might again occupy a privileged reform space. For example, the Kayford Mountain disobedients nonviolently yet illegally occupied an un-reclaimed mining site to plant restorative trees.³⁵⁰ How might such actions intersect with—and, ultimately, deeply inform—systemic reform approaches steeped in ecofeminism?

Prominent strains of ecofeminism favor local systems that are both strongly sustainable and critically just; such reconstructed systems might involve, as a starting point, local, renewable-based food production (e.g., community-based

³⁴⁵ SHIVA, *supra* note 342, at 63.

³⁴⁶ BARRY, *STANDING OUR GROUND*, *supra* note 3, at 149.

³⁴⁷ *See id.*

³⁴⁸ *See* sources cited *supra* note 313.

³⁴⁹ M'Gonigle & Takeda, *supra* note 16, at 1111.

³⁵⁰ *See* Taylor, *supra* note 27.

agriculture).³⁵¹ Correspondingly, as one revitalization measure, many Appalachian commentators call for the conversion of inactive mountaintop removal sites into niche agriculture lands. Indeed, “[c]ommercial agriculture or farming” has been established on at least some mountaintop removal areas.³⁵² The Kayford Mountain disobedience—with its similar emphasis on unreclaimed mountaintop removal sites, grassroots community action, and creative ecological remediation³⁵³—could potentially offer much in terms of further collective explorations of local economic systems: crucial first steps towards systemic, ecofeminist inspired reform in the Appalachian region.

Ultimately, CLR reform alliances stand to benefit immensely from the infusion of the Appalachian civil disobedient work product, whether the aim is incremental progressive reform or more radical, institutional-transformative reformations. Contemporary Appalachia faces truly existential challenges; however, civilly disobedient citizens could beneficially and profoundly shape new regional futures that are ecologically sustainable, socioeconomically dynamic, culturally reconstructive, and critically just.

V. CONCLUSION

The longstanding systemic inequities of the current neoliberal regime have engendered a global ecological and socioeconomic crisis—the latter catastrophe being inexorably and profoundly entwined with the former.³⁵⁴ Climate change, a rapid loss of biodiversity, mass wealth inequalities, and persistent issues pertaining to race, gender, and sex continue to roil both western democracies and the world at large.³⁵⁵ However, amid these upheavals, civil disobedience occupies a diverse and singularly important niche within any meaningful discourse on reform.

What have we seen in the prior decade? Lacking genuine intra-systemic or systemic progressive reform, we have seen considered, nonviolent civil disobedience with Black Lives Matter,³⁵⁶ FEMEN,³⁵⁷ and Occupy Wall Street.³⁵⁸ We have seen cultural, ecological, and environmental justice-based civil disobedience at Appalachian mountaintop removal sites and, most recently, with

³⁵¹ See MARIA MIES & VANDANA SHIVA, *ECOFEMINISM* 297–302 (1993).

³⁵² Ross Geredien, *Post-Mountaintop Removal Reclamation of Mountain Summits for Economic Development in Appalachia*, NAT. RES. DEF. COUNCIL (Dec. 7, 2009), <http://www.ilovemountains.org/reclamation-fail/details.php>.

³⁵³ See Taylor, *supra* note 27.

³⁵⁴ See generally PHOEBE GODFREY & DENISE TORRES, *SYSTEMIC CRISES OF GLOBAL CLIMATE CHANGE: INTERSECTIONS OF RACE, CLASS AND GENDER* (2016) (explaining how the global environmental crisis disproportionately impacts subordinated groups).

³⁵⁵ *Id.*

³⁵⁶ See Glaeser & Suntein, *supra* note 8.

³⁵⁷ See Zychowicz, *supra* note 32, at 85.

³⁵⁸ See MITCHELL ET AL., *supra* note 11, at 47.

the Standing Rock Protest at the Dakota Access Pipeline.³⁵⁹ To be sure, the civil disobedience tradition is alive and well; extra-legal actions, like in eras past, continuously add crucial new contours to our collective liberatory and earth-sustaining movements—providing what Hannah Arendt so elegantly referred to as a contestatory “revolutionary spirit.”³⁶⁰

In this intense and rapidly changing contemporary landscape, CLR modeled alliances constitute a potentially potent vehicle through which to incorporate civil disobedients within egalitarian-focused socio-legal reform alliances. Through such novel and radical approaches to the legal research and analysis process—i.e., approaches where, in addition to members of the progressive legal elite, grassroots activists like civil disobedients also occupy privileged, core reform positions—we may achieve both procedurally just and maximally effective socio-legal change.

This Article utilizes Appalachian civil disobedience as a CLR case model, and the subordinated Appalachian region is indeed in desperate need of reform. However, the CLR framework detailed herein is applicable in a great many settings—globally, nationally, and perhaps especially at the regional and local levels.³⁶¹ As Gary Snyder has said: “Find your place on the planet. Dig in, and take responsibility from there . . . even while holding in mind the largest scale of potential change. Get a sense of workable territory, learn about it, and start acting point by point.”³⁶² CLR modeled reform alliances and similar non-hegemonic formations facilitate such actions; and indeed, a critically just and ecologically sustainable future may depend upon their creative cultivation.

³⁵⁹ See Crane-Murdock, *supra* note 11.

³⁶⁰ See sources cited *supra* note 183.

³⁶¹ See, e.g., Rebecca A. Fletcher, *The Global Neighborhoods of Appalachian Studies*, in *APPALACHIA REVISITED: NEW PERSPECTIVES ON PLACE, TRADITION, AND PROGRESS* 277–78 (William Schumann & Rebecca A. Fletcher eds., 2016) (“Appalachia is intricately and holistically linked within, not isolated from, the rest of America and the world, a concept that reflects a broader view of regional continuity and change.”).

³⁶² GARY SNYDER, *TURTLE ISLAND* 101 (1974).