

2019

Edward Snowden, National Security Whistleblowing, and Civil Disobedience

David E. Pozen
Columbia Law School, dpozen@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Law and Philosophy Commons](#), [Law and Politics Commons](#), [Philosophy Commons](#), and the [Political Theory Commons](#)

Recommended Citation

David E. Pozen, *Edward Snowden, National Security Whistleblowing, and Civil Disobedience*, WHISTLEBLOWING NATION: THE HISTORY OF NATIONAL SECURITY DISCLOSURES AND THE CULT OF STATE SECRECY, KAETEN MISTRY & HANNAH GURMAN, Eds., COLUMBIA UNIVERSITY PRESS, 2020; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-648 (2019).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2585

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

CODA

Edward Snowden, National Security Whistleblowing, and Civil Disobedience

DAVID E. POZEN

NATIONAL SECURITY WHISTLEBLOWERS are complicated characters. On the one hand, as the chapters in this volume reflect, they may appear disloyal, self-centered, overconfident in their own views, threatening to the general good. On the other hand, as the chapters also reflect, they may appear heroic, selfless, zealous for truth, essential to democratic accountability. The best-known whistleblowers are depicted as all of these things at the same time. As Hannah Gurman and Kaeten Mistry observe, national security whistleblowers are increasingly “included in the tradition of civil disobedience” even as they are increasingly indicted as public enemies.¹ Their cultural celebrity and legal precarity, their legitimation and persecution, have developed in dialectical relation since at least the Vietnam War.

No recent U.S. whistleblower has been more lionized or more vilified than Edward Snowden. He has been nominated for the Nobel Peace Prize and denounced as a “total traitor” deserving of the death penalty.² Although none of the essays in this volume focuses on Snowden, he is everywhere in its pages. His case “encapsulates,” in Mistry and Gurman’s words, the “ambiguous and paradoxical” attitudes toward national security whistleblowing that the volume highlights and historicizes.³

—-1
—0
—+1

Perhaps we might look to Snowden to help theorize these attitudes as well. If defenders of whistleblowers are apt to include them in the tradition of civil disobedience, and if Snowden is the emblematic whistleblower of our age, what does civil disobedience theory have to tell us about Snowden's case? Conversely, what does Snowden's case have to tell us about civil disobedience theory as it relates to the national security state? Resolving the question whether Snowden is a civil disobedient (as he has suggested)⁴ will not resolve the question whether his actions were justified. But unlike the label "whistleblower," the label "civil disobedient" comes with a substantial scholarly pedigree, affording an opportunity to place the Snowden debate within a larger philosophical context.

On most accounts, civil disobedience "involves a conscientious and communicative breach of law designed to demonstrate condemnation of a law or policy and to contribute to a change in that law or policy."⁵ Theorists of civil disobedience disagree on a lot, but this is the core of virtually every definition: a morally serious violation of law that conveys a protest message and aspires to motivate reform. Isn't that Snowden? What's so difficult about his case?

The difficulty, I will suggest, is that most definitions of civil disobedience include additional elements, additional criteria for distinguishing civil disobedience from other presumptively less favored forms of lawbreaking, and Snowden does not clearly satisfy any of these. Yet Snowden does not clearly fail any of them either, at least not without a plausible justification or excuse. His case is therefore an awkward fit for civil disobedience theory, and this awkwardness may help explain some of the "ambiguous and paradoxical" attitudes that swirl around it.

Without purporting to be exhaustive, let us consider some of the ways in which Snowden, along with many other national security whistleblowers, puts pressure on traditional models of civil disobedience.

First, some prominent theories of civil disobedience require that the lawbreaking be a tactic of last resort, preceded by an earnest attempt at persuasion and an exhaustion of lawful alternatives. In *A Theory of Justice*, for instance, John Rawls writes that a "further condition for civil disobedience

-1—
0—
+1—

is the following. We may suppose that the normal appeals to the political majority have already been made in good faith and that they have failed.”⁶ Martin Luther King Jr.’s “Letter from Birmingham City Jail” cites “negotiation” as one of the “four basic steps” that must be taken before moving to “direct action.”⁷ There is some dispute about the facts of Snowden’s case, but according to the National Security Agency (NSA), he did not appeal to his superiors, follow the normal whistleblower protocols, or otherwise attempt to change the surveillance system from within before divulging its details to the outside world. He did not satisfy Rawls’s condition of fair notice.⁸

Against this charge, however, Snowden might respond that doing so would have been self-defeating. To be effective, disclosures of classified information generally need concealment before the fact. The NSA may well have shut down Snowden if it had gotten any wind of what he was contemplating.⁹ Moreover, the legal regime for national security whistleblowing, to the extent it facilitates whistleblowing at all, is oriented toward allegations of discrete abuses by particular bad actors—abuses that can be quietly and surgically remedied once identified. The whistleblower regime is not well equipped to handle allegations, such as Snowden’s, of formally authorized yet immoral and unconstitutional behavior on a sweeping scale. Indeed, there is something faintly ridiculous about the image of Snowden bringing his allegations to the NSA inspector general or a congressional committee under these circumstances. Both the nature of Snowden’s methods (a media leak) and the nature of his protest (a comprehensive critique of agency practice) are hard to square with a commitment to advance notice and negotiation.

Second, many theories of civil disobedience require that the civil disobedient seek to minimize the extent of his or her lawbreaking and the collateral damage it causes. This is often discussed under the rubric of nonviolence, which Hannah Arendt believed to be a “generally accepted necessary characteristic of civil disobedience.”¹⁰ But the point is not necessarily limited to physical violence, as the gravamen of these discussions is that civil disobedience should be as civil—as uncoercive and undisruptive—as

—1
—0
—+1

possible.¹¹ Snowden may seem suspect on this ground. He reportedly purloined tens of thousands of sensitive documents, and the NSA claims that the harm to U.S. national security interests has been severe.¹²

Has it, though? Six years after Snowden fled the country, it remains extremely unclear how many classified documents he took with him, which tranches he has shared with whom, and what the effects have been.¹³ As a descriptive matter, outside observers cannot say with any confidence just how reckless or judicious Snowden's lawbreaking has been. The public consequences of that lawbreaking, furthermore, have been mediated by the media, as Snowden vested select journalists with the power to decide what to publish. The breadth of Snowden's critique of the NSA complicates analysis of this criterion as well. Insofar as he intended to communicate the message that the basic architecture of NSA surveillance had become unmoored from democratic and constitutional constraints, his defenders might insist that only a massive leak could illuminate the massive scope of the problem. Whether one believes Snowden to have caused undue harm depends not only on unknown facts, in other words, but also on what one takes him to have been protesting and with what degree of warrant.

Third, Snowden's status as a government contractor arguably strains the civil disobedience paradigm. The canonical examples in the literature, from Dr. King to Rosa Parks to Mahatma Gandhi, were not working for the state at the time they broke the law. There is something especially discomfiting, some may maintain, about a government worker turning to civil disobedience and violating not only the generally applicable laws that everyone is supposed to follow but also the employment contract—and in particular the nondisclosure clause—that he or she signed. Such disobedience raises concerns about the norm of promise keeping as well as more familiar concerns about public order and authority.

In Snowden's case, however, it was precisely his status as a government insider that enabled him to identify an otherwise obscure policy problem and respond to it. National security whistleblowing is like this. The protagonists serve in a position of trust at a public institution while occupying "another, equally important position in the constitutional structure—that of potential checks on abuses or mistakes to which they alone may be

privity.”¹⁴ When it comes to the hypersecretive activities of an agency such as the NSA, only an insider will have the prerequisite knowledge to be able to mount a meaningful challenge. If civil disobedience relies on a reasonably detailed grasp of the laws or policies that are being protested, we may have to acknowledge the possibility of governmental civil disobedience or else accept that there can be none at all in the intelligence field.

Fourth, some accounts of civil disobedience portray it as a collective practice. Arendt, for instance, writes that the civil disobedient “never exists as an individual; he can function and survive only as a member of a group.”¹⁵ Civil disobedients, in her telling, are not lone wolves but “organized minorities, bound together by common opinion.”¹⁶ Similarly, Michael Walzer writes that the “duty” of civil disobedience “arises when obligations incurred in some small group come into conflict with obligations incurred in a larger, more inclusive group, generally the state.”¹⁷ In contrast with these portraits, Snowden seems to have taken matters into his own hands. His famous predecessor Daniel Ellsberg at least collaborated with a former colleague (Anthony Russo) and reached out to individual members of Congress. As far as I am aware, Snowden did not attempt to recruit any allies in his plan to leak information about the NSA. This might suggest a troubling amount of independence from others who could have challenged his beliefs and thus a troubling amount of epistemic hubris.¹⁸ What if Snowden had been mistaken about some key point of fact or law? What if his views on NSA surveillance had been ill-informed or idiosyncratic? A collective protest against the agency’s operations, involving not just Snowden but a group of like-minded colleagues, might have abated these concerns.

Yet how could Snowden have pulled that off? How, that is, could he have formed such a group under the constraints of NSA classification and compartmentalization? National security whistleblowing typically demands a great deal of individual secrecy, during the planning and execution stages, to survive within the larger atmosphere of institutional secrecy. Banding together with fellow dissidents along the lines envisioned by Arendt and Walzer is infeasible in a setting like the NSA. In addition, while Snowden may have started out as a lone wolf, he did not end as one. He appears to have formulated and launched his protest plan by himself, but as already

—-1
—0
—+1



FIGURE 12.1

Signs thanking Edward Snowden held by protesters during a rally against mass surveillance in Washington, DC, October 26, 2013.

Source: Photo by Rena Schild/Shutterstock.

mentioned, he enlisted the aid of journalists and deferred to their professional judgment in determining which documents to publish. The news media and, later, the civil-libertarian NGO community became the site of Snowden's collective praxis.

Fifth, certain commentators have taken the position that a civil disobedient, properly so called, must violate the same law that he or she means to challenge, as when a pacifist refuses to report for duty under a military-conscription statute. "The disobedience of laws which are not themselves the target of the protest," Supreme Court Justice Abe Fortas declared in 1968, "constitutes an act of rebellion, not merely of dissent."¹⁹ Fortas plainly would not recognize Snowden's "act of rebellion" as civil disobedience. Snowden was indicted for violating laws, in particular the U.S. Code's

-1—
0—
+1—

prohibitions on unauthorized communication of national defense and intelligence information, that he may have found objectionable in various respects but that were not the target of his protest.²⁰

Most theorists of civil disobedience, however, have not followed Fortas in ruling out the possibility of indirect civil disobedience,²¹ and in Snowden's case it is hard to imagine what direct civil disobedience would have looked like. (Spying on Americans beyond what even the NSA's rules permitted?) Only by violating the laws limiting disclosure of classified information, it seems, could Snowden communicate his condemnation of the laws and policies governing NSA surveillance. Either Fortas's condition must be jettisoned, or national security whistleblowers will almost never be eligible to qualify as civil disobedients.

Finally, classic discussions of civil disobedience suggest that it must be undertaken with a willingness to submit to punishment. Dr. King's "Letter from Birmingham City Jail" focuses on this feature. "One who breaks an unjust law," according to King, "must do it openly, lovingly . . . and with a willingness to accept the penalty."²² As Jessica Bulman-Pozen and I have written: "The civil disobedient's willingness to accept legal consequences evinces her commitment to the *polis* and humility before fellow citizens, notwithstanding her momentary turn away from the law. It is thus, for many theorists, a critical way of negotiating the paradox of law-breaking that is nonetheless law-respecting"²³—a paradox that inheres in the pairing of "civil" with "disobedience" and that any satisfying account of civil disobedience must resolve. In line with these arguments, critics of Snowden have repeatedly insisted that his flight from the United States and from criminal prosecution, not to mention his residence in Russia, disqualifies him from civil disobedience status.²⁴ Secretary of State John Kerry, for example, told a television interviewer in 2014 that if Snowden "has a complaint about what's wrong with American surveillance" and seeks to cast himself as a civil disobedient, he "should man up," "come back here," and "stand in our system of justice and make his case."²⁵

Once again, though, matters are more complicated than conventional accounts of civil disobedience might imply. Shortly after his disclosures were first reported, Snowden came forward to acknowledge his identity as

—1
—0
—+1

their source, and in this sense he was not evasive at all. He has also been subject to a range of serious legal consequences, including possible “permanent displacement from his family and friends.”²⁶ Thus far, it is true, Snowden has refused to come back and make his case to a jury of his peers in the Eastern District of Virginia (the jurisdiction in which he was charged), in a proceeding that would be partly closed to the public. After initially expressing an intention to “ask the courts and people of Hong Kong to decide [his] fate,”²⁷ Snowden appealed to “the international community” to judge his actions.²⁸ Such lofty language struck some observers as cagey and self-serving. But it starts to sound more felicitous when one considers the mismatch between the territorial limits and cultural biases of the Eastern District of Virginia and the global reach of the surveillance programs that Snowden exposed—programs that might be of concern to anyone in the world at risk of being sucked into the NSA’s panoptic vortex.²⁹

A deep question lurks in the background here: what is the moral and political community within which a putative civil disobedient ought to be judged? Theorists of civil disobedience have tended to ignore this question, presumably on the assumption that the relevant moral and political community lines up reasonably well with the legal jurisdiction in which the lawbreaking occurred. Snowden’s intimation of a more cosmopolitan stance, a global ethics of resistance, complicates this assumption. It forces us to ask whether a willingness to submit to punishment, in the spirit of Dr. King, necessarily requires a willingness to submit to localized forms of punishment. This question will only grow increasingly acute as technological developments allow more and more whistleblowers to reach an international audience.

On numerous levels, then, Snowden’s case does not map neatly onto traditional theories of civil disobedience. The same holds true for most cases of national security whistleblowing. One possible takeaway is that the ambivalent attitudes noted by Gurman and Mistry are not simply the product of polarized politics or insufficient consideration; rather, they reflect the genuine difficulties of locating such whistleblowers within our main ethical framework for assessing conscientious and communicative lawbreaking. Another possible takeaway points in a revisionist direction. Maybe

-1—
0—
+1—

certain aspects of the framework itself ought to be revisited and revised, or put aside altogether, in light of these difficulties.³⁰ Just as the chapters in this splendid volume urge us to move “beyond the reductive characterization of whistleblowers as heroes or traitors,”³¹ we may need to move beyond the standard models of civil disobedience to gain greater normative purchase on what whistleblowers do.

NOTES

1. Hannah Gurman and Kaeten Mistry, “The Paradox of National Security Whistleblowing: Locating and Framing a History of the Phenomenon,” chapter 1 in this volume.
2. Ryan Goodman, “Five (Overlooked) Decision Points for the Trump Administration in National Security,” *Just Security*, January 4, 2017, <https://www.justsecurity.org/35958/overlooked-decision-points-trump-administration-national-security>, quoting a 2015 remark by then-presidential candidate Donald Trump.
3. Kaeten Mistry and Hannah Gurman, introduction, this volume.
4. See, for example, Melissa Chan, “Edward Snowden Invokes Martin Luther King to Defend Whistleblowing,” *Time*, May 12, 2016, <http://time.com/4327930/edward-snowden-martin-luther-king-whistleblowing>; and Terrence McCoy, “Edward Snowden: ‘I’d Like to Go Home,’” *Washington Post*, May 29, 2014, <https://www.washingtonpost.com/news/morning-mix/wp/2014/05/29/edward-snowden-says-he-would-like-to-return-home-but-not-to-a-jail-cell>.
5. Kimberley Brownlee, “Civil Disobedience,” *Stanford Encyclopedia of Philosophy*, December 20, 2013, <https://plato.stanford.edu/entries/civil-disobedience>. See also, for example, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press, 1979), 263: “*Civil Disobedience* is a politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one’s protest against . . . a law or a public policy.”
6. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 373.
7. Martin Luther King Jr., “Letter from Birmingham City Jail,” in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.*, ed. James Melvin Washington (New York: HarperCollins, 1986), 290.
8. See Kimberley Brownlee, “The Civil Disobedience of Edward Snowden: A Reply to William Scheuerman,” *Philosophy and Social Criticism* 42 (2016): 966, explaining that Snowden fails Rawls’s “fair-notice publicity” condition as well as his condition of willingness to accept legal consequences but arguing that Snowden qualifies as a civil disobedient under “more modest and more plausible” conceptions than Rawls’s.

—1
—0
—+1

9. See Gurman and Mistry, “The Paradox of National Security Whistleblowing,” contending that “the experiences of individuals who used [the official national security whistleblowing] channels,” before Snowden, “highlighted the hollowness of their promises”; and Candice Delmas, “The Ethics of Government Whistleblowing,” *Social Theory and Practice* 41 (2015): 99, suggesting, with reference to Snowden, that the requirement of breaking the law only as a last resort “is not violated if there are reasons to think that lawful attempts would be useless or counterproductive.” See also Jessica Bulman-Pozen and David E. Pozen, “Uncivil Obedience,” *Columbia Law Review* 115 (2015): 815–16: “In some cases . . . [advance] publicity would furnish legal enforcers the opportunity to thwart the endeavor. In these cases, subsequent acknowledgement and explanation of the act may fulfill the requirement of communicativeness, along with many of the social values this requirement is thought to serve.”
10. Hannah Arendt, “Civil Disobedience,” in *Crises of the Republic* (New York: Harcourt Brace Jovanovich, 1969), 76–77.
11. See Bulman-Pozen and Pozen, “Uncivil Obedience,” 816–17, reviewing relevant literature.
12. See, for example, Deb Riechmann, “Costs of Snowden Leak Still Mounting 5 Years Later,” AP News, June 4, 2018, <https://apnews.com/797f390ee28b4bfbboe1b13cfedf0593>.
13. See Riechmann, “Costs of Snowden Leak Still Mounting 5 Years Later,” describing rebuttals of the NSA’s claims by Snowden supporters.
14. Heidi Kitrosser, “Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information,” *Journal of National Security Law and Policy* 6 (2013): 440.
15. Arendt, “Civil Disobedience,” 55.
16. Arendt, “Civil Disobedience,” 56.
17. Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge, MA: Harvard University Press, 1970), 10.
18. Cf. Rahul Sagar, “Is Edward Snowden Engaged in Civil Disobedience?—A Response to Glennon,” *Just Security*, June 5, 2014, <https://www.justsecurity.org/11267/edward-snowden-engaged-civil-disobedience-a-response-glennon>: “[Snowden] acted unilaterally, leaving fellow citizens with no choice over whether and what kinds of classified information ought to be disclosed. He didn’t appeal to them; he decided for them.”
19. Abe Fortas, *Concerning Dissent and Civil Disobedience* (New York: Signet, 1968), 63.
20. See William E. Scheuerman, “Whistleblowing as Civil Disobedience: The Case of Edward Snowden,” *Philosophy and Social Criticism* 40 (2014): 612, noting that Snowden “violated prohibitions on whistleblowing” as a means “to bring the injustices of U.S. surveillance policies to public attention, not because he necessarily aspire[d] to discredit either government non-disclosure rules or the Espionage Act.”
21. See Bulman-Pozen and Pozen, “Uncivil Obedience,” 813.
22. King, “Letter from Birmingham City Jail,” 294 (emphasis omitted).
23. Bulman-Pozen and Pozen, “Uncivil Obedience,” 817. See also, for example, H. A. Bedau, “Civil Disobedience and Personal Responsibility for Injustice,” in *Civil Disobedience in*

-1—
0—
+1—

- Focus*, ed. Hugo Adam Bedau (New York: Routledge, 1991), 51, stating that civil disobedience's occurrence within the framework of the rule of law necessitates "a willingness on the part of the disobedient to accept the legal consequences of his act"; and Bernard E. Harcourt, "Political Disobedience," in *Occupy: Three Inquiries in Disobedience* (Chicago: University of Chicago Press, 2013), 46–47: "[Civil disobedience] respects the legal norm at the very moment of resistance, and places itself under the sanction of that norm. If it resists the legal sanction that it brings upon itself, in truth it is no longer engaged in civil disobedience."
24. See Michael J. Glennon, "Is Snowden Obligated to Accept Punishment?" *Just Security*, June 3, 2014, <https://www.justsecurity.org/11068/guest-post-snowden-obliged-accept-punishment>, cataloging and disputing such arguments.
 25. Glennon, "Is Snowden Obligated to Accept Punishment?"
 26. Piero Moraro, "On (Not) Accepting the Punishment for Civil Disobedience," *Philosophical Quarterly* 68 (2018): 508. See also David Pozen, "What Happens When We Actually Catch Edward Snowden?" *Lawfare*, July 15, 2013, <https://www.lawfareblog.com/what-happens-when-we-actually-catch-edward-snowden>: "A long prison term is a terrible fate. But even a short prison term would scare any rational person, and exile is a profound punishment as well. Indeed, it is an ancient response to offenses that are viewed as betraying one's community."
 27. Lana Lan, "Whistleblower Edward Snowden Tells SCMP: 'Let Hong Kong People Decide My Fate,'" *South China Morning Post*, June 15, 2013, <https://www.scmp.com/news/hong-kong/article/1259422/edward-snowden-let-hong-kong-people-decide-my-fate>.
 28. Edward Snowden, "Snowden's Letter of Appeal to Washington," October 31, 2013, <https://archive.nytimes.com/www.nytimes.com/interactive/2013/11/01/world/europe/02snowden-letter.html>.
 29. Cf. Scheuerman, "Whistleblowing as Civil Disobedience," 621–23, discussing the global implications of Snowden's disclosures and the "lack of a sufficiently independent global legal system in which Snowden . . . could freely and openly defend" his actions under international or domestic law.
 30. In this spirit, see, for example, Erin Pineda, "Civil Disobedience and Punishment: (Mis)reading Justification and Strategy from SNCC to Snowden," *History of the Present* 5 (2015): 4, using "the discourse surrounding Snowden's exile as a space within which to reconsider the place of punishment in theories of civil disobedience and to question the perennial power of a certain version of civil rights history to set the terms of judgment for contemporary protest"; and Candice Delmas, "That Lonesome Whistle," *Boston Review*, June 14, 2016, <http://bostonreview.net/editors-picks-world-us/candice-delmas-lonesome-whistle>, arguing that Snowden's actions, like national security whistleblowing generally, does not qualify as civil disobedience but can be justified "on its own terms."
 31. Mistry and Gurman, introduction.

—1
—0
—+1