The Moral Status of Civil Disobedience

Kimberley Brownlee

Corpus Christi College
University of Oxford

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Abstract

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This dissertation examines the moral character of civil disobedience. The discussion begins with a conceptual analysis of *civil disobedience* which eschews standard definitions in favour of a paradigm case approach, highlighting a parallel between the communicative aspects of civil disobedience and the communicative aspects of lawful punishment by the state. Foundations for a moral evaluation of civil disobedience are then laid down through, first, an examination of the nature of wrongdoing and justification, and second, a critique of contemporary defences of political obligation. The absence of political obligation, it is argued, does not immediately justify civil disobedience even in reprehensible regimes because, in all contexts, adherence to the law and disobedience of the law must be judged on the basis of their character and consequences. Various considerations relevant to the justifiability of civil disobedience are then examined before the discussion turns to the three principal claims defended in this thesis. The first is that people have a moral right to engage in civil disobedience irrespective of both the political regime and the merits of their cause. The second is that the reasons for which people engage in civil disobedience may be understood in terms of a pursuit of ideals. When motivated by a deep commitment to the genuine ideals of their society, disobedients may be said to demonstrate responsible citizenship. The third claim is that the law should treat disobedients differently from other offenders. When civil disobedience is morally justified, and sometimes when it is not, the law has reason to be lenient to its practitioners. In defending these claims, this discussion critiques not only the 'classical' narrow conception of civil disobedience as a public, non-violent, conscientious breach of law for which disobedients are willing to be punished, but also broader conceptions of civil disobedience which take a modest view of its justifiability and accord it limited status as a moral right.

Preface

My first debt of gratitude is to John Tasioulas who exceeded my expectations of a supervisor both in the energy and time he devoted to reviewing my work and in the support he gave in guiding me through the transition from student to academic. Working with John has been true to John Gardner's comment to me when I first arrived at Oxford: 'You have a great supervisor and a great topic, go have a wonderful doctorate.' I am equally grateful to my second supervisor Joseph Raz whose feedback and encouragement has done much to improve the quality of my work. I wish to thank Joseph for continuing to give me the benefit of his advice on many issues professional and philosophical.

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A shorter version of Chapter One has appeared in *Res Publica* (2004) Vol. 10, No. 4 under the title 'Features of a Paradigm Case of Civil Disobedience.' Parts of Chapter Six comprise a paper entitled 'The Communicative Aspects of Civil Disobedience and Lawful Punishment' published in *Criminal Law and Philosophy* (2007), Vol. 1, No. 2. I have drawn upon various parts of the thesis to prepare the entry 'Civil Disobedience' for the *Stanford Encyclopedia of Philosophy*.

I dedicate the thesis to my parents Dave and Jill Brownlee who have been unfailingly supportive of my aspirations despite the physical distance that my pursuing them has put between us.

Kimberley Brownlee
Corpus Christi College, Oxford

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Introduction

What is the moral status of civil disobedience? What purpose, if any, does civil disobedience serve in a society? How should civil disobedients treat and be treated by the law? To offer philosophically adequate answers to these questions, I shall root this discussion of civil disobedience within an examination of key philosophical issues in moral theory, rights theory, and the philosophy of punishment. In particular, before undertaking my analysis of the moral character of civil disobedience in the latter half of the thesis, I find it necessary to lay down (in Chapters Two and Three) some relatively deep philosophical foundations in reasons theory concerning the nature of both wrongdoing and justified action. The central objective of this thesis, to examine the moral character of civil disobedience, thus partitions into several more specific aims which include, in addition to addressing the much discussed issues of definition and justification of civil disobedience, tackling some less well-discussed concerns such as how civil disobedience should be assessed in relation to the demands of responsible citizenship, how disobedients conceive of their own activism, and how the law should respond to civil disobedience. Before engaging with these issues, I offer in Chapter One a conceptual analysis of *civil disobedience*, rejecting a definitional approach in favour of a paradigm case approach and highlighting a not previously identified parallel between a communicative conception of civil disobedience and the increasingly popular communicative conception of lawful punishment by the state. Briefly, both civil disobedience and lawful punishment may be associated with a backward-looking aim to demonstrate condemnation of and dissociation from certain conduct and with a forward-looking aim to bring about through moral dialogue a lasting change in that conduct. But it is

not principally in this conceptual analysis that this dissertation claims some originality. The most distinctive components of the thesis relate to three evaluative claims defended respectively in Chapters Four, Five, and Six.

The first is that people have a general *pro tanto* moral right to engage in civil disobedience. In defending this claim, I challenge two dominant positions in civil disobedience theory put forth by John Rawls and Joseph Raz respectively. Whereas Rawls maintains that, when certain justifying conditions are met, a person may be supposed to have a right even in a nearly just society to engage in civil disobedience, Raz, by contrast, rejects both that a justification entails a right to act and that a right to civil disobedience exists in all societies. According to Raz, in a liberal regime, people have no right to civil disobedience since, by hypothesis, the law adequately protects their rights to political participation. While I agree with Raz that questions of justification and questions of rights are distinct, I argue that more can be said in defence of a right to civil disobedience than either Raz or Rawls allows. My task of defending a general right to civil disobedience is complicated by, and I believe strengthened by, the fact that, when it comes to a right to act, I remain neutral about disobedients' objectives and motives (though not neutral about the nature and consequences of their chosen disobedience): I maintain that *ceteris paribus* space must be made for the bigot under the umbrella of a right to civil disobedience.

The second central claim I defend (in Chapter Five) is that the reasons for which disobedients breach the law may be best understood in terms of a pursuit of ideals. An important aim in this chapter is to vindicate the concept of *ideals* as a moral category and to locate this concept in relation to more familiar moral concepts like *duty*, *rights*, *virtue*, and *the good*. I then mobilise the concept of *ideals* in understanding historical and contemporary cases of civil disobedience with an eye to

neutralising concerns about false ideals, improper motivations, and extremism, which together underpin much of the current wariness about ideals. My more general aim in Chapter Five is to further the returning interest amongst moral philosophers in ideals by offering an account that relates ideals to duty and virtue through responsible citizenship.

The third key claim I defend in the dissertation is that the law should treat civil disobedients differently from ordinary offenders and that when civil disobedience is morally justified, the law has good reason either not to punish the offender or to punish her less severely than would otherwise be appropriate. Moreover, the status of a person's action as civil disobedience is, irrespective of moral justification, an attendant circumstance which must be taken into account when determining the appropriate legal response. I argue that in the majority of cases the status of an offence as civil disobedience mitigates the offence; however, in some cases, given the nature of the disobedient's professed commitments and the manner in which she pursues them, the status of her action as civil disobedience can aggravate her offence.

Although there is no automatic inference from the conclusions of this dissertation to any practical pay-off, the issues examined here, particularly in Chapters Four, Five, and Six, offer a plausible perspective from which society and the law may conceive of civil disobedience, its purpose in society, and the appropriate ways to respond to it.

1. Conscientiousness and Communication

The standard approach when examining civil disobedience is to give a definition for this type of dissent, that is, to specify necessary and sufficient conditions for civilly disobedient action.[1] Since, however, definitions tend to be overly rigid and tend, as a consequence, to anticipate evaluation, I shall take a different approach and identify what I take to be a typical or paradigm case of civil disobedience.[2] The features exemplified in such a case, I shall argue, are, broadly speaking, conscientiousness and communication combined with the aim to demonstrate protest against certain policies, practices or laws and often, moreover, the aim to bring about through moral dialogue a lasting change in those policies or laws.[3] My aim in this chapter is not to draw sharp boundaries between civil disobedience and other types of dissent, but rather to specify a broad class of actions which in general count as civil disobedience. I begin by outlining the benefits of the methodological approach I have adopted. I then make explicit the role played by both conscientiousness and communication in a paradigm case of civil disobedience. While these features of civil disobedience sometimes overlap with those of both other breaches of law and other forms of dissent, broad distinctions may be drawn between paradigmatic civil disobedience and these other practices. In the latter half of this

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[1] For the standard definition of *civil disobedience*, see Rawls, John (1971), *A Theory of Justice.* Cambridge: Harvard University Press, 364. See also Bedau, Hugo A. (1961), 'On Civil Disobedience' in *The Journal of Philosophy*, Vol. 58, No. 21, 653-665. For an alternative definition, see Raz, Joseph (1979), *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 263.

[2] A paradigm case, on this reading, is a descriptive case, not a normative case.

[3] I do not suggest that these are the only features exemplified in a typical case of civil disobedience. It might be, for example, that typically civil disobedients also demonstrate civic virtue or defend objectively valuable concerns or act non-violently. But it would be unadvisable to identify such features as features exemplified in paradigmatic civil disobedience. Given the normative implications of these features, identifying them as part of paradigmatic civil disobedience would anticipate our evaluation of the merits of this practice. Moreover, such features narrow the parameters of the paradigm case to such an extent that they prevent shifts in the practice which the paradigm case approach is meant to accommodate.

chapter, I consider civil disobedience in contrast with both ordinary offences and various forms of dissent such as legal protest, conscientious objection, terrorism, and revolutionary action.

1. Methodology

The aim of the paradigm case approach is to combat scepticism, either in general or in relation to specific cases, about whether *A*s are *B*. The argument is that, to be able to doubt either that there is any *A* that is *B* or that a particular *A* is *B*, one must have an idea of what *B* is, and this idea is, or can be, gained by pointing to something that is *B*. Since such an example of *B* picks out what *B* is, it would be absurd to doubt whether that example, or paradigm case, is *B*. Thus, the sceptical position is refuted.[4] In applying this approach to the practice of civil disobedience, I aim to quash scepticism about whether a particular class of actions counts as civil disobedience, and thus to combat indirectly any general scepticism about whether there is an action that is civil disobedience. The classic strategies employed by Mohandas Gandhi, Rosa Parks, Martin Luther King Jr, and others (whose lives and work I consider in detail in Chapter Five) are examples of civil disobedience, and may be pointed to to gain an idea of what civil disobedience is.[5] These activists' disobedient actions exemplify certain key features: they involve 1) conscientious and 2) communicative breaches of law for the purpose of 3) demonstrating protest against a law or policy and/or 4) persuading authorities as well as other segments of society to change the law or policy. Since one can point to actions displaying these features to gain an idea of what civil disobedience is, it would be absurd to doubt whether these

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[4] For a brief account of the paradigm case argument, see Audi, Robert (1995), (ed.) *The Cambridge Dictionary of Philosophy*. New York: Cambridge University Press, 558.

[5] Consider, for example, Rosa Parks' refusal in December 1955 to give up her bus seat to a white passenger. She was warned that she would be arrested, but remained seated. I shall assume a familiarity with this case and with the lives and work of many of these activists.

actions in general are civil disobedience: they can be taken as typical or paradigm examples of civil disobedience. Note that this summary of the features exemplified in paradigm cases does not restrict the range of policies which disobedients may target through their activism.[6] Whereas thinkers such as Joseph Raz exclude from the class of civilly disobedient acts those breaches of law that protest the decisions of non-governmental agencies (trade unions, banks, private universities, etc.),[7] I allow such breaches under the umbrella of civil disobedience.[8] I also allow under that umbrella disobedience against the decisions of international bodies or foreign governments. Moreover, I maintain that such acts of disobedience constitute paradigm cases of civil disobedience when they exemplify the features outlined above.

Within the class of paradigm cases of civil disobedience there will be some variation in the extent to which the key features are exemplified. These features may be interpreted as matters of degree or as items on a list or as some combination of the two. I stipulate that an action may be regarded as a paradigm case of civil disobedience if it exemplifies many or all of the relevant features to an appropriate degree, the standard for which may be provided by commonsense. This view makes room for some oddball cases that do not fully exemplify all of the key features. Actions that exhibit some features to a lesser degree than others do still can count as paradigm examples of civil disobedience provided that they exemplify the other relevant features to an appropriate degree. Non-paradigmatic civil disobedience, by contrast, is disobedience to which it makes sense to apply the label 'civil

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[6] For ease of presentation, I use the noun 'disobedient' throughout the dissertation to refer to persons who engage in civil disobedience. In using this terminology, I do not imply either that disobeying is central to these persons' identity or that this activity classifies them as deviant in their society. That said, we will see in Chapter Five that many paradigmatic disobedients like Gandhi, King, and Mandela did regard their activism as constitutive of their identity.

[7] Raz (1979), 264.

[8] It would be a mistake to hold that the non-governmental policies and practices opposed by civil disobedients are somehow not matters of law. In condemning such policies, civil disobedients challenge, amongst other things, the legal framework that accepts these policies and practices as lawful.

disobedience', but which does not exemplify the key features in a manner sufficient for it to be a typical or paradigm case of civil disobedience.

A paradigm case approach enjoys some advantages over a definitional approach. First, as noted above, a definition implies that civil disobedience has clear boundaries. Since, however, people engage in dissent for a variety of reasons and their dissent takes a variety of forms, it is not possible to draw sharp lines between civil disobedience and other types of dissent like conscientious objection, radical protest, and revolutionary action. Thus, a paradigm case approach, which specifies only what surely counts as civil disobedience, is more accommodating of the complexities in this multifarious practice than a definitional approach would be. Nonetheless, on the paradigm case approach, civil disobedience can be broadly distinguished from other forms of dissent in its key features. While some of the key features of other types of dissent overlap with those of civil disobedience, or may be found together sometimes in a single action, they can for the most part be grouped together according to the types of dissent that exemplify them.

Second, the paradigm case approach avoids the dialectic of generalisation and counterexample that applies to definitions. One can undermine a definition for *B* either by presenting an example of *B* that does not fit with the definition or by presenting an example of something that is not *B* but does fit with the definition. By contrast, one cannot undermine an account of a paradigm case of *B* by either of these methods. Some might object that one can undermine an account of a paradigm case by pointing to an example of something that exhibits the features of the paradigm case, but is not an instance of *B*. In relation to civil disobedience, the objection would be that an action that clearly is not civil disobedience nonetheless could exhibit the key features of a paradigm case of civil disobedience, and consequently, would have to be

regarded on the paradigm case approach as a paradigm case of this practice. But, since it is the features exemplified in paradigm cases that give us an idea of what civil disobedience is, only those actions that are civilly disobedient could be taken as paradigm cases of civil disobedience. A counterexample could only pose a challenge if the features of the paradigm case were described in overly broad terms. When the relevant features are properly specified, the paradigm case approach can resist counterexamples. My task in the next two sections is to specify the role played by conscientiousness and communication and their attendant aims in a paradigm case of civil disobedience.

2. Conscientiousness

a. Seriousness and Sincerity

Conscientiousness is characterised by an obedience or loyalty to conscience. It is associated with earnestness, care, diligence, scrupulousness, and consistency. Although many of these qualities seem admirable, *conscientiousness* does not always carry a positive connotation. The conscientious person sometimes seems pedantic, critical of failings in others, and fixated on details at the expense of more important concerns. Conscientiousness, on this reading, is not a virtue (though it is necessary for self-respect, which is a virtue); it is an attitude marked by certain attributes. The various qualities associated with conscientiousness can be captured, I believe, by two attributes: *sincerity* and *seriousness*.[9] Conscientiousness essentially involves a sincere and serious commitment to or belief about something.

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[9] Note the difference between two senses of *seriousness*. First, there is the seriousness associated with earnestness, sobriety, and solemnity, which contrasts with flippancy and insincerity. Second, there is the seriousness associated with gravity or importance which contrasts with triviality. It is the first of these two senses that I associate with conscientiousness.

Sincerity and seriousness can manifest themselves in certain intentions and actions, but not in others. They cannot manifest themselves, for example, in self-deceiving intentions or actions since self-deception contravenes the loyalty to conscience and the earnestness that are identified with conscientiousness. This does not mean that a person cannot be conscientiously deceitful or frivolous. Rather, it means that she can neither engage in actions nor have intentions that could not be pursued with seriousness and sincerity. This places only a minimal constraint upon the actual content of her actions or intentions since most actions or intentions can be undertaken with sincerity and seriousness. Some marks of a sincere and serious commitment or belief include: consistency, constancy, a degree of self-sacrifice, a willingness to take risks, a spontaneous response to opposition, and a capacity to defend the reasons for engaging in the pursuit. Such marks of commitment reflect a person's adherence to her own sincerely held beliefs about what she has reason to do.

b. The Conscientious Aspect of Civil Disobedience

In relation to civil disobedience, conscientiousness takes the form of a sincere and serious belief that a law or policy warrants revision and that the values that underpin that belief are sufficiently weighty to require a breach of law in their defence. Conscientiousness requires that a person who sincerely believes that a certain type of decision or policy is misguided or seriously wrong not only avoid that type of decision herself, but also judge the conduct of government or society when it pursues such decisions as being misguided or wrong.[10] Moreover, her belief commits her to communicating this judgment in some situations. Antony Duff states in a generalised context (which highlights the connection between conscientiousness and

[10] This description of conscientiousness draws upon Antony Duff's discussion of what is involved in meaning what we say. See Duff, Antony (2001), *Punishment, Communication, and Community*. Oxford: Oxford University Press, 28.

communication) that, 'To remain silent, to let the action pass without criticism, necessarily casts doubt on the sincerity of [her] declaration that such conduct is seriously wrong.'[11] In relation to civil disobedience, we must say something more circumspect, namely, that a person's negative judgment about governmental decisions or current social practices gives her reason to communicate her objections through disobedience of the law, but she must balance this reason against other reasons when deciding how to act. Other commitments, like her commitments to particular persons, may give her weighty reasons not to communicate her objections in this way, especially when the consequences of disobedience for her and for those close to her would be severe.

What matters for conscientiousness is that a person acknowledge the reasons for action generated by her commitments and beliefs. The person who believes that a law or policy requires revision and that the values behind her judgment are sufficiently weighty to warrant a breach of law in their defence would be morally inconsistent to deny that she has reasons to engage in civil disobedience against that law or policy. Moreover, her denial would show a lack of respect for her own values. Considerations of self-respect and moral consistency thus give her subjective intrinsic reasons relating to her own values to communicate her judgments by dissociating herself from laws and policies that she opposes.[12] I return to this topic in my discussion of communication. My point for now is simply that the person who actively believes that a law or policy warrants revision and who makes an all things

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[11] Duff (2001), 28.

[12] *Subjective* intrinsic reasons contrast with *objective* intrinsic reasons which derive from a respect for the value of an institution, practice, principle, or ideal that is objectively valuable. Intrinsic reasons as a class contrast with instrumental reasons, which highlight the potential impact of an action. See, Soper, Philip (2002), *The Ethics of Deference: Learning from Law's Morals*. Cambridge: Cambridge University Press, 25-7, 136-8.

considered judgment to engage in civil disobedience against that policy demonstrates the sincerity, seriousness, and consistency of commitment found in conscientiousness.

Note though that reasons to act which relate to self-respect are not necessarily weighty considerations, especially when the person is mistaken in the value of her commitments. While conscientiousness demands that a person sincerely believe that she has *good* reasons to act as she does, it does not demand that she be correct in her judgments about either her own actions or the law to which she objects. Briefly, a person's belief in the inappropriateness or defectiveness of a law or policy need not be true and justified for her action to be conscientious; what matters is how that action relates to her values and beliefs. Hugo Bedau observes that there is no logical reason why, for example, a person could not engage in civil disobedience against the desegregation of schools in the United States.[13] A person might believe that children develop better without the pressures of multiethnic interaction, or she might believe that desegregation causes children to lose touch with their cultural heritage. Or, less appealingly, she might believe that some ethnic groups are inferior to others and should be educated separately. Alternatively, she might not be able to articulate why she believes that she ought to oppose this policy: her action might be entirely spontaneous. Even so, her action is conscientious if it aligns with her deeply held values and beliefs. A more contemporary example would be opposing through civil disobedience the practice of abortion. While such disobedience, when indiscriminate about abortion practices, lacks objective merit, it can be just as conscientiously undertaken as any other act of civil disobedience. Thus, since correctness of judgment is not a key feature of a paradigm case of civil disobedience, the actions of the person who opposes an acceptable policy can count, absent other constraints, as a paradigm

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[13] Bedau (1961), 660.

case.[14] It is a merit of this account of paradigmatic civil disobedience that, by both offering a broad understanding of communication and allowing for spontaneous action, it avoids the charge of over-intellectualisation.

The mistaken dissenter's disobedience, however, cannot count as a paradigm case when she deceives herself about her reasons for acting. Following from my earlier comments on self-deception, there is a distinction to be drawn between what a person takes her motivations and intentions to be and what her motivations and intentions actually are. The person who takes her opposition to desegregation to be based on certain valid moral principles, but who does not acknowledge to herself the actual basis of her opposition, which is her deep set racism, lacks conscientiousness. It is not her racism as such, but her self-deception that is at odds with conscientiousness.

In summary, conscientiousness points to the sincerity, seriousness, and moral consistency of a person's commitments. To appreciate the centrality of conscientiousness to civil disobedience, we must consider this feature in relation to communication. I shall argue, as anticipated above, that, in paradigm situations, the communicative aims of civil disobedience stem from a person's conscientious commitment to certain values and beliefs.

3. Communication

a. Aspects of Communication

What does it take to communicate successfully? First, at least two persons must be involved. Unlike expression, which does not require an audience (one can express one's grief or happiness alone in the desert, for example), communication is an *other*-directed activity. It requires both a 'speaker' and a 'hearer'. The speaker uses

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[14] I note this in order to distinguish my view from that of Rawls who defines *civil disobedience* such that it is only ever concerned with substantial breaches of injustice. See Rawls (1971), 363-91.

specific means of communication – words, allusions, images, body movements, facial expressions – to convey to the hearer news, information, ideas, beliefs, feelings, and attitudes. When communicating, the speaker must consider whether the content of her message is something that the hearer has the capacity to understand. She must also consider whether the means that she uses to communicate her message are likely to foster that understanding. Finally, she must consider what impact her mode or manner of communication has upon the hearer.[15] Some modes of communication relevant to civil disobedience include: coercion, violence, publicity, collective action, and direct or indirect action. (I shall touch on coercion, violence, and publicity below. I consider the merits of direct versus indirect civil disobedience in Chapter Three.) Although the speaker's choice of means and mode of communication may hinder or promote communication, the success of communication depends as much upon the hearer as it does upon the speaker. The hearer's decision to remain receptive to what the speaker conveys determines whether communication succeeds.[16] This point is significant in relation to civil disobedience, as it places certain constraints upon the kinds of individuals or groups that can count as legitimate hearers or targets of civil disobedience. Some minimal constraints apply, for example, to the kind of government that a person may regard as a viable hearer of civilly disobedient communication. The government must be one that has the potential at least to be receptive. It is unlikely that the lawmakers in either a totalitarian dictatorship or a nation at war would be potentially receptive hearers of dissenting voices. In such circumstances, a person may need either to address bodies other than the government

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[15] Note the difference between the means and the modes of communication. I understand *means* to refer to the types of actions that people use to communicate and *mode* to refer to the manner in which these actions are performed, be it violently or peacefully, privately or publicly, and so on.

[16] The appropriateness of a hearer's response to what is communicated to her does not necessarily reflect genuine understanding. A hearer might exhibit behaviour appropriate for one who understood the communication without actually understanding it.

or to construe the notion of *government* broadly to include organs or bodies within the political arena that are both potentially receptive to her communication of her position and able to make a claim to the attention of the executive. I consider in Chapter Three what impact the receptiveness of those with authority as hearers has upon the justifiability of civil disobedience directed toward such persons.

Communication is understood here as intentional communication, and may be contrasted with incidental or contingent communication. The latter applies to occasions where a speaker communicates things to a hearer without intending it or perhaps realising it. For example, a speaker's face may betray her or her words may reveal more about her views than she realises, or her aim may be to bring about a certain end to which communication of that aim is incidental. This is not the kind of communication that I take to be central to the class of actions that surely count as civil disobedience. Rather, my claim is that such actions exemplify the intention to communicate certain views and ideas through disobedience of the law.[17]

b. The Communicative Aspect of Civil Disobedience

Though not identified as a defining feature, communication lurks behind many well-known accounts of civil disobedience. John Rawls, for one, emphasises the public and political nature of civil disobedience, and Joseph Raz emphasises the aim of expressing protest against a law or policy. However, these seeming nods to communication require some refinement. Rawls' claim that civil disobedience must be public goes too far since people sometimes must act covertly to avoid being prevented by authorities from engaging in civil disobedience. (I return to this below.) Raz's claim that one of the aims of civil disobedience is to express protest does not

[17] It is true that, through civil disobedience, people may unintentionally communicate other things as well.

really go far enough since, as indicated above, expression can be a solitary endeavour. My project is to tease out and make explicit the role played by communication in a typical case of civil disobedience.

To begin, there is a parallel that I wish to explore between the communicative aspects of civil disobedience and the communicative aspects of lawful punishment by the state. Both practices reflect commitments of the parties engaged in them. It is a mark of society's adherence to certain values that it is willing to condemn individuals' actions when those actions contravene these values. Likewise, it is a mark of a person's adherence to certain values that she is willing to condemn the actions of her government or even her society when those actions contravene these values; as noted above, a person can show the moral consistency of her commitments when she decides to communicate her objections through disobedience of the law. The communicative theory of punishment offers a useful starting point for an analysis of the aims of civil disobedience since, like lawful punishment, civil disobedience can be associated with a backward-looking aim to demonstrate protest against certain conduct and a forward-looking aim to bring about lasting change in that conduct. I shall consider each of these aims in turn.

In punishing an offender, Joel Feinberg argues, the state seeks to convey its disavowal, condemnation, and denunciation of the crime committed as well as its desire for repentance and reformation on the part of the offender.[18] Similarly, in civilly disobeying the law, a person seeks to convey her disavowal and condemnation of a law or policy as well as her dissociation from both that law or policy and the government that enacted it. Her disavowal and condemnation essentially involve a rejection of either the values upheld by this law or policy or other features attendant to

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[18] Feinberg, Joel (1994), 'The Expressive Function of Punishment' in *A Reader on Punishment*. Antony Duff and David Garland (eds.), Oxford: Oxford University Press, 77-79.

it such as the process through which it was adopted. Her dissociation essentially involves a public declaration that she is wholly unconnected with and opposed to the law or policy in question, so much so that she is willing to violate a law, either that law or another law, and expose herself to the risk of punishment and censure to demonstrate her personal detachment from it. By dissociating herself from a law or policy, this person makes it clear that the government does not speak for her when it either enacts and enforces this law or deems this social policy or practice to be lawful.

To whom are these attitudes addressed? Once again, the communicative theory of punishment offers a useful analogy. Through punishment, the state naturally addresses the offender. But, it also addresses society as a whole, the victims of the offence (if such victims exist), and sometimes the international community. When the state communicates to these groups, it aims to achieve certain ends. According to the communicative theory of punishment, in addressing the offender, the state attempts to engage her in a moral dialogue. It aims rationally to persuade her of the wrongness of her action and to bring her to repent that action so that she reforms her conduct and seeks to recompense injured parties. In addressing the public, the state aims, amongst other things, to confirm the innocence of other people, to reassure people of their safety and security, and to deter people from violating the law. In communicating to victims of the action, the state aims to show them that their interests have not been disregarded. Finally, in communicating to the international community, the state aims, perhaps, to reassure allies or to demonstrate domestic order.

Similarly, through her civil disobedience, a person addresses, in the first instance, the policymakers who enacted the law or policy that she challenges. But, she also addresses the victims of that law or policy if such victims exist, other dissenters, society as a whole, and sometimes other communities not affected by the law. Now,

she may aim simply to communicate to these groups her disavowal and condemnation of the law or policy in question. But, it is probable that, like the state, she has the further aim of bringing about change. Civil disobedience, like lawful punishment, has a forward-looking aspect. By breaching the law, a disobedient may aim both to bring about a change to current laws or policies and to prevent the development of new laws or policies similar to those that she currently finds objectionable. Note that, to aim to reform a law or social policy, she need not have a concrete conception of what it should become. She simply may believe that the present policy is unacceptable and should be replaced. Alternatively, she may believe (in the case of laws) that the law should not be replaced by anything at all; she may believe that the law has no place in this area of people's lives. Finally, she may believe that the law or policy is not objectionable in itself and so does not require substantive revision, but nonetheless must be re-examined in light of current values. She may think, for example, that a reasonable law formulated without the democratic participation of all adult members of society requires reconsideration.[19] Each of these attitudes is in keeping with the aim to reform the law or policy she opposes. To bring this forward-looking aim into focus, let us consider it in relation to each of the groups that might be targeted by civil disobedience, taking policymakers first.

As suggested above, the forward-looking aim of civil disobedience has two aspects. The first is to lead the authors of the policy in question to reform that policy. The second is to lead those policymakers and society generally to internalise the reasons behind the disobedient's condemnation and disavowal of that policy so that no similar policy will be implemented in future. Having these kinds of aims places

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[19] C.f. Pogge, Thomas (2004), 'Historical Injustice: The Other Two Domains' in *Justice in Time: Responding to Historical Injustice*. Lukas Meyer (ed.), Baden-Baden: NOMOS Verlag; In this article, Pogge considers both the moral status of laws developed under such conditions and the ways, in general, that past injustices continue in present social rules.

certain restrictions upon the modes of civilly disobedient communication that a person reasonably may use to realise her aims. It would be unreasonable for her to pursue her aims through primarily coercive modes of communication since coercion essentially involves the use of threats and intimidation to restrain or influence people irrespective of their rights or civil liberties. As a strategy, coercion is likely to turn policymakers against a disobedient's position. Therefore, presumably, to have the lasting effect upon policymakers' opinions and values that she desires, a disobedient must aim, not to force policymakers to adopt her views, but rationally to persuade them of the flaws in the law or policy that she opposes. In short, to be sincere and serious in her aim to bring about a lasting change in governmental policies, she must recognise the importance of engaging policymakers in a moral dialogue. Too radical a protest could obscure the moral force of her objection. (Note, though, that coercion nonetheless is available to a civil disobedient as an intermediate or instrumental mode of communication. It is consistent with conscientiously held commitments to try to force an issue onto the table so that policymakers may be rationally persuaded of its merits.)

The issue of coercion becomes particularly salient in relation to collective disobedience. To aim sincerely to persuade policymakers and the public to bring about a lasting change in policy, disobedients must communicate their sentiments of disapprobation and condemnation in a manner in keeping with the modes of communication appropriate to that aim. In some situations, civilly disobedient communication of condemnation or dissociation by a large segment of society could take on a coercive aspect in having the consequence of hindering the operation of key institutions in the society. If too many citizens refuse to comply with a certain law, the government may be forced rather than persuaded to change its policies. While such action on its own may succeed in bringing temporary, or even lasting change, it is

unlikely that the change would be stable and successful unless supplemented by persuasive argument. Policy reform is more likely to succeed when policymakers and citizens alike are persuaded by the reasons for the reform. Thus, disobedients have good reasons to choose their means and modes of communications carefully to realise their objectives in ways that comply with the restrictions of conscientious communication.

Let us consider the other potential audiences of civil disobedience. In addressing the victims of a policy (if such victims exist), a disobedient's primary aim, presumably, is to communicate that not all members of society believe that this policy is acceptable. By communicating her dissociation from this policy, particularly when it does not negatively affect her, a disobedient demonstrates a certain sense of duty toward her fellow citizens. She shows that she recognises the reasons that she has, based upon self-respect and respect for others, to challenge policies that she believes threaten others' rights or fundamental interests. Consider a historical example. By not paying the poll tax established partly to enforce the Fugitive Slave Law, Henry David Thoreau communicated to slaves, first, that he dissociated himself from the laws that repressed them, and second, that his actions reflected his beliefs and values.

When a disobedient addresses society, other dissenters, and potential dissenters, a key aim is to build support for her position by persuading these hearers that the merits of her cause are sufficient to warrant a breach of law in its defence. There is a pragmatic reason for doing this: often broad-based, collective support for an issue is needed to touch a nerve with the executive or the legislature. (However, as noted above, the form that collective action takes impacts upon the way in which the messages will be received, a concern to which leaders of such actions should be attentive.)

Finally, a person may address communities or governments unconnected with the policy she opposes. She may address societies that have similar policies to her own and that might change their policies if made to realise that the kind of dissent they observe elsewhere could arise within their own borders. In communicating to such parties, a person may also indirectly address her own government and society, bringing international attention to her cause.

Naturally, a disobedient may aim to communicate to more than one audience at a time. Doing so, however, requires a complex strategy since the modes of communication that most effectively reach one hearer may not be the same for another hearer. Let me then examine further some modes of communication relevant to an account of paradigmatic civil disobedience.

c. Modes of Communication: Publicity and Violence

Two controversial modes of communication relevant to civil disobedience are publicity and violence. Publicity is a criterion within the commonly accepted definition of *civil disobedience*. According to Rawls, civil disobedience is never covert or secretive; it is only ever committed in public, openly, and with fair notice to legal authorities.[20] Bedau defends a similar claim. He states that usually it is essential to the disobedient's purpose that both the government and the public know what she intends to do.[21] Although I do not deny that sometimes advance warning may be essential to disobedients' strategy, this is not always the case with civil disobedience. As noted earlier, publicity sometimes detracts from or undermines the attempt to communicate through civil disobedience. As Brian Smart points out, if a person publicises her intention to breach the law, then she provides both political opponents

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[20] Rawls (1971), 366.
[21] Bedau (1961), 655.

and legal authorities with the opportunity to abort her efforts to communicate.[22] For this reason, covert disobedience is sometimes more successful than action undertaken publicly and with fair warning. As Raz notes, only after the fact does a person need to make it known that an act of civil disobedience has occurred, and what the motivation behind it is.[23]

The second controversial mode of communication is violence. On the standard account defended by Rawls, civil disobedience displays neither coercion nor violence. Rawls states that:

> To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address. Indeed, any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act. Sometimes if the appeal fails in its purpose, forceful resistance may later be entertained. Yet, civil disobedience is giving voice to conscientious and deeply held convictions; while it may warn and admonish, it is not itself a threat.[24]

While I have suggested that, in a typical case, civil disobedience is essentially non-coercive, I would not make the same suggestion concerning violence. I think a less restrictive attitude toward violence than Rawls' is required. First, there is the difficulty of specifying an appropriate commonsense notion of violence. It is unclear, for example, whether violence to self, violence to property, or minor violence against others should be included in a conception of the relevant kinds of violence. If the significant criterion for a commonsense notion of a violent act is a likelihood of causing injury, however minor, then these kinds of acts count as acts of violence.[25] Second, discriminate violence is not by definition a coercive measure. Nor is it by definition incompatible with conscientious intentions. To clarify the point, consider the Buddhist monk who in 1963 set himself on fire in front of the American embassy

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[22] Smart, Brian (1991), 'Defining Civil Disobedience' in *Civil Disobedience in Focus*. Hugo A. Bedau (ed.), London: Routledge, 206.
[23] Raz (1979), 265.
[24] Rawls (1971), 366.
[25] For a discussion of the differences between violence and non-violence, see Gupta, R. K. (1992), 'Defining Violent and Non-violent Acts' in *Journal of the Indian Council for Philosophical Research*, Vol. 9, No. 3, 157-161, and his supplement in (1993) Vol. 10, No. 3, 109-111.

in Saigon to protest against US policy. Or, consider the anti-war protesters who damage or destroy military equipment. These breaches of law are violent, but they are also non-coercive. And, as Raz observes, the harm to others caused by both non-violent acts and legal acts is sometimes worse than that caused by violence. Therefore, there is no *general* reason why violent action should not be available to civil disobedients. Moreover, the wrong that this person perceives sometimes may be so iniquitous that it is right to use violence to root it out. Such violence may be necessary to preserve or to re-establish the rights and civil liberties that coercive practices seek to suspend. Finally, violence does not necessarily obscure the communicative quality of civil disobedience as Rawls and Peter Singer suggest it does.[26] While I grant that violence of the sort engaged in by the Buddhist monk is not as explicit or as subtle as a verbal declaration of dissent, I maintain that this kind of discriminate, well-considered violent civil disobedience can provide an eloquent statement of both the disobedient's frustration and the importance of the issues the disobedient addresses. For these reasons, the use of strategic violence can support rather than undermine the conscientious and communicative aspects of civil disobedience.

This does not alter the fact that non-violent dissent normally is to be preferred. Some moral considerations are, as Raz notes, that non-violence avoids the direct harm caused by violence, and non-violence does not encourage violence in other situations where violence would be wrong, something which an otherwise warranted use of violence may do. Moreover, on a prudential note, non-violence does not carry the same risk of antagonising potential allies or confirming the antipathy of opponents.[27] I would add that non-violence does not distract the attention of the public, and non-violence does not give authorities an excuse to use violent countermeasures against

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[26] Rawls (1971), 366; Singer, Peter (1973), *Democracy and Disobedience*. Oxford: Clarendon, 86.
[27] Raz (1979), 267.

disobedients. Given these considerations, people should use violence in civil disobedience prudently, discriminately, and with great reluctance.

Our discussion thus far has considered various features exemplified in paradigm cases of civil disobedience. Despite the ties amongst these several features, they can to a certain extent pull apart as suggested in Section 1. A conscientious breach of law might fail to communicate successfully with any of the intended hearers. Or, a conscientious and communicative breach of law might lack the forward-looking aim that I have identified as paradigmatic of civil disobedience. Nevertheless, provided that such actions exemplify the other key features to an appropriate degree (and are supported by aims that reasonably may be conceived of in the political realm), these actions still may be regarded as typical cases of civil disobedience. They fall within that class of actions that one may point to to gain an idea of what civil disobedience is, and therefore, it would be absurd to doubt whether such actions count as civil disobedience. When an action fails to exemplify any of the key features, the action might be characterised nonetheless as civilly disobedient, but it is likely that it is better captured by other descriptions. My aims in what remains of this chapter are, first, to contrast paradigmatic civil disobedience with ordinary breaches of law, and second, to consider how civil disobedience either overlaps with or differs broadly from other kinds of dissent.

4. Common Crimes

In democratic societies, civil disobedience is not itself a crime. If a disobedient is punished by the law, it is not for her civil disobedience as such, but for the recognised offences she commits, such as blocking a road or disturbing the peace, or trespassing, or damaging property, etc. Therefore, if judges are persuaded as they

sometimes are either not to punish a disobedient or to punish her differently from other people who breach the same laws, it must be due to some features which distinguish her actions from those of non-civilly disobedient offenders. I suggest that the combined features of conscientiousness and communication with their attendant aims of demonstrating protest and bringing about through moral dialogue a lasting change in policy broadly distinguish civilly disobedient breaches of law from ordinary offences.

Typically a person who commits a crime has no wish to communicate with her government or society since she has no desire to make it known that she has breached the law. Since, in most cases, she wishes to benefit or, at least, not to suffer from her unlawful action, it is in her interests to preserve the secrecy of her conduct. One exception might be where the breach is so minor that concealment is unnecessary since sanction is unlikely to follow such as in the case of jaywalking. Another exception might where a person wishes to thumb her nose at authorities in making it known that she has committed a crime. By making an exception of herself and by distancing herself from a legal rule, the ordinary offender communicates a certain disregard for the law. This communication, however, does not reflect an aim either to demonstrate conscientiously held objections to that law or to lead society to reform the law. Paradigmatic civil disobedients, by contrast, seek to make their disobedience known to specific members of the community either before or after the fact to demonstrate both the seriousness of their condemnation of that law or policy and their sincere desire for policy change.

The conscientiousness exemplified in paradigmatic civil disobedience is rarely found in common criminal offences, but this is not to say that it cannot be present. A person may breach the law for moral reasons – to feed her family for example –

without taking any position against the law which prohibits her action. This absence of principled motivation, i.e. condemnation of the law or of practices it deems lawful, distinguishes her conduct not only from civil disobedience, but also from conscientious objection, which like civil disobedience is undertaken for the reason of distancing oneself from the law or policy one opposes. (I consider conscientious objection below.) Were a breach of law to exhibit a certain conscientious commitment to particular convictions, in combination with an aim to communicate those convictions to certain parties through breach of law, then that action is best characterised as civil disobedience, though, depending upon the merit of the convictions, it may be trivial or immature disobedience.

A further difference between civil disobedience and common crimes, some argue, pertains to the willingness to accept punishment. Civil disobedients are said to be willing to accept punishment not only to demonstrate their respect for the rule of law, but also to distinguish themselves from ordinary offenders who seek to avoid detection and punishment. I reject this distinction between civil disobedience and ordinary offences for several reasons. First, as the paradigm case of Gandhi shows, not all civil disobedients have respect for the 'rule of law' of the system in which they act. Second, relatedly, a disobedient's willingness to accept punishment does not necessarily reflect such respect; Gandhi was happy to go to jail for his offences, but felt no fidelity toward British rule in India. Moreover, an unwillingness to accept punishment does not necessarily reflect a lack of fidelity for the rule of law. I pursue these two points below. Third, ordinary offenders who repent the wrong they have done may be willing to accept punishment to be absolved of their crime. A willingness to accept punishment thus does not distinguish the civilly disobedient from ordinary offenders.

5. Political Dissent

Before examining civil disobedience in relation to other forms of political dissent, let me address a methodological issue. Having adopted a paradigm case approach to civil disobedience, it is appropriate to adopt a similar methodology with respect to other forms of dissent both since they, like civil disobedience, are multifarious practices that cannot readily be captured by definitions, and since they broadly overlap with each other and with civil disobedience. Concerning the former point, for some types of dissent (like that which is often called terrorism), endeavouring to produce a viable definition arbitrarily excludes concerns central to a debate about the legitimacy of such forms of protest. (I return to this below.) Concerning the latter point, since, as Raz notes, people engage in political dissent for a variety of reasons, a single action can be described accurately by different terms of dissent. Jeremy Waldron develops this point:

> Modes of action may be described in terms of their means or in terms of their ends ("One man's garbage collector [*means*] is another man's disease-preventer [*end*],"...Moreover one of these descriptions may have negative connotations, while the other is positive or neutral ("One man's bureaucrat [*negative*] is another man's protector of the environment [*positive*],"...). An individual can be *both* a freedom-fighter [*end, described positively*] *and* a terrorist [*means, described negatively*] if he uses terroristic means in his struggle for freedom; or he can be one or the other or neither of these things.[28]

The descriptions given for the kinds of protest under consideration are all, at least partly, means-oriented: 'civil disobedience', 'terrorism', 'conscientious objection', 'revolutionary action', and 'legal protest' all pick out the means that dissenters employ. However, 'revolutionary action' is also an ends-oriented description since it highlights what these dissenters hope to achieve through their action, namely, a revolution in thinking and political operation. Putting that aside, we may take

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[28] Waldron, Jeremy (2004), 'Terrorism and the Uses of Terror' in *Journal of Ethics*, Vol. 8, No. 1, 24.

advantage of the parallel form of these descriptions in our comparison of the key features of these practices. However, these descriptions do not provide a basis for an unbiased comparison of key features since these descriptions have different connotations. Whereas the terms 'conscientious objection', 'legal protest' and 'civil disobedience' carry either positive or neutral connotations, the terms 'terrorism' and perhaps 'revolutionary action' carry negative connotations. 'Terrorism' in particular is an epithet assigned to the political actions of others. First employed to describe the government of intimidation in France during the Revolution of 1789-1794,[29] 'terrorism' has an etymology quite different from that of 'civil disobedience', coined by Thoreau and embraced by many who breach the law in a conscientiously communicative manner. The variety of activities captured by the epithet 'terrorism' include: coercive uses of force by states or non-state actors against civilians, large-scale violent (but not necessarily coercive) protest, terrorisation (not necessarily through violence) by states or non-state actors of peoples and/or governments, threats of indiscriminate, large-scale violence, as well as (on the US and UK definitions) a wider range of forms of protest. In what follows, I shall use the term 'radical protest', not 'terrorism', to describe radical disobedience.

In my discussion of these various types of dissent, I shall briefly explicate the features I take to be central to each and shall analyse where these features overlap with and differ from those paradigmatic to civil disobedience.

a. Legal Protest

The obvious difference between legal protest and civil disobedience is that the former lies within the bounds of the law, but the latter does not. This difference in

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[29] Simpson, John (ed.) (1989), *Oxford English Dictionary*. Second Edition. Retrieved 21 May 2006 from http://dictionary.oed.com/.

legality translates into a more significant, moral difference when placed against the backdrop of a general moral obligation to follow the law. If it were morally wrong to breach the law because it is the law, then special justification would be required for civil disobedience which is not required for legal protest. However, as I shall argue in Chapter Two, there is no good reason to endorse such a general obligation and therefore the legal status of an action is largely irrelevant to its moral status. Both civil disobedience and legal protest must be judged on the basis of their character and consequences.

Further differences between these practices derive, however, from the implications of their legal status and pertain to what the law and society demands from persons who engage in these practices. A common challenge to civil disobedience is that those who employ it step unnecessarily outside the proper channels of political participation. Yet, there are reasons to think that civil disobedience often better contributes to a moral dialogue with society and the state than legal protest does. First, as Bertrand Russell observes, typically it is difficult to make the most salient facts in a dispute known through conventional channels of participation.[30] The controllers of mainstream media tend to give defenders of unpopular minority views limited space to make their case. Given the sensational news value of illegal methods, however, engaging in civil disobedience often leads to wide dissemination of a position.

Second, although legal protest often demonstrates conscientious communication, these features are not paradigmatic to the practice in the same way that they are to civil disobedience. Legal protest, being legal, is granted a certain protection or *de facto* legitimacy by government (and sometimes society) not

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[30] Russell, Bertrand (1998), *Autobiography*. London: Routledge, 635.

extended to civil disobedience.[31] The legal protester will not be called upon by the law to defend her decision to protest. This means that the conscientious intentions underpinning legal protest need not meet the same standards as those that differentiate paradigmatic civil disobedience from common criminal behaviour. The only conscientious intentions that a legal protester could be required to have are those that will prevent her protest from losing its legality. Beyond the constraints of the law, no restrictions apply to the reasons, self deceiving or otherwise, that legal protesters may have for engaging in dissent.

Moreover, the legal protester is not prompted in her action by a belief that her convictions are sufficiently weighty to ground a breach of law in their defence. Either she does not have that belief or she does have that belief but for various reasons does not act upon it. In the former case, she thinks her convictions are sufficiently weighty to warrant some defence through communicative engagement with the government and society, but not a defence involving breach of law. In the latter case, while she thinks her values do warrant a breach of law in their defence, she does not undertake to defend them through this kind of dissociation from the law. This person is not necessarily morally inconsistent to decide not to breach the law. As noted above, sometimes countervailing reasons – like those related to concerns about censure or punishment or the security of her family – may outweigh reasons to breach the law in defence of beliefs. But, nevertheless she refrains from exposing herself to the risks of censure and punishment which the disobedient accepts when breaching the law.

Communication is a feature seemingly shared by legal protest and civil disobedience. Both try to convey certain attitudes and values, however successfully, to the government or the public. But, whereas the communicative aspect of civil

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[31] I argue in Chapter Four for modest normative protection of civil disobedience (i.e. a moral right to civil disobedience), which has significant implications for how the law and society should respond to such disobedience.

disobedience is closely linked to the conscientious aspect, the communicative aspect of legal protest is not. In paradigm cases, disobedients aim to demonstrate their condemnation of certain laws or policies by dissociating themselves from the law they oppose. The legal protester does not dissociate herself, in any performative sense, from the law or policy she opposes and, in some circumstances, this may cast doubt on the sincerity of her judgment.

These differences between civil disobedience and lawful protest are essentially a matter of degree. Legal protest can turn into civil disobedience, thereby forcing dissenters to reconsider the strength of their convictions in light of their decision to breach the law. Civil disobedience can also turn into legal protest. That said, the legal status of these practices determines to a large extent how they are perceived by society and how their practitioners perceive themselves. I shall not consider whether there are other features paradigmatic to legal protest that are not paradigmatic to civil disobedience. It is sufficient for our analysis of the latter to show how it may be distinguished from the former.

b. Rule Departures

A practice distinct from, but related to, civil disobedience is that of rule departure on the part of authorities. Rule departure is essentially the deliberate decision by an official, often for conscientious reasons, not to discharge the duties of her office.[32] It may involve a decision by police not to arrest offenders or a decision by prosecutors not to proceed to trial, or a decision by a jury to acquit an obviously guilty person. Whether these conscientious acts actually contravene the general duties of the office is unclear. Presumably, if an official's breach of a specific duty is more

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[32] See Feinberg, Joel (1995), 'Civil Disobedience in the Modern World' in *Philosophy of Law*. Fifth Edition, Joel Feinberg and Hyman Gross (eds.), Belmont: Wadsworth.

in keeping with the spirit and overall aims of the office than a painstaking respect for its particular duties is, then the former better adheres than the latter does to the demands of the office.[33] (I discuss this point in my analysis of lawful punishment in Chapter Six.)

Rule departures resemble civil disobedience in various ways. Both involve dissociation and condemnation of certain governmental policies and practices. Both are communicative, though their audiences may differ. The official who departs from the rules of her office presumably addresses her action principally to the individuals or groups whom she intends to assist through her breach of a specific duty. Her action demonstrates to these parties both that she disagrees with a policy that would treat them in a certain way and that her actions align with her commitments. Rule departure thus, like civil disobedience, is characterised (at least in paradigm cases) by a sincere and serious commitment to or belief about certain values.

Where civil disobedience and rule departure differ is, first, in their legality. Whether rule departure actually involves a breach of law is unclear. Civil disobedience, by contrast, involves a breach of those laws currently on the books. A second, more perceptible difference between rule departure and civil disobedience, noted by Joel Feinberg, is that, unlike civil disobedience, rule departure does not usually expose those who employ it to the risk of punishment.[34] This difference pertains not to the features exemplified in these practices, but rather to the likely ramifications of practicing them.

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[33] C.f. Greenawalt, Kent (1987), *Conflicts of Law and Morality*. Oxford: Oxford University Press, 281.
[34] Feinberg (1995), 121.

c. Conscientious Objection

Following Raz, *conscientious objection* may be understood as a violation of the law motivated by the dissenter's belief that she is morally prohibited to follow the law because the law is either bad or wrong totally or in part. The conscientious objector may believe, for example, that the general character of the law in question is morally wrong, or that that the law extends to certain cases which it should not cover.[35] While commonly taken to refer to pacifist objections to military service, conscientious objection may apply to any law, negative or positive, that a person believes for moral reasons she is compelled to disobey.

Paradigmatic conscientious objection, while distinguished by its lack of the communicative quality that civil disobedience exemplifies, shares with civil disobedience the feature of conscientious commitment to deeply held values. But, it is unclear whether this attitude takes the same form in each of these practices. I maintained in Section 2 that the sincerity and seriousness of conscientiousness require a person not only to avoid decisions and actions which she regards as wrong, but also to communicate her judgment in certain contexts. Conscientious objection typically lacks an intention to communicate to government and society either that a breach of law has occurred or what the reasons behind it are. The devout person who continues to practice her religion in secret after it has been banned, for example, does not protest against the law, but privately breaches it for moral reasons. The young student who dodges a draft call, by contrast, may aim to communicate disapprobation of current military policies while at the same time protecting himself from exposure and prosecution. When a conscientious objector avoids all communication of her view,

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[35] **Raz (1979), 263.**

we may assume that she lacks any genuine desire, beyond a hope, for policy change. Her conscientiousness thus is of a different stripe from the civil disobedient's.

In one respect, a conscientious objector seems more sincere than other dissenters are since she does not make a demonstration of her commitments or seek to force her views onto the community. She does not wear her conscience on her breast so to speak, but simply aims to act with integrity in keeping with her moral outlook. The personal nature of much conscientious objection commands respect, as it suggests modesty and reflection, which more vocal and confident displays of conviction may lack. And yet, one might maintain that civil disobedience has more merit in its conscientiousness than (purely private) conscientious objection does since its practitioners offer greater defence for their views by standing up to be counted. I pursue this issue further in Chapter Four where I challenge Raz's claim that an argument from conscience aligns more closely with conscientious objection than with civil disobedience.

d. Radical Protest

Although radical protest typically lies further outside the realm of tolerated (or tolerable) political action than civil disobedience does, nevertheless it resembles civil disobedience in several respects. Under conditions of exigency, while radical protesters often use organised violence, coercion, or intimidation, they also can demonstrate to a degree both the conscientiousness and the communication reminiscent of civil disobedience. When dissenters have no other viable means of communication or protest available to them (thinkers such as Michael Walzer deny that dissenters are ever restricted to this extent[36]), their use of radical protest may be

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[36] Walzer, Michael (2004), *Arguing about War*. London: Yale University Press, Chapter 4.

regarded as conscientious provided that they would use less radical means of communication were such means viable. But, both conscientiousness and communication, as I have characterised them, become tainted when applied to too radical protest, first, by the aim to inspire fear in people, and second, by the desire simply to coerce government or society to change its policies. Features exemplified in radical protest such as violence, while compatible with the features exemplified in civil disobedience, are not key features of paradigmatic civil disobedience.

Unlike the typical civil disobedient, the radical activist uses modes of communication unlikely to persuade others of the merits of her position. Typically, her aims are more urgent and extreme than the disobedient's are; she seeks change through brutal strategies of coercion and fear, not persuasion and acceptance. The parallel between civil disobedience and lawful punishment is useful in bringing out this distinction. The parallel between punishment as a communicative practice and civil disobedience contrasts with an equal parallel between punishment as deterrence and radical protest. On a communicative conception of punishment and civil disobedience, authorities and disobedients (in paradigm cases) seek to persuade the other of their own view through what Duff calls 'transparent persuasion', that is, persuasion which appeals to the very reasons which justify the attempt to persuade. The moral reasons that a communicative system of punishment gives people to follow the law are the same moral reasons that justify the claim that citizens should follow the law. Likewise, as I shall argue in Chapter Three, the moral reasons a disobedient offers an authority to change certain policies are the same moral reasons which justify her claim that the authority should change those policies. A deterrent system of punishment, by contrast, like radical protest, aims primarily at prudential persuasion. Punishment as deterrence gives people prudential reasons to follow the law relating to

the threat of punishment. Radical protest, similarly, gives people a prudential reason relating to the threat of harm to follow orders.

e. Revolutionary Action

The final form of dissent with which to compare paradigmatic civil disobedience is revolutionary action. According to Rawls, despite its breach of law, civil disobedience, unlike revolutionary action, maintains a fidelity to the law at the outer limits thereof.[37] This fidelity is exhibited, Rawls believes, in the public, non-violent quality of a disobedient's dissent and in her willingness to subject herself to punishment for her actions. I need not reiterate why neither publicity nor non-violence is an essential feature of civil disobedience. Instead, I shall expand upon my brief critique of the 'willingness to accept punishment' criterion. I noted above that such willingness does not always reflect fidelity to law. Gandhi voluntarily submitted to the legal consequences of his actions, but did not possess that fidelity to law which Rawls makes a condition for civil disobedience. I also asserted that unwillingness to accept punishment does not necessarily reflect a lack of respect for the law. If the object of a person's condemnation is the punishment for a certain offence, then she may be unwilling to accept the penalty for that offence but retain an otherwise undiminished fidelity to the rule of law. It follows from Rawls' account that a person, whose conduct meets his criteria of publicity, non-violence, and conscientiousness, but who believes that she is justified in resisting attempts to enforce this law, is not civilly disobedient, but militant or revolutionary. Rawls' view leaves her no opportunity to challenge through direct civil disobedience those sanctions or punishments which are substantially unjust.

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[37] Rawls (1971), 366.

Like non-violence, a willingness to accept the legal consequences of an offence normally is preferable, and often has a positive impact upon the disobedient's cause. Singer notes that this willingness may make the majority realise that what is for it a matter of indifference is for disobedients a matter of great importance.[38] Moreover, as Raz points out, submitting to punishment may demonstrate the purity of the disobedient's motives or serve as a means to mobilise more broad-based support.[39] The point remains, though, that whether a person acts civil disobediently does not depend upon her willingness to accept punishment for her actions and such willingness is not constitutive of fidelity to law.

Distinguishing the paradigm features of civil disobedience from those of revolutionary action is difficult since the latter often involves the former as part of its larger aim to achieve a change either of government or of the system of government. But, the acts of civil disobedience which are incorporated into a revolution are non-paradigmatic in some sense since they contribute to an undertaking which does not aim to persuade the government of the merits of its cause. As a general practice, revolution, like radical protest, does not seek to persuade the government to change established policies. But, unlike much radical protest, revolutionary action may seek to persuade the society under that government that a change in regime is required. If revolutionaries seek to persuade the government of anything, it is that it should cease to be the government. In India, Gandhi had some success in this project. Once the movement became irresistible, the British left India fairly peacefully.

But Gandhi's revolutionary project may be contrasted with other revolutions such as the French revolution, or even the South African revolution, where there were endorsements of revolutionary terror. Large-scale resistance that incorporates

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[38] Singer (1973), 84.
[39] Raz (1979), 265.

terrorisation is quite a different enterprise from the non-violent resistance that distinguished Gandhi's protest. Akeel Bilgrami describes Gandhi's views on the Indian situation as follows:

> …he knew that violent revolutionary action could not possibly carry the mass of people with it. Revolutionary action was mostly conceived hugger-mugger in underground cells and took the form of isolated subversive terrorist action against key focal points of government power and interest, it was not conceived as a mass movement. He was not unaware that there existed in the west ideologies of revolutionary violence which were geared to mass movements, but he was not unaware either, that these were conceived in terms of middle class leadership vanguards that were the fonts of authority.[40]

Gandhi's revolution differed from what we typically take revolutions to be, as he knew that violence would not succeed in generating a mass movement. (I consider Gandhi's life and work in Chapter Five.)

Since, as noted above, people may engage in dissent for numerous reasons, acts of civil disobedience guided by conscientious reasons may also be driven by some revolutionary aims. The differences between civil disobedience and other forms of dissent are not blurred by its potential to appear in conjunction with some of them. Rather this reaffirms their differences; when we feel compelled to say that both civil disobedience and another form of dissent are in play, it is because we recognise that we cannot lump all the features we observe under one category of dissent.

6. Summary

In this chapter, we have identified a close connection between conscientiousness and communication. Since conscientiousness requires moral consistency, someone who sincerely believes that a decision or policy is inappropriate or wrong has weighty reasons to communicate that judgment through actions that both disassociate her from such decisions and most effectively disseminate her position. As

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[40] Bilgrami, Akeel (2002), 'Gandhi's Integrity: The Philosophy Behind the Politics' in *Postcolonial Studies,* Vol. 5, No. 1, 81.

we have seen, the conscientious communication exemplified in civil disobedience is associated with certain aims. One is the backward-looking aim to demonstrate protest against a law or policy; the other is the forward-looking aim to bring about a change to that law or policy. The sincerity of the disobedient's aims (the second in particular) is reflected in the mode of communication that she adopts. As a mode of address, civil disobedience aims not to coerce, but to persuade policymakers and the public of the need to revise a law or policy, because too radical a protest can obscure the moral appeal of the communication. And, too modest a protest, through more conventional channels, can reduce the appeal to a whisper. Thus, we have a sense of the kind of communication that civil disobedience tends to make relative to other forms of political engagement. With this understanding of the practice, we may proceed with our analysis of the moral character of civil disobedience.

2. Wrongdoing and Obligation

Civil disobedience, as a practice, is often thought to be morally problematic. Joseph Raz maintains, for example, that when one takes an act of civil disobedience one steps outside the legitimate bounds of toleration.[1] Some thinkers (though not Raz) take civil disobedience to be morally wrong for the reason that it breaches the law.[2] Others take it to be morally wrong at least partly for the reason that it contravenes moral principles and values unrelated to political obligation (e.g. it has adverse consequences). Taking for granted the force of these reasons against civil disobedience, theorists move swiftly to the 'real' question of whether, on specific occasions or under specific conditions, particular acts of civil disobedience are justified. In this chapter, I argue that moral considerations supporting the view that civil disobedience is generally wrong do not bear out. Civil disobedience, as I show below and in Chapter Three, comes in a variety of moral stripes. Often civil disobedience is not, in any significant sense, morally wrong.[3] At times, however, civil disobedience is undeniably morally problematic, though not for the reason that it breaches the law. Civil disobedience that is wrong sometimes is also either justified or excused.[4] This view relies upon a theory of wrongdoing that distinguishes between a denial of wrongdoing and an assertion of justification.

My first aim in this chapter is to explicate in Section 1 this theory of wrongdoing and to note my reasons for preferring it to a rival theory endorsed by both

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[1] Raz, Joseph (1979), *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 275.

[2] C.f. Storing, Herbert (1991), 'The Case Against Civil Disobedience' in *Civil Disobedience in Focus*. Hugo Bedau (ed.), London: Routledge.

[3] Rare is the case that an action is morally right from all valid perspectives. By saying that some civil disobedience is not morally problematic, I mean that it does not contravene any weighty moral principles or values, though there are almost inevitably reasons against it (as is the case with most actions).

[4] Whether civil disobedience is justified is a separate question that I take up in Chapter Three.

Kant and the utilitarians, which denies that actions can be both wrong and justified. I also specify both the pluralist ethical framework and the view of practical reasoning that support the theory of wrongdoing I adopt. My second aim is to employ this theory of wrongdoing to challenge the view that civil disobedience, as a political practice, is inevitably morally wrong. One important component of the challenge I address is, as noted above, the idea that persons have a *pro tanto* moral obligation to follow the law because it is the law. Were there such an obligation then breaching the law would be morally problematic on that basis. Although one could defend some civil disobedience while acknowledging political obligation, I take the stronger view and argue in Section 2 that there is no good reason to think persons have such an obligation to follow the law. To support this claim, I critique two recent, non-voluntarist defences of political obligation within the associative obligation tradition: Ronald Dworkin's argument from integrity and Philip Soper's ethics of deference. Finally, in Sections 3 and 4, I show that arguments concerning rights, the status of persons, and consequential considerations which might lead us to regard civil disobedience as inescapably wrong are not compelling.

1. Wrongdoing

a. The Non-Closure View

In this section, I lay the foundation for my analysis of civil disobedience by explicating the theory of wrongdoing I endorse, which I shall call the non-closure theory. This theory begins with the generally accepted claim that, when there is a clear objection to a given action, that action requires justification. In other words, when there is a non-trivial reason against a certain action, it is legitimate for persons with both a certain standing relative to the agent in question and a *prima facie* cause

to ground their objection (such as a complaint or allegation) to expect that it be possible to explain why the agent nonetheless took that action. If the agent's action is in fact wrong, then, as John Gardner argues, presumably there is quite a powerful objection to performing that action, which indicates that wrongdoing requires justification if anything does.[5] A *wrong* is understood on the non-closure view simply as a violation of a moral requirement;[6] and this leaves open the question of whether that wrong is in fact justified.[7] The rival 'closure' view of wrongdoing (as Gardner labels it) maintains, by contrast, that an action is wrong if, and only if, it is unjustified. On Kant's view, there can be no moral reason for performing an action if there are moral reasons against performing that action since it is always morally wrong to fail to do what one has a moral reason to do.[8] If an action that has moral reasons against it could also have moral reasons in favour of it, then some morally wrong actions would not be morally wrong all things considered, as it would be morally wrong to fail to perform them. On R.B. Brandt's more recent, utilitarian account, '...an act is *morally wrong* if it would be properly disapproved of...in the *absence* of an excuse or justification. An act is *morally right* if it is not morally wrong.'[9] In brief, on the closure view, any wrong is an unjustified wrong since, as Gardner summarises, the reasons which might have been used to justify it have already been taken into consideration in determining that it is wrong.

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[5] Gardner, John (2002), 'In Defence of Defences' in *Flores Juris et Legum: Festskrift till Nils Jareborg* Uppsala: Iustus Forlag, 1. Retrieved 3 October 2003 from http://users.ox.ac.uk/~lawf0081/biblio.htm. Note that there are at least two ways of interpreting the notion of *justification*. One may understand it either as a product (i.e. explanation) or as the activity of producing such a product in response to an objection. I explicate these two notions of *justification* in Chapter Three.

[6] A *requirement* may be understood either as the product of the act of requiring or as something which exists independently of any person's requiring it (such as the requirement not to kill). When saying that a wrong is a violation of a requirement, I allow for either interpretation of the notion of *requirement*.

[7] Gardner, John and Macklem, Timothy (2002), 'Reasons' in *Oxford Handbook of Jurisprudence and Philosophy of Law*. Jules Coleman and Scott Shapiro (eds.), Oxford: Oxford University Press, 467.

[8] Kant, Immanuel (1996), *The Metaphysics of Morals*. Mary McGregor (trans.), Cambridge: Cambridge University Press, 16-17. Cited from Gardner (2002), 1.

[9] Brandt, R. B. (1989), 'Morality and its Critics' in *American Philosophical Quarterly*, Vol. 26, No. 2, 92. Emphasis original.

There are two apparent points of congruence between the closure view and the non-closure view, which, upon closer examination, not surprisingly break down. First, in both views, a wrong 'all things considered' is an unjustified wrong. However, on the non-closure view, the absence of justification is an added feature distinct from the wrongness of the action. A wrong action that is justified is nonetheless wrong on this view, but may be regarded as 'all things considered alright' to perform. On the closure view, a wrong 'all things considered' is the only kind of wrong there is. Second, in both views, a distinction is drawn between a wrong 'all things considered' and a *prima facie* wrong. However, different conceptions of a *prima facie* wrong are in play. On the non-closure view, a *prima facie* wrong is simply a wrong. The qualifier *prima facie* was introduced somewhat confusingly by W. D. Ross so as to question the closure view which takes all wrongs to be unjustified wrongs.[10] On the closure view, a *prima facie* wrong is an action that seems wrong at first glance but in fact is not; an action is wrong if, and only if, it is wrong 'all things considered'.

I shall not attempt to defend the non-closure view over the closure view. Rather, I shall note briefly my reasons for preferring the non-closure view.

b. Pluralism

On the non-closure view, a person who acts wrongly nonetheless may demonstrate that her action is vindicated by reason: an action is justified when it is taken for an undefeated reason.[11] In contrast, the closure view, by rejecting the possibility of justified wrongdoing, denies that an agent who commits a wrong can

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[10] Ross, W. D. (1930), *The Right and the Good*. Oxford: Oxford University Press, 28. For a brief explanation of the ambiguity in Ross's terminology, see Gardner, (2002), 2n.

[11] A reason is undefeated when it is neither overridden by other ordinary reasons nor excluded by a reason not to act for that reason. An exclusionary reason is one that rules out reasons that would make it less likely that a person achieve what those reasons would have her achieve. If a person has reason to help someone, but due to her over-eagerness in fact would harm that person, then she has reason not to act for that reason. See Gardner and Macklem (2002), 458, 463.

show that her action nonetheless has moral reasons in its favour. On this view, she cannot give a credible moral defence of her action, as she can have no undefeated reason for her action when her action is wrong. In this respect, the non-closure view seems preferable, as it pays tribute to an important aspect of what it means to be human. Being human involves being able to have goals, projects, and values, to make choices and decisions, and to provide an account of those goals, values, and choices when they conflict with other values and principles. While the closure view, to a certain extent, may make room for this part of human life, it nonetheless denies that those actions that conflict with what one has moral reason to do can have any moral worth.

That the non-closure view recognises the potential for moral conflict is a related point in its favour. This view accommodates the idea that a plurality of first-order values and principles come into play in moral decision-making, and when these first-order values and principles clash, there is no higher-order value or principle according to which they can be ranked. The closure view, by contrast, which is premised on the overly optimistic idea that perfection of one's rational faculties will bring perfection in one's life, denies this fact about human experience that there are moral conflicts.[12]

Rare is the case, the non-closure view acknowledges, that an agent can do what is right 'all things considered'. Frequent is the case that an agent confronts moral conflicts, sometimes tragic moral conflicts, in which the action required of her by one set of principles or values is the very action ruled out by another set of principles or

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[12] Searle, John (1978), '*Prima facie* Obligations' in *Practical Reasoning*, Joseph Raz (ed.), Oxford: Oxford University Press, 86. See also Gardner (2002), 6.

values.[13] As Bernard Williams states, the 'I can't' represents a sub-conclusion within an agent's deliberation, which rules out one line of action and leads the agent to conclude that she should perform a different line of action.[14] That the 'I can't' functions as an excluder within the decision-making process is problematic because often whatever the agent does on such occasions will be ruled out by moral considerations that she recognises as weighty or even obligatory.

In cases of tragic conflict, the agent must make an all things considered judgment whether an action is right or wrong *simpliciter*, and so judge what she morally ought actually to do.[15] And yet, her decision, however right, may be accompanied by deep regret that she cannot respect the values and principles contravened in taking this action. The closure view is unable to rationalise the regret people often feel or the desire they often have to make reparation to those harmed by their decisions; it '[does] not do justice to the facts of regret and related considerations' observes Williams, because it eliminates from the scene the ought that is not acted upon.[16] The non-closure view does not eliminate this ought, but instead allows it to affect not only the agent's attitude toward her action, but also the moral status of that action.[17]

On the non-closure view, when a father like Nelson Mandela, for example, commits himself to freeing black and coloured South Africans from oppression and,

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[13] For a discussion of tragic moral conflicts, see both Berlin, Isaiah (1969), 'Two Concepts of Liberty' in *Four Essays on Liberty*. New York: Oxford University Press and Williams, Bernard (1981), 'Conflicts of Values' in *Moral Luck*. Cambridge: Cambridge University Press.

[14] Williams, Bernard (1995), 'Moral Incapacity' in *Making Sense of Humanity and Other Philosophical Papers: 1982-1993*. Cambridge: Cambridge University Press, 46, 48.

[15] Gaut, Berys (2002), 'Justifying Moral Pluralism' in *Ethical Intuitions: Re-evaluations*. Philip Stratton-Lake (ed.), Oxford: Clarendon Press, 138.

[16] Williams, Bernard (1977), 'Ethical Consistency' in *Problems of the Self*. New York: Cambridge University Press, 175. Cited from Donagan, Alan (1984), 'Consistency in Rationalist Moral Systems' in *The Journal of Philosophy*, Vol. 81, No. 6, 296.

[17] Oughts as well as requirements can affect the moral status of an action. Although oughts, as ordinary reasons, are not protected reasons, they do come into the assessment and do not go away when they are not respected.

as a result, neglects his wife and children (being separated from them for 27 years and returning to them as father of the nation), his decision is right to the extent that it serves general welfare, respects the equal rights of all people, promotes a great good in society, and so on. His decision is wrong to the extent that it breaches a duty or harms the interests of his children and family who are dependent upon him for sustenance, love and support. In some variants of this tragic conflict, though, the first-order principles at stake are not equally weighty. When confronted with the real possibility of saving either a million people or his own children, Mandela's duty to do the former has greater weight even though it is morally reprehensible for him to sacrifice the interests of his children to whom he has a unique set of highly stringent duties and responsibilities. The point is that, in such extreme situations, it is possible to judge which action he morally ought to take even though this action violates other fundamental moral commitments he has. I examine more fully in Chapter Five the prevalence of tragic conflict in the lives of great pioneers and the importance for civic virtue of putting the common good before individual concerns.

By granting that an action like Mandela's may be justified and thus all things considered alright to perform, the non-closure view allows us to distinguish degrees of wrongdoing, something that the closure view cannot do, and yet something that we are accustomed to doing in our reflective moral practice.[18] The non-closure view accommodates the reality that morally valuable choices are often problematic given the impossibility of realising or respecting all first-order values in individual actions. By acknowledging the effect that competing reasons have upon the moral status of an action, the non-closure view of wrongdoing offers a more appropriate framework within which to consider a multifarious and morally complex practice like civil

[18] C.f. Gardner and Macklem (2002).

disobedience than the closure view does. The extent to which an action is wrong is determined by the force of the reasons against performing that action and, in the following subsection, I shall show how different types of reasons are relevant to complicated moral decisions, and to the case that concerns us of civil disobedience.

c. Reasons

Having indicated the value in adopting the non-closure view of wrongdoing, we should outline fully what a wrong is on this account. Although the preceding discussion has hinted at the centrality of reasons in assessing issues of wrongdoing and justification, it has not specified what role is played by reasons.[19] One task is to distinguish between the role that reasons play in assessing the rightness or wrongness of an action and the role that they play in assessing the extent to which an action is justified or unjustified. Both rightness and justification admit of degrees, and the degree to which an action is justified contributes something to the degree to which that action is right to perform. As suggested above, an action that is all things considered alright to perform may be one that is to a large extent wrong, but nevertheless on the whole justified.[20]

Concerning wrongdoing, in the obvious case, an action is right, from a certain perspective, when there are no reasons against performing that action. Less obviously, an action is right, from a certain perspective, when there are no *protected* reasons against performing that action, though there may be ordinary reasons against performing it that are defeated by the reasons for performing it. Conversely, an action is wrong, from a certain perspective, when there is at least one protected reason against performing it. A *protected reason* is a single fact that is both a reason to act in

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[19] My comments here turn on the understanding that reasons are facts that speak in favour of (or against) actions. All reasons are guiding reasons.

[20] I shall discuss in Chapter Three how justifications for actions admit degrees.

a particular way and a reason to exclude various opposing reasons.[21] The fact that one makes a promise to do something, for example, is both a reason to fulfil one's promise and a reason not to act for countervailing reasons against fulfilling one's promise (such as a loss of enthusiasm).[22] When an action is required by a protected reason, it is felt by the agent to be obligatory. In this case, one feels obligated to fulfil one's promise.

Yet, the force of such protected reasons is not absolute. In some contexts, a person has good reason, maybe even an undefeated reason, not to fulfil her promise. Suppose she promises a friend to injure someone whom the friend dislikes but who has done nothing blameworthy. There are weighty, if not protected, reasons against performing that action and they offer good reasons not to fulfil the promise. Take another case: recall Mandela's conflict of commitments. Although he promises to commit himself to the cause of the African National Congress (ANC), he may nonetheless have had undefeated reasons to abandon the struggle for freedom for the sake of his family and children (when, for example, they were under threat as a result of his political activities). The force of the protected reason to honour his promises to the ANC simply entails that he could not have appealed to certain reasons to avoid performing the promised action. He could not have pleaded a loss of enthusiasm or a dislike for his collaborators. But, other reasons for not fulfilling his promise to the movement, reasons related to the needs and interests of his family, would have been open to him and could have been sufficiently weighty to justify his conduct, though not sufficiently weighty to make his breach of promise (given its magnitude) morally right. And, although such action would not be civically virtuous since it does not give priority to the common good, the fact that it would have been justified does add

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[21] Raz (1979), 18.
[22] Gardner and Macklem (2002).

something to its rightness as an action to perform. In the promising-to-injure case, by contrast, the agent's decision not to fulfil the promise is morally right. There is no protected reason, we could argue, for injuring the disliked person, and so there is no obligation to fulfil the promise, and a very weighty reason, presumably a protected reason, not to do so.

As these examples indicate, distinguishing between considerations of right and wrong and considerations of justification is often difficult. Talk of justification, as Gardner points out, highlights a striking asymmetry in human thought and experience between the pursuit of positive value and the avoidance of negative value; between reasons for and reasons against an action. This asymmetry is brought to the surface by claims about justification only because such claims implicate both reasons for and reasons against the justified action.[23] In view of this, one might ask whether a pluralist approach, which allows for degrees of wrongdoing, blurs any possible distinction that might be drawn between the role reasons play in determining wrongdoing and the role they play in assessing justification. My reply would be that we cannot reject pluralism simply because it does not offer an easy way to classify actions as right or wrong, justified or unjustified. The distinction between a denial of wrongdoing and an assertion of justification is nonetheless real. For example, whereas a denial of wrongdoing points to the absence of certain reasons against an action, an assertion of justification points to the presence of certain reasons in favour of an action. An action that calls for justification, by definition, has reasons against performing it; and justification thus points to undefeated reasons in favour of that action.

As these comments suggest, wrongs as such are not the only kinds of actions that require justification. There is room in the non-closure view for actions that are

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[23] Gardner, John (1996), 'Justifications and Reasons' in *Harm and Culpability*. A. P. Simester and A. T. H. Smith (eds.), Oxford: Clarendon Press, 108-9.

wrong when performed without justification, and not wrong when performed with justification.[24] Put differently, some actions do not violate a requirement when performed for an undefeated reason, but do violate a requirement when performed not for an undefeated reason. Borrowing an example from Frances Kamm, consider person A who wants to kill person B and who refuses to defend himself against any person but B. Person A sets up a situation so that B will attack him, which will allow A to respond in self-defence with lethal action.[25] Self-defence such as this is wrong because it lacks justification. Self-defence performed for the undefeated reason to save one's own life, however, is a complicated case. In such cases, the denial of wrongdoing and the assertion of justification seem difficult to separate. This is particularly true in the realm of criminal law where the difference between offences and defences is often unclear.

> To say that the defendant committed a criminal wrong, but was justified comes to the same thing, in the end, as saying that she committed no criminal wrong...Regarding some arguments available to criminal defendants it is admittedly unclear, morally as well as legally, whether they are to be regarded as denials of wrongdoing, or rather as concessions of wrongdoing coupled with assertions of justification. That is because, morally as well as legally, some wrongs...do admittedly anticipate, in their very definitions, various arguments that would otherwise count as justificatory.[26]

The person who genuinely kills for reasons of self-defence could be regarded either as having acted wrongly, though her action is justified, or as having not acted wrongly because her act is justified. On the second interpretation, the justification is built into the definition of her action as an act of self-defence. I would favour the second interpretation since it not only allows that the reasons for which one acts can shape the nature of one's action, but also retains the distinction between a denial of wrongdoing and an assertion of justification.

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[24] Gardner (2002), 5, 8n.
[25] Kamm, Frances (2005) 'Just War'. Lecture given at the 25th Anniversary International Congress of the Society for Applied Philosophy, St Anne's College, Oxford, 1 July.
[26] Gardner (2002), 4-5.

The accommodation of complicated cases does not cause the non-closure view to collapse into the closure view of wrongdoing. The merit of the non-closure view lies in its recognition that a denial of wrongdoing and an assertion of justification can be pulled apart, a phenomenon that the closure view cannot accommodate. That said, the non-closure view need not be committed to the claim that they never coincide, but can incorporate the idea that, in special cases, the justification for an action causes that action to be right all things considered. In the self-defence case, for example, it is because certain reasons for striking out are present and acted upon (one acts for the reason of saving one's life) that other reasons against lethal attack are absent. So, although complicated cases do little to clarify the role that reasons play in relation to the rightness or the justification of an action, we see that such cases are merely complex variants of more simple cases in which the distinction between a denial of wrongdoing and an assertion of justification is clear. We therefore may stand by the distinction that, whereas the absence of certain reasons *against* an action speaks to its rightness (and the presence of those reasons to its wrongness), the presence of certain reasons *in favour of* an action speaks to its justification (and the absence of those reasons to its lack of justification).

Some of the material just covered will be deployed in Chapter Three in the analysis of the justifiability of civil disobedience. What matters for our present purposes is that we have understood what makes an action wrong and have appreciated that wrongdoing admits degrees. Before we proceed, let me briefly explicate the line of thought sketched above which I pursue in Chapters Three and Five. Briefly, some acts of civil disobedience it would be wrong to perform without justification, but not wrong to perform with justification. One cannot consider acts of civil disobedience without reference to certain aims and purposes; the reasons for

which certain acts of civil disobedience are undertaken build in justification.[27] I shall suggest that *ceteris paribus* some civil disobedience resembles self-defence in that, while it may have morally problematic features, it gains its moral status often from the reasons for which it is taken.

Putting complicated cases and intricacies of justification aside, in what remains of this chapter, I apply the non-closure view of wrongdoing to civil disobedience. We have seen that an action is wrong when there is a protected reason against that action. The protected reason, which is felt by the agent to be obligatory, is both a reason against taking this action and a reason for taking a different action. My objective is to rebut the claim that there are always protected reasons against civil disobedience. To do this, it is necessary to consider those aspects of political and moral life that purportedly generate protected reasons against civil disobedience. Whereas my attention in Sections 3 and 4 turns to claims about rights, utility, and the status of persons, my focus in the next section is political obligation.[28]

2. Political Obligation

Were there a general *pro tanto* moral duty to follow the law, then persons would have a protected reason to follow the law, and this would make civil disobedience, as an intentional breach of law, a morally problematic practice. I shall argue that there is, at present, no good argument for a general moral duty to follow the law.

In the history of philosophy, many arguments, both voluntarist and non-voluntarist, have been given for political obligation. John Locke, for one, espoused

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[27] Whether an action has legal justification depends upon the kinds of reasons for action that are permitted by the law. I am speaking here of moral justification.

[28] Typically, political obligation is regarded by its defenders as a qualified or *pro tanto* duty. While I shall use the popular term 'political obligation' to refer to the duty to follow the law, I appreciate that 'legal obligation' is a more accurate description of this duty.

the voluntarist position that we have a duty to follow the law only when we have consented to its rule. David Hume, by contrast, defended the non-voluntarist view that political obligation is rooted in the value of government under law. From these two traditions rise the principal contemporary arguments for political obligation, which pertain to consent, gratitude, promise-keeping, fairness, necessary institutions, and public good. I have not the space to address all of these arguments or the many challenges that have been raised against them.[29] I shall take it for granted that such arguments have largely been discredited, and that a critique of political obligation is better served by examining some not yet overanalysed views of thinkers who agree that these mainstream arguments are unpersuasive, but who nonetheless argue for political obligation. As noted at the outset, I shall consider two, not unrelated, non-voluntarist defences of political obligation put forward by Dworkin and Soper respectively. I regard non-voluntarists as more formidable adversaries than voluntarists since the latter rely upon an implausible account of political life which ignores that people are born into and grow up in political communities and never directly or indirectly consent to their membership. My aim is to show that, despite the apparent appeal of these non-voluntarists' claims, neither Dworkin nor Soper offers satisfactory grounds for a general moral obligation to follow the law. After critiquing these two attempts to give new life political obligation, I note briefly some positive arguments for my position.

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[29] For a detailed examination and critique of these central arguments for political obligation see both Smith, M.B.E. (1973), 'Is There a Prima Facie Obligation to Obey the Law?' in *Yale Law Journal*, Vol. 82, No. 5, 950-976; and Green, Leslie (2002) 'Law and Obligations' in *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Jules Coleman and Scott Shapiro (eds.), Oxford: Oxford University Press.

a. Critique of Dworkin's Argument from Integrity

To summarise Dworkin's position, a community of principle, which identifies integrity as a political ideal, assimilates political obligation to the general class of associative obligations and, thus, provides the best defence of political legitimacy.[30] This defence is possible in such a community, says Dworkin, because a general commitment to integrity expresses a concern by each member for all others which meets certain conditions: communal obligations are felt by members to be special, personal, pervasive, and egalitarian. While these conditions upon associative obligations are an interpretive property of the community's practices, not a psychological property of its members, these conditions must be recognised and honoured by members for that community to be a true community.

My principal focus in what follows is Dworkin's claim that political obligation is associative, but my critique also briefly covers other aspects of his argument from integrity. In considering political obligation and associative obligations, various dissimilarities come to light which belie Dworkin's effort to understand the former in terms of the latter. I discuss, first, two dissimilarities noted by John Simmons in his sustained critique of associative political obligations.[31] I argue then that, although not immune to challenge, Simmons's observations highlight other dissimilarities concerning reciprocity and the orientation of political obligation that sustain the objection against assimilating political obligation with associative obligations.

First, for the theory on political obligation to be true to people's experience of moral life, says Simmons, it must recognise that people find their associative obligations to be vague and indeterminate. To most people, it is unclear what they are

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[30] Associative or communal obligations, as a subset of role obligations, are defined by Dworkin as 'the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbours.' Dworkin, Ronald (1986), *Law's Empire*, Oxford: Hart Publishing, 196.

[31] Simmons, John (1996), 'Associative Political Obligations' in *Ethics*, Vol. 106, No. 2, 247-273.

required to do for their family members, friends, and colleagues to demonstrate the special concern that they have for these people. By contrast, to most people, it is clear what the law demands of them. It demands that they, amongst other things, pay taxes, honour contracts, avoid certain actions, respect others' rights, take care, and accept judicial decisions as binding.[32] This disparity suggests that political obligation is not associative. Of course, one could challenge the authority of people's shared moral experience, but this avenue is closed to Dworkin who points to people's belief that they have associative obligations simply by belonging to groups defined by social practice (not necessarily as a matter of choice) to add intuitive support to the idea of associative obligations. A reply, however, which is open to Dworkin, emphasises the expansiveness of his notion of *political obligation*. For Dworkin,

> Political obligation is then not just a matter of obeying the discrete political decisions of the community one by one, as political philosophers usually represent it. It becomes a more protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme.[33]

On this broader understanding, people must do more to fulfil their political obligation than simply adhere to the dictates of the law.[34] They are required to take actions that fulfil an obligation of fidelity to the community's scheme of principle. But what actions would fulfil such an obligation is by no means clear.

Given Dworkin's take on political obligation, Simmons's suggestion does little to expose a division between political obligation and associative obligations. The second dissimilarity that I draw from Simmons, concerning the communal aspect of associative obligations, is more useful. Again, for theory on political obligation to be true to people's shared experience, says Simmons, it must recognise that our

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[32] This list paraphrases a list offered by Green (2002), 514.
[33] Dworkin (1986), 190.
[34] I do not endorse Dworkin's expansive conception of *political obligation*. My aim, however, is to show that, even on his interpretation, Dworkin's effort to assimilate political obligation with associative obligations does not work.

experience of family life, friendship, and neighbourhood is much more communal in nature than our experience of political life is.

> Our sense of community – of shared interests, values, expectations, life prospects, and the like – is, at least for most of us, so much less involved in our political lives than in these other aspects of our lives that it is only a matter of ancient habit that we refer to modern states as political communities at all.[35]

I think this overstates the difference between people's experience of political life and their experience of other aspects of life, and I do not endorse the idea that modern states are somehow not communities. Nevertheless, I agree with Simmons that our large-scale societies little resemble the close-knit groups Dworkin describes which are capable of generating associative obligations. The real value in Simmons's argument, though, is that it highlights other, compelling dissimilarities between political obligation and associative obligations.

One such dissimilarity relates to the feeling of reciprocity amongst members of a close-knit group, something which Dworkin sees as pivotal to associative obligations. Reciprocity is a prominent condition, he says, for the natural duty to honour the special responsibilities we have as members of a particular group. 'I have special responsibilities to my brother in virtue of our brotherhood, but these are sensitive to the degree to which he accepts such responsibilities toward me.'[36] My responsibilities to him, says Dworkin, are contingent upon reciprocity. But, despite what Dworkin says, our responsibilities in the political realm are not likewise contingent upon others' acceptance of their own responsibilities; a person does not lose whatever obligation she has to follow the law when others deny their own obligation. Note that we may make this point without accepting the further claim that there is a general obligation to follow the law. We may appeal instead to specific obligations, such as the obligation to respect laws that align with moral principles

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[35] Simmons (1996), 271-2.
[36] Dworkin (1986), 198.

prohibiting actions such as rape and murder. A person's obligation to respect these laws is not contingent upon an acceptance of that obligation by others. Similarly, a person does not lose this obligation when she is denied the benefits of belonging to the political community. A wrongfully convicted person, for example, who is denied the benefits of membership, does not lose, in virtue of her situation, the obligation to adhere to such laws.

To this, Dworkin might reply that it is the obligations to a particular citizen that one loses when that person disregards her obligations, not one's obligation to adhere to the laws and principles of the community. By breaching the bond between members, this person forfeits her claim to reciprocal concern. But, if that is so, then the associative obligations that arise from such a bond (and which may be disregarded in relation to her) could not include political obligation because political obligation is not oriented toward other citizens. In more detail, on Dworkin's view, for an obligation to be associative, members of a group must regard it as both 1) *special*, holding distinctly within that group, and 2) *personal*, 'running directly from each member to each other member, not just to the group as a whole in some collective sense', in a way that 3) stems from a general *concern* for other members 4) which is *equal* and *pervasive*.[37] For political obligation to count as associative, the members of a political community would have to be able to express special, personal, equal concern for each other through their adherence to this obligation. But, this seems to be impossible since, as a practice, political obligation involves fidelity to the laws and principles of the community, and thus is oriented not toward the needs or interests of individual members, but toward the dictates of the law, which may or may not align with actions that would demonstrate equal, personal concern for other members. So,

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[37] Dworkin (1986), 199.

although a person's adherence to political obligation may demonstrate support or concern for a particular government or particular community as a whole, it cannot demonstrate direct concern for each and every member of that community; nor can that person forfeit that concern in relation to a single individual.

My objection does not rebut Dworkin's claim that, since the conditions for associative obligations are interpretive and not psychological, personal relationships between members are not necessary to ground associative obligation. I take it that whether people know each other has no bearing upon the issue of their ability to express personal concern through respect for political obligation. My claim is that political obligation, given its orientation toward the law and a scheme of principle, is not the kind of responsibility that admits of *personal* concern.

The objection I have made differs from and is, I believe, stronger than Simmons's empirical argument that,

> It is simply not true, either in our own political community or in any others with which we are familiar, that most citizens feel with respect to all of their fellows a deep and abiding concern. In the interest of realism, we must acknowledge that the divisions between religions, ethnic groups, races, political parties, castes, economic classes, and so on run too deep for this claim to be convincingly denied. Where one might find the kind of closeness and concern necessary for Dworkin's account of associative obligations, of course, will only be in groups far smaller than the large-scale political communities with which Dworkin claims to be concerned.[38]

Whereas Simmons argues that members of a political community simply do not feel the abiding personal concern for each other that Dworkin describes, I argue that they cannot feel a kind of *personal* concern that is said to be manifested in adherence to the law.

We could end our critique of Dworkin's account here, having shown that, given the dissimilarities between political and associative obligations, one cannot defend the former by arguing that it is an instance of the latter. But, before we move

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[38] Simmons (1996), 260.

to Soper's account, I wish to note other faults in Dworkin's argument from integrity which could undermine his position even if political obligation were best classified as associative. First, there is the question of why integrity should ground an obligation to obey. As Leslie Green observes, while the virtue of integrity may be admirable and may contribute to legitimacy, it does not follow that it generates any claim to our obedience.[39] Second, there is the problem of voluntariness. Given the importance for a true community of people's *recognition* of the conditions for associative obligations, Dworkin's account seems more voluntarist than he acknowledges, and this exposes him to the charge that his account poorly describes the reality of political life. Third, there is Dworkin's appeal to independent principles of justice and equal concern, which, as Simmons notes, seem to render superfluous the very local communal obligations that were said to lie at the heart of Dworkin's defence of political obligation.[40] Fourth, there is Dworkin's claim that the obligation to obey derives analytically from the concept of *the state*. Dworkin states that, if citizens do not have genuine moral obligations just in virtue of law, then the state's warrant for coercion is seriously, perhaps fatally, undermined: '...no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations.'[41] But, were this so, it would be unintelligible or self-contradictory to deny the authority of the state. Since philosophical anarchism is not unintelligible, political obligation cannot be derived analytically from the concept of *the state*.[42] Although undeveloped, these points support the conclusion that the first of the two defences of political obligation under consideration is unpersuasive. Let us turn to the second, Soper's ethics of deference, which purports to meet the challenges just noted.

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[39] Green (2002), 535.
[40] Simmons (1996), 260.
[41] Dworkin (1986), 191
[42] Simmons (1996), 254.

b. Critique of Soper's Argument from Deference

One challenge to Dworkin which Soper claims to meet is that concerning the normative force of local social practices. Dworkin's mistake, says Soper, is 'to tie the interpretive conditions that lead to political obligation too closely to the particular practices of a community, requiring those practices to reveal at some level a continued sense of equal concern for all members', a concern which could only be based upon external moral principles.[43] The ethics of deference, says Soper, can account for both the apparent normative force of existing local practices and the fact that this force derives ultimately from external moral principles.[44] Under the ethics of deference, although the only practice needed to yield political obligation is the practice of the state, the reasons for deferring to the state derive from Kantian principles of moral consistency, self-respect, and respect for others. Since the consequences of adherence to the law are not always advantageous, instrumental reasons will inevitably fail to ground a general duty of deference. Only intrinsic reasons based upon one's own values could ground this duty: the intrinsic reasons for deference which relate to one's values and one's need for self-respect are subjective intrinsic reasons, and may be contrasted with objective intrinsic reasons. The state's right to deference arises, therefore, from one's acknowledgement of 'the necessity of an enterprise that requires designated authorities to impose norms, in good faith, on the community at large.'[45]

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[43] Soper, Philip (2002), *The Ethics of Deference: Learning from Law's Morals*. Cambridge: Cambridge University Press, 171.

[44] Soper re-describes the obligation to obey the law in terms of a duty of deference. Unlike obedience, which is at home in the realm of commands and coercion, deference requires one to give weight 'to the normative judgments of others even against one's own judgment about the correct action to take.' (169) In doing so, one makes a rational choice to prefer another's judgment to one's own. Before considering political obligation and the authority of the law, Soper examines three non-legal contexts that he argues can be re-described in terms of deference: friendship, promise-keeping, and fair-play. For an analysis of the language of deference in relation to political obligation see, Brownlee, Kimberley (2004) 'Obedience, Conformity, and Deference' in *Res Publica* Vol. 10, No. 3, 267-274.

[45] Soper (2002), 164.

A second challenge which Soper claims to meet relates to Dworkin's conceptual argument. While Soper grants that Dworkin is correct to identify a conceptual connection between understanding and accepting the value of the state and the obligation to adhere to the law, Soper agrees with Simmons that the connection cannot be analytic. The most that can be derived analytically from the concept of *the state*, says Soper, is the authority of the state to enforce its norms. The moral authority to be obeyed (or deferred to), by contrast, is something synthetic, which arises from people's recognition of the value of the state. People who understand what a legal system is and admit that it is valuable must recognise, says Soper, that they are being morally inconsistent if they deny that they owe deference to state norms.

But this treatment of the conceptual argument exposes Soper to a third objection raised against Dworkin, concerning voluntarism. To cash out this objection, let us consider the challenge posed by the philosophical anarchist. Since she denies the value of the state, the philosophical anarchist is not morally inconsistent to deny that she owes deference to state norms. Her values of moral consistency and self-respect give her subjective intrinsic reasons *not* to defer to the law. The fact that the philosophical anarchist has no duty of deference as such suggests that the ethics of deference cannot defend political obligation as a *general* moral duty (held by everyone at all times) to defer to the law. Recognising the problem that the philosophical anarchist poses, Soper says that the benefits of the state must be defended to her in objective, not subjective, terms. And yet, since few people are sincere philosophical anarchists, Soper decides not to provide an objective defence of the state. He says that,

> Though an objective defence of the state as an alternative to anarchy is probably not that difficult to mount, I shall leave the question open and unaddressed here: Few people, after all, are sincere political anarchists, which means that most people will at

> least have subjective reasons to defer (even if the anarchist is right) so long as the state whose value they acknowledge is properly defined.[46]

Soper's reluctance to give an objective account is puzzling.[47] His reason for not giving one, I would suggest, is that, specifying the values behind the state would fill out the claim I make below that people who acknowledge these values have subjective intrinsic reasons not to defer to laws that contravene them.

For our present purposes, note that, were Soper to give an objective defence of the state, it would not necessarily follow that the philosophical anarchist has a duty to defer to state norms; the value of a state does not in itself generate a duty to follow its dictates. As it stands, the duty of deference does not apply to all people, and this diminishes its merits as an account of political obligation. Moreover, since the duty to defer depends upon people's *decision* to regard the state as valuable, Soper's account (like Dworkin's) contains an ineliminable element of voluntarism. The failing in voluntarism, noted above, is that it relies upon an implausible view of political reality.

Soper would reply that voluntariness is less critical than is usually thought. Since the argument for political obligation stems from the value of the practice, the manner in which people come to acknowledge that value, says Soper, is irrelevant. However, the manner in which people come to value a practice must be true to their experience of that practice. The suggestion that political obligation is somehow voluntary ill reflects people's experience of political life, and thus detracts from any account that must incorporate it.

This is not the most pressing objection against political obligation as a duty of deference. Weightier objections concern, first, Soper's idea of the legislator to whom one is said to defer, and second, Soper's suggestion that recognising the value of the

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[46] Soper (2002), 166. For a defence of philosophical anarchism, see Wolff, R. P. (1970), *In Defence of Anarchism*. New York: Harper & Row.
[47] The only value behind the state that Soper notes is that of security.

state entails a general duty to defer to the state's norms. Let us consider the legislator first.

In an effort to distinguish the ethics of deference from standard theories of associative obligations, Soper emphasises that deference is owed not to individual persons with whom one shares a personal bond and whose potential disappointment generates the duty, but to 'a hypothetical person in the character of an actual or ideal (but personally unknown) legislator' who shares one's values on the nature and role of the state.[48] When one defers to legal norms, the content of which one has not chosen, one defers to the judgments of this legislator who does the job that one would do oneself were the roles reversed, expecting compliance with norms enacted in good faith for the benefit of all citizens. Through deference, says Soper, one demonstrates respect not only for this hypothetical character, but also for oneself as someone who values the law.

To bring this duty into focus, however, it must be possible to put oneself in the legislator's place and to know that one would expect deference from others were one engaged in enacting the same norms in good faith to further values held in common. There are two problems with this. First, it assumes that the legislator's expectations are clear. Were it possible to equate the legislator's expectations as Soper does with legal norms (to pay taxes, to honour contracts, etc.), then these expectations would be clear. But, since the legislator continually must review his stance on complicated issues and competing concerns, his expectations cannot be equated with actual norms. At best, one may make reasonable assumptions about the legislator's expectations by assessing the relative importance he typically assigns to different considerations. But, one cannot know that, when conflicts arise, the legislator will not act against his prior

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[48] Soper (2002), 170. By 'legislator', Soper includes all legal representatives involved in developing, enacting, and enforcing the law. See Soper (2002), 56.

convictions. Therefore, the expectations that one should conceive of oneself having were the roles reversed are by no means clear.

Second, this account assumes that one shares the values reflected in the legislator's expectations. Soper says:

> ...the law's expectation of voluntary compliance corresponds to what I would also expect if I were the legislator. The duty to respect the legal norm is a reflection of the duty to respect the values I myself acknowledge in recognising what a legal system is.[49]

It is possible though that one might share with the legislator no specific values except a preference for a state over a state of nature. Presumably, then, even if the legislator's expectations were clear, one would be unable to imagine a reversal of roles in which one retains one's self-respect while either enacting norms that the legislator enacts or expecting deference from others to those norms if somehow one enacted them.

Soper's reply to this must appeal to the good faith of the legislator. Good faith is sufficient, he says, not only to exculpate the legislator who enacts a bad norm, but also to give a citizen who regards the state as valuable a duty to defer to this norm even though she thinks it is bad. Moreover, good faith is sufficient, says Soper, to exculpate the legislator and to give the citizen a duty to defer when the citizen disagrees with the merits of the particular state that expects her deference.

> Legal systems, if they are not to collapse into coercive systems, must in short admit that all standards tentatively identified as law by a positivist pedigree will count as valid law only if they are not too unjust and thus remain capable of supporting a good-faith claim that using coercion to enforce the law is morally permissible.[50]

The claim then would be that whatever laws the legislator enacts will not exceed a certain level of injustice, and so one need not be squeamish when imagining a reversal of roles.

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[49] Soper (2002), 164.
[50] Soper (2002), 97.

While we may question Soper's grounds for denying certain norms the status of law, my primary concern is to rebut the suggestion that the moral merit with which he imbues nearly all laws is sufficient to meet my objection. Note that laws need not be unjust to clash with one's core values: injustice is not the only defect that laws can exhibit. A law, for example, simply might apply to a sphere in which one believes the law does not belong (I consider this point in Chapter Three). If such a law clashed with one's core values, then one would be unable, I argue, to imagine retaining one's self-respect while expecting deference to that law. Moreover, one would be unable either to put oneself in the place of the legislator who enacted that law or to recognise the values he implemented as one's own values.

The problems associated with conceiving of the legislator's expectations need not undermine Soper's account of political obligation provided that one's value for the state *per se* is sufficient to generate a duty of deference to state norms. As I shall argue, however, preferring a state to a state of nature generates an intrinsic reason not to defer to norms that contravene the values behind that preference.

Before continuing, let me clarify Soper's notion of political obligation (or legal obligation as he calls it). Soper understands political obligation as a mere 'ought' and not the more serious 'obligation'. Whereas oughts point to reasons for action that often must be weighed against other reasons when deciding what to do, obligations suggest a bond between the agent and the person to whom the obligation is owed which pre-empts other reasons for action.[51] According to the ethics of deference, people who value the state have an ordinary reason (a content-independent, intrinsic reason) to defer to legal norms. While I disagree with this conception of political obligation, I aim to show that, even on this view, there is no general moral

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[51] Soper (2002), 90. Although political obligation is an ought, the term *obligation* is appropriate, says Soper, to mark its particular feature of being backed by a claimed right to enforce.

duty to defer to the law. The reasons we have to follow the law may be content-dependent or content-independent, instrumental or intrinsic, and general (to everyone) or specific (to individual persons), but there is no reason to defer to the law that has the combined properties of being general, content-independent, and intrinsic.[52]

Since it is content-independent intrinsic reasons that interest us, I will but note some content-dependent reasons to follow the law. Content-dependent, intrinsic reasons can be either general, like the reasons to respect laws proscribing rape or murder, or specific, like the reasons doctors have to follow their professional code. Instrumental reasons, by contrast, are *context*-dependent and thus tend to be specific or incidental to a person's situation rather than general. Examples of content-dependent, instrumental reasons are that following good laws often both promotes within the society the values supported by these laws and has positive effects for others and oneself. Content-independent reasons also can be either instrumental or intrinsic. Examples of instrumental reasons are that one may be punished if one breaks the law and one's breach of law may gravely affect others. Intrinsic reasons of this sort, I argue, can be specific, but not general. A reformed criminal, for example, who promises his girlfriend not to break the law again if she marries him,[53] has a specific, content-independent, intrinsic reason (arising from his promise) to follow the law. But, as I shall argue, he does not share with all others who value the law any general content-independent, intrinsic reason to follow the law.

As noted earlier, the intrinsic reasons that purportedly ground the duty of deference are *subjective* reasons that derive from people's values and principles of moral consistency, self-respect, and respect for others. The idea that people who value a legal system have a content-independent, subjective intrinsic reason to defer to *all*

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[52] I understand 'general' here to refer to all people who value the law.
[53] This example comes from Raz (1979), 237.

legal norms represents, I believe, an attack on both their moral consistency and their self-respect. First, people who prefer a legal system would be morally inconsistent to argue that they have a duty to defer to norms that contravene the values that ground their preference. Second, such people would show a lack of self-respect to defer to norms that violate their core values. Consequently, people who value the state have subjective intrinsic reasons not to defer to norms that either alone or in combination contravene the values behind the state. These reasons not to defer are indeed subjective, as they allow people who value the state to act consistently with their own values even if moral theory, in some ultimate sense, shows those values to be indefensible.

Note that we need neither specify the values that underpin a preference for the state nor show that any laws in a given legal system breach those values to argue persuasively that, were such laws to exist, people who value the law would have a subjective, intrinsic reason not to defer to them. This is sufficient to conclude that there can be no *general* reason to defer to the law that is both *content-independent* and *intrinsic*. While there are many other reasons to follow the law, there is no reason of the kind that Soper needs to defend a general duty of deference.

If we accept both that Soper's arguments for political obligation fare no better than Dworkin's do and that there are no other good arguments for political obligation which we have not discussed, then we may conclude that, at present, there is no plausible defence for a general moral obligation to follow the law. To strengthen this position, let me conclude by noting some positive arguments for my view.

First, if there were a general moral obligation to follow the law, then breaching the law actually would affect the moral quality of one's action.[54] By considering some

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[54] See Smith (1973) for a brief treatment of this argument.

examples, however, we see that the illegality of one's action has negligible moral force. Sexually assaulting a colleague, for example, is a highly reprehensible action irrespective of its illegality, and the feature of its being illegal is not what makes it reprehensible. To attribute its moral status in part to its illegality would be to disregard the real reasons that make assault objectionable. Similarly, jay-walking across an empty street is hardly a reprehensible action, and the illegality of that action does not make it more blameworthy. And, conversely, the legality of an action does not necessarily make it morally acceptable. Spitting at someone's feet and refusing without cause to acknowledge her are reprehensible acts irrespective of their legality. Since the legality or illegality of an action has little effect upon its moral status, we have reason to reject the idea of a general moral obligation to obey the law.

Second, political obligation seems self-defeating since it can prevent citizens both from taking the actions that best serve the interests of their community and, thereby, from honouring what they owe to each other as members of a community. The constraint imposed by an obligation to follow the law checks people's efforts to further the common good. Drawing upon David Lyons, adherence to the law is neither central nor essential to the responsibilities we have as members of a political community.[55] Political obligation misrepresents the duties we have as citizens. I shall pursue this line of argument in Chapter Five in my discussion of the relation between civic virtue and the pursuit of public ideals.

Once we put aside the thought that the breach of law is morally significant as such, we are in a position to judge civil disobedience, as M.B.E. Smith observes, '...in the same way we judge most other kinds of acts, on the basis of their character

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[55] Lyons, David (1998), 'Moral Judgment, Historical Reality, and Civil Disobedience' in *Philosophy and Public Affairs* Vol. 27, No. 1.

and consequences.'[56] It is to the character and consequences of civil disobedience that I turn.

3. Instrumental Reasons

Even in the absence of a general moral duty to follow the law many moral considerations seem to favour legal protest over civil disobedience as a form of dissent. Some of these considerations are best captured by instrumental reasons, others by intrinsic reasons. First, there are instrumental reasons against taking actions that invariably, or almost invariably, cause serious negative consequences either for individuals or for society as a whole. Second, there are instrumental reasons against taking actions that are inherently self-defeating and which generate resentment and hostility toward the agent's objectives and cause authorities to become more intolerant of certain actions. Third, there are, as noted earlier, intrinsic reasons relating to core values concerning the status of persons that speak against actions that violate laws proscribing murder, rape, assault and so on. Fourth, there are intrinsic reasons relating to the same core values that speak against actions (be they *mala in se* or *mala prohibita*) that expose innocent parties to risks they have not agreed to assume.[57] These four types of reasons, so the argument goes, each offer both a reason to adhere to the law and a reason not to be swayed by countervailing reasons to engage in civil disobedience. In this section and the next, I argue that often the actions that these reasons oppose do not include civil disobedience, and in the cases where they do, those reasons must be considered in relation to the reasons for engaging in civil disobedience. Such an assessment, I argue, does not invariably decide against civil

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[56] Smith (1973), 972.
[57] These points are noted by Lyons (1998), 36.

disobedience. Often, civil disobedience proves to be all things considered alright to perform.

Let us look at the idea, noted at the outset of this chapter, that civil disobedience almost always has great negative consequences either for individuals or for the society as a whole. In his discussion of civil disobedience, Raz states,

> It may be thought that the view...that there is no obligation to obey the law opens the way to an easy justification of disobedience on moral and political grounds...But this is far from being the case. The argument for denying an obligation to obey turned in part on the fact that on numerous occasions the fact that an act is in breach of the law has no adverse consequences. This, however, is never (or hardly ever) true in civil disobedience...Such acts are normally designed to catch the public eye and inevitably set people thinking of resorting to disobedience to achieve whatever changes in law or policy they find justified. Thus they have almost invariably some adverse consequences.[58]

Raz goes on to say that his reasoning throughout *The Authority of Law* supports the assumption that in a reasonably just state any consideration in favour of disobedience has to overcome presumptions against it based on its accompanying undesirable results. In addition, civil disobedience is very divisive, he says, which adds to the disadvantages of this practice and which should make one very reluctant to engage in it.[59] There is the added worry which Raz does not note that civil disobedience might encourage more than just other civil disobedience; it might encourage a general disrespect for the law, particularly where the law is perceived as being lenient toward certain kinds of offences such as trespass or road-blocking.[60]

There are at least two replies to this objection. First, we could challenge the empirical claim that civil disobedience almost always has the consequences of dividing people and of leading people to think of engaging in disobedience to achieve change. The consequences of civil disobedience will vary greatly depending upon the means and mode of communication used, the circumstances in which civil

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[58] Raz (1979), 262.
[59] Raz (1979), 275.
[60] As I argue in Chapter Six, possibilities like this make it necessary for the law to emphasise that it treats offenders who breach the law in protest differently from offenders who do not.

disobedience is employed, the identity of the intended hearer, the social climate, the level of toleration for and responsiveness to dissent, and the efforts of other political actors. It would be mistaken to say that, irrespective of these contextual considerations, civil disobedience divides and incites others to disobey. Second, we could challenge the idea that these consequences, if and when they occur, are actually negative. That people may be more likely either to contemplate civil disobedience or to engage in civil disobedience when they see civil disobedience in their society need not be a negative result. Much depends on the form that these acts of disobedience take and the intentions of the participants. It is true that, in some cases, civil disobedience causes disastrous results for many people, but, it is also true that, in other cases, it produces great long term social benefits, defends genuinely important values, and honours duties to oppose injustice and oppression. And, often these benefits result only from the intense political pressure generated by a steadily increasing support for disobedience as a means of political communication.

The second instrumental argument turns on the idea that civil disobedience is self-defeating. Instead of persuading government and the public to see the flaws in existing policies, so the objection goes, civil disobedience generates anger and resentment, sometimes causing authorities to become intolerant of dissent. In reply, I would emphasise that civil disobedience is a complex, multifarious practice which we cannot condemn as a whole on the basis of instrumental reasons that inevitably apply to particular contexts. As Carl Cohen states, 'Whether disobedience creates…resentment, and the adverse reaction claimed, depends upon the nature of the disobedient act, upon its consequences, and upon the relation of that disobedient to the object of protest.'[61] As noted above, the consequences of civil disobedience are

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[61] Cohen, Carl (1970), 'Defending Civil Disobedience' in *The Monist*, Vol. 54, No. 4, 480.

determined largely by the features of the disobedient action taken and the circumstances in which it is taken. Often, society looks to disobedients as the only actors who both will offer a countervailing perspective to that of the majority and will push for political and social changes for which the majority feel unwilling or unable to struggle. As John Stuart Mill says, 'If there are any persons who contest a received opinion...let us thank them for it, open our minds to listen to them, and rejoice that there is someone to do for us what we otherwise ought.'[62] We may take it, therefore, that civil disobedience is not inherently self-defeating.

4. Intrinsic Reasons

Let us turn to intrinsic reasons against morally reprehensible acts. These reasons reflect the commonsense view that actions that violate the basic rights and interests of people are wrong, which aligns with the idea that we must treat other people as ends and never merely as means. The objection to civil disobedience is that the means and mode of communication used in civil disobedience violate certain protected reasons concerning how we treat others. The force of the objection seemingly strengthens when we recall arguments made in Chapter One. First, I argued that, although, in a paradigm case, a disobedient aims to persuade (and not to coerce) others to accept her position, the use of coercion as a way of getting her issue onto the table is not incompatible with the conscientious intentions of paradigmatic civil disobedience. Second, I argued that discriminate violence is not, by definition, incompatible with either conscientiousness or political communication of the sort exemplified in paradigmatic civil disobedience. Thus, violence and coercion (of an intermediate variety), though distinct, may both be exhibited in paradigm cases of

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[62] Mill, John Stuart (1999), *On Liberty*. Edward Alexander (ed.), Peterborough, Ontario: Broadview Press, 90.

civil disobedience. These claims purportedly support the above objection by appearing to place civil disobedience within the category of actions that disregard the essential rights and interests of other people.

Several replies present themselves. First, although there are often good reasons not to use limited coercion as a way of garnering attention and not to use violence in civil disobedience, those good reasons must be weighed against the reasons for using these modes of communication. Opponents of civil disobedience must grant that, in particular contexts and environments, such disobedience may be alright all things considered.[63] Neither violence nor intermediate coercion is necessarily at odds with a respect for basic rights. Moreover, as noted in Chapter One, in many cases, the use of violence is essential to re-establish those rights that authorities would seek to suspend. As Raz observes, 'The evil the disobedience is designed to rectify may be so great, may indeed itself involve violence against innocent persons...that it may be right to use violence to bring it to an end.'[64] Similarly, often limited coercion is necessary to bring attention to the loss or erosion of basic rights.

Second, when either violence or coercion does violate basic rights, the defender of civil disobedience readily may condemn these modes of conduct. Political action that takes the form of rape or murder is indeed wrong and unjustifiable. Committing rape to communicate opposition to what seem to be overly harsh penalties for rape, for example, could never be supported by an undefeated reason. Moreover, most cases and certainly all paradigm cases of civil disobedience do not take such forms. We reasonably may challenge the idea that political dissent of this variety falls under the umbrella of civil disobedience, which has the sincere aim of

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[63] C.f. Rawls, John (1971), *A Theory of Justice*. Cambridge: Harvard University Press, 363.
[64] Raz (1979), 267. One could say something more circumspect, that it is wrong, but justified to use disobedience to bring state violence to an end.

bringing about a positive change in the law. Such an aim never could be pursued conscientiously through actions like rape.

Third, not all civil disobedience employs violence or intermediate coercion; so, even if the above defence of violent and coercive modes of communication were unpersuasive, we still may challenge this objection by pointing to those acts of civil disobedience that do not use such modes of communication. We may make the same argument in relation to the challenge that some actions, which are neither violent nor coercive, nonetheless violate people's rights. While some disobedience may take such forms, not all civil disobedience does. It is sufficient for our present purposes to have shown that this objection fails to demonstrate that civil disobedience, as a practice, is wrong.[65]

According to the final objection, there are intrinsic reasons against civil disobedience on the grounds that it exposes innocent persons to risks they have not agreed to assume. To be wrong, so the objection goes, civil disobedience need not violate people's basic rights; it need only expose people to the risk that their rights will be violated. In reply, this objection captures too much in its net. Many, if not most, of the actions that people take in their daily lives expose other people to risks that they have not agreed to assume. The taxi driver exposes the pedestrian to the risk of being hit; the window washer exposes the people beneath her to the risk of injury; the parent exposes the child to innumerable risks that he has not agreed to assume as soon as they walk out the door or indeed when they stay home. It would be unreasonable, therefore, to condemn a certain practice because of the risks it forces upon other people. And, it is no challenge to civil disobedience to qualify the point by condemning practices that impose *undue* or *excessive* risks on others. In many cases,

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[65] The legitimacy of using violence or intermediate coercion is a topic I return to in my discussion of the justifiability of civil disobedience.

civil disobedience does not expose people to undue or excessive risks. Many disobedients pride themselves on selecting strategies that are unlikely to cause great harm.[66] Given that disobedients expose themselves to the risk of censure and punishment, it is in their interests to pursue projects calculated to generate maximum support for their cause and not projects that expose those whom they hope to convince to undue or excessive risks.

We may conclude therefore that the protected reasons for performing actions that respect the rights and interests of others need not exclude the practice of civil disobedience. As we have seen, in some circumstances, political dissent of this kind is necessary to preserve and to protect those rights and interests.

5. Summary

Assuming that we have dealt with the most forceful arguments against civil disobedience, we may reject the claim that civil disobedience, as a form of dissent, is inescapably wrong. This conclusion does not challenge the wrongness of any particular act of civil disobedience. While we may put to rest concerns about the moral implications of the illegality of civil disobedience, we must recognise the weight of other reasons against particular acts of civil disobedience, reasons pertaining to the status of persons and to the potential effects of disobedience. Often, such reasons are indeed protected reasons. Even so, as we have seen, protected reasons do not have absolute force; they can be outweighed by other considerations. My claim is that a case by case analysis is required to determine whether (and for what reasons) civil disobedience is blameworthy for whatever impact it has upon

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[66] I explore this further in Chapter Five.

individuals or the society as a whole.[67] Civil disobedience that violates others' basic rights, or exposes others to undue or excessive risks, or has seriously untoward consequences, or generates hostility and intolerance of dissent, is to that extent, wrong. And, questions of justification then come into play.

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[67] Paradigm cases of civil disobedience can be wrong just as easily as non-paradigm cases can be. A conscientious and communicative breach of law that aims to persuade lawmakers to change their policies nonetheless may stem from an indefensible position, may cause great harm to others, may violate others' rights, and may treat others as a means.

3. Justification and Reasons

The paradigm case approach that I have adopted, being focused as it is on particular examples of civil disobedience, is not structured to support arguments for a general justification of morally problematic civil disobedience. For this reason, my analysis pertains largely to the justifiability of individual cases of civil disobedience. I consider the justifiability of non-paradigmatic acts of civil disobedience as well as that of paradigmatic acts of civil disobedience, noting that sometimes the former enjoy greater justification than do the latter.

Since an action is justified when it is performed for an undefeated reason, our task here is to identify what constitutes an undefeated reason to perform an act of civil disobedience. As I argue in Section 1, the kinds of reasons that count toward the justification of an act of civil disobedience depend in part upon the parties to whom justification is owed. When an act of civil disobedience is wrong (or at least objectionable for some good reason, though that reason might not be a protected reason), some individuals are in a position legitimately to demand justification. For a disobedient's reasons to contribute to the justification of her civil disobedience, they must be intelligible and potentially persuasive to these persons. Note that, for a disobedient action to be justified, these persons need not actually be persuaded by the relevant reasons: the reasons simply must be ones that similarly placed people who rationally reflected upon the reasons would find persuasive. Such reasons necessarily are ones that can transcend differences in comprehensive moral outlook and, thereby, can give disobedients the best chance of engaging society and government in a moral dialogue.

After explicating the notion of *justification* in Section 1, I draw upon Rawls' notion of *public reason* in Section 2 to specify the reasons that contribute to the justification of an act of civil disobedience. These reasons, discussed in Chapters One and Two, fall into three categories: subjective intrinsic reasons, objective intrinsic reasons and instrumental reasons. The values underpinning these three types of reasons are brought into focus by various considerations which I analyse in Sections 3 through 8 including: 1) the disobedient's conscientious commitments, 2) the law or policy at issue, 3) the political regime, 4) the social setting, 5) the means and mode of communication used, and 6) the consequences of the disobedience. When these considerations combine to generate undefeated reasons in favour of an act of civil disobedience then the disobedience taken for those reasons is justified. In what follows, I also take up the suggestion I made in Chapter Two about complicated cases, namely, that some acts of civil disobedience are right when justified and wrong when not justified.

1. Justification

The notion of *justification* may be understood in at least two ways depending upon the issues at hand. First, *justification* may be understood as a product, namely, a proof, argument or explanation for something: a proof justifies a theory, an argument justifies or vindicates a conclusion, an explanation or defence justifies an action. [1] Second, *justification* may also be understood as an activity, namely, the activity of providing such a proof, argument or explanation. That activity, however, is not

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[1] Rawls, for one, draws a distinction between justification and proof. See Rawls (1971), *A Theory of Justice*. Cambridge, Mass: Harvard University Press, and (1999) 'The Idea of Public Reason Revisited' in *The Law of Peoples*. Cambridge, Mass: Harvard University Press. But, as Charles Larmore observes, this contrast is overdrawn since justification may take many forms. See Larmore, Charles (2003), 'Public Reason' in *The Cambridge Companion to Rawls*. Samuel Freeman (ed.), Cambridge: Cambridge University Press, 376.

necessary to a justification in the first sense. For an action to be justified, an agent need not engage in the activity of explanation; what matters is that it be possible for her to do so (or for someone to do so on her behalf, e.g. in court) if required.

Implicit in the idea of justification as an activity is some notion of success: there is the potential, at least, that the activity will succeed and the explanation will be accepted. But, by whom is it to be accepted? *Justification*, as indicated above, implies that there is a person or group to whom the justification is owed. Not everyone, we assume, may call upon a person to give a justification for her actions. Having the power to call for justification, as noted in Chapter Two, requires both a certain standing relative to this person and a *prima facie* cause (such as a complaint or allegation) to ground the call for justification. In the case of civil disobedience, various parties legitimately may call for justification including any persons negatively affected by the action, the persons to whom the action is addressed, and legal representatives and officials who must engage with citizens who breach the law. When a disobedient can meet these calls for justification then her action is justified.

An explanation for a given action is justificatory to the extent that it points to certain reasons that a person had at the time for taking that action. The reasons cited cannot be ordinary reasons; they must be undefeated reasons, which are neither overridden nor excluded by other considerations.[2] The person who can show that she acts for an undefeated reason need not then given consideration to the other reasons for or against her action: as Gardner says, it is sufficient that the reason she acts for be undefeated.[3] As an explanation for action, justification contrasts with excuse. An explanation is excusatory to the extent that it points to reasons that the agent had for

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[2] Presumably, in some situations, a variety of reasons must apply for any one of those reasons to be undefeated.

[3] Gardner, John (1996), 'Justifications and Reasons' in *Harm and Culpability*. A. P. Simester and A. T. H. Smiths (eds.), Oxford: Clarendon Press, 112-3.

thinking or for believing that she was justified to take a given action.[4] On Gardner's view, 'Excuses point to features of [a person's] situation that do not militate in favour of the action [she] took, but nevertheless *do* militate in favour of the beliefs or emotions or attitudes (etc.) on the strength of which [she] took that action.'[5] While the agent has an undefeated reason for thinking that her action is justified, the considerations which could be reasons for her action together are insufficient to justify the action because they are defeated reasons.[6] According to Gardner and Macklem,

> ...the paradigm excuse is that one had a justified belief in justification. This excusatory case is sometimes known to lawyers as a case of 'putative' or 'perspectival' justification. The qualifications 'putative' and 'perspectival' show that something less than a real justification for the action is involved. This means, to our minds, that something less than a real reason for the action is involved. Instead it is a real reason for belief that there is a reason for action.[7]

In cases where there is only one reason at issue and the person is mistaken to believe that it favours her action, then she in fact has no reason, let alone an undefeated reason, to take the action. If she has an undefeated reason to believe she has reason to act, then her excused action, to a certain extent, is vindicated by reason because when called upon to explain her conduct, it is possible to point to the reason she had for thinking that she had reason to act as she did.

As the above comments indicate, both excuses and justifications admit degrees. An explanation may be partially justificatory and partially excusatory. This means that, for the person who has some ordinary but defeated reasons to act, it is

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[4] Not all excuses are belief-based. Some are emotion-based. Anger and fear can lead one to think that one's action is justified when it is not. C.f. Gardner, John and Macklem, Timothy (2002), 'Reasons' in *Oxford Handbook of Jurisprudence and Philosophy of Law*. Jules Coleman and Scott Shapiro (eds.), Oxford: Oxford University Press.

[5] Gardner, John (2002), 'In Defence of Defences' in *Flores Juris et Legum: Festskrift till Nils Jareborg* Uppsala: Iustus Forlag, 1. Retrieved 3 October, 2003, from http://users.ox.ac.uk/~lawf0081/biblio.htm, 13. Emphasis original.

[6] The reasons against an action do not disappear when they are defeated. They retain their force and may be cause for great regret on the part of the agent that her action violates them. See Gardner (1996).

[7] Gardner and Macklem (2002), 444.

possible to offer more than an excusatory explanation for that action. One may offer a partial justification by showing that the reasons against her action are countered by ordinary, but no less real, reasons in favour of that action.[8] To give a complete justification for her action, it would have to be possible to show that the reasons for her action are undefeated, being sufficient to prevail over the reasons against her action. As Gardner says, '...by claiming full justification one denies that the *prima facie* judgement against performing the action or accepting the belief should be elevated to the status of an 'all things considered' judgment against its performance or acceptance.'[9] All things considered, such an action is alright despite the reasons against it.

As explanations that admit degrees, justifications and excuses align well with a pluralist ethical framework. Just as an action may be morally right from one perspective and morally wrong from another, or, put differently, morally right *to the extent that* it serves one moral principle and morally wrong *to the extent that* it contravenes another, so too an action may be justified from one perspective and unjustified from another, or justified to the extent that it is done for a particular reason and not justified to the extent that it is not done for that reason. It follows that an act that is to a certain extent wrong may be, with complete justification, on the whole alright to perform. As noted in the previous chapter, justification adds to the rightness of an action by emphasising the weight of the reasons in favour of the action, which, in some cases and from some perspectives, outweigh the reasons against the action.

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[8] Since excuses, like justifications, admit degrees, we must allow for actions that are only partially excused. Presumably, an action is partially excused when the agent has a partially justified belief that there are reasons to take that action. Such a belief would be one that the agent has reasons to hold, though those reasons would be, to a certain extent, outweighed by the reasons against holding that belief. Although an action that is but partially excused gains little by way of defence, such an action is nonetheless vindicated by reasons. There are real reasons behind this person's belief that she should take this action, and she may point to these reasons when called upon to explain her conduct.

[9] Gardner (1996), 107.

Moreover, remember that, whereas some actions, for the most part, have their moral status independently of their justification, other actions take their moral status from their justification. As I argued in Chapter Two and will explicate further below, in complicated cases, it is difficult to distinguish a denial of wrongdoing from an assertion of justification. In some cases, actions that otherwise would be wrong are right because they are performed with justification. Some acts of civil disobedience, I shall argue, should be understood as complicated cases.

2. Reasons (revisited)

Recall from Chapter One the central role played by conscientiousness and communication in paradigm cases of civil disobedience. As features that contribute to our idea of what civil disobedience is, conscientiousness and communication provide a framework within which to understand the kinds of reasons that count toward the justification of civil disobedience. Conscientiousness, for one, requires a degree of moral consistency; a person demonstrates the consistency of her commitment to certain values and principles through her willingness to communicate her disavowal of, and dissociation from, governmental or societal decisions that violate those values. Communication in this context is associated with certain aims, namely an aim to demonstrate protest against certain types of conduct, and an aim to bring about through moral dialogue a change in that conduct. As I have argued, in paradigm cases, a disobedient aims to lead policymakers not only to reform existing policies, but also to internalise her objections so as to produce a lasting change in policy.

When it comes to justifying civil disobedience, however, moral consistency and the communication of objections is not enough. For an act of civil disobedience to be justified, a person's reasons for action must be potentially persuasive to relevant

others, that is, they must meet not only certain subjective conditions concerning moral consistency and self-respect, but also certain objective conditions concerning their intelligibility to other people. That a law is impious under the disobedient's religion, for example, gives her a subjective intrinsic reason relating to her conscientious religious commitments to communicate her opposition to that law by dissociating herself from it. But, that the law is impious does not itself give her a reason for action that would be potentially persuasive to the various persons who legitimately may call for justification and who may not share her moral outlook. By contrast, that the law seriously or inappropriately harms others' interests or her own interests gives her reasons to communicate her opposition to that law through disobedience, reasons which have the potential at least to persuade the various parties who may call for justification. These reasons can contribute to justification, but reasons related to piety cannot, because only the former can transcend differences in background and outlook. This view of reasons finds some common ground with a Rawlsian framework of public justification. I shall outline briefly Rawls' account of public reason before arguing that values other than justice may play a central role in the justification of civil disobedience.

On Rawls' view, public reason is an ideal of democratic citizenship.[10] It requires that citizens appeal to political conceptions of justice, and to ascertainable evidence and facts open to public view, in order to reach conclusions about what they think are the most reasonable political institutions and policies. Public justification, says Rawls, 'is not simply valid reasoning, but arguments addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept

[10] I explore a variant of Rawls' public reason in Chapter Five where I discuss the importance for civic virtue of having an appropriate civic voice.

to conclusions we think they could also reasonably accept.'[11] Since many moral notions are rooted in comprehensive religious or ethical doctrines about which citizens are likely to disagree, Rawls sought to limit the scope of public reason to moral principles within the domain of justice. On an 'exclusive' interpretation, citizens overstep the boundaries of public reason when they draw upon their comprehensive doctrines of truth or the good to settle fundamental questions about the structure of political life. But, the exclusive interpretation is not, as Rawls states in his later writing, the only or proper way to think about public reason. On a more 'inclusive' interpretation, in a society deeply divided over constitutional essentials and consequently lacking a generally accepted language of public reason, citizens may appeal in public debates to their comprehensive ethical doctrines, which are unlikely ever to form part of public reason, on the understanding that they believe that over time this will further public reason.[12] Rawls later softened this constraint, retaining only the following proviso. Provided that, in due course, citizens present public reasons, given by a reasonable political conception of justice, sufficient to support whatever their comprehensive doctrines were introduced to support, then citizens may appeal to their own convictions in the political debates of a well-ordered society.[13]

The introduction of the proviso is not regarded by all as an improvement. Charles Larmore, for one, questions its necessity: What need would there be, he asks, to abandon the constraints of public reason in a well ordered society?[14] The reason Rawls gives is that, by appealing to their comprehensive views subject to the proviso, citizens show how their convictions entail commitment to a common idea of justice. I

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[11] Rawls (1999), 155.
[12] Larmore (2003), 385-6. Rawls cites the Abolitionists and the members of the civil rights movement like Martin Luther King Jr as citizens who justifiably appealed to elements of their own comprehensive doctrines to bring about change in the political system. See Rawls (1999), 154-5.
[13] See Rawls, John (1996), *Political Liberalism*, Second Edition. New York: Columbia University Press.
[14] Larmore (2003), 386.

approve of the shift in Rawls' position, but for different reasons. Relaxing the constraints on public reason grants the citizens of well-ordered societies the same freedom to draw upon their comprehensive doctrines in public debate that is granted to the citizens of politically divided societies, and thereby affords greater space in public debates to values other than justice. Many of the concerns that underpin Rawls' theory of justice – respect for persons, reciprocity, civility, fairness – could be cashed out in terms of values other than justice. And, an account of public reason that limits its scope to the domain of justice does a disservice to other public values and ideals which are as fundamental as justice is. On a pluralist account, transparency, trust, security, social welfare, individual rights, desert, integrity, stability, democracy and so on both cannot be subsumed under, or ranked according to, some higher principle, and may be drawn upon in public debate, without requiring support from principles of justice, to provide a source of common agreement on fundamental political and moral issues. In Chapter Five, I offer an account of public ideals which recognises the plurality of values that command our attention.

Moreover, limiting the scope of public reason to the domain of justice unduly restricts the kinds of concerns that disobedients legitimately can claim to be justified in defending. In all of his comments about civil disobedience, Rawls maintains that civil disobedience, by definition, appeals to principles and values within a liberal political conception of justice.[15] Even in his later writing where he introduces his proviso, he distinguishes civil disobedience from 'witnessing' which involves expressing *principled* dissent (through disobedience), as a matter of faith, say, against existing institutions, policies, or legislation. On Rawls' view, whereas a witness draws his opposition at least partly from his comprehensive ethical doctrine, a civil

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[15] See Rawls (1999), 156n.

disobedient draws hers from a political conception of justice. Rawls fails to recognise that a person can undertake civilly disobedient action in defence of concerns unrelated to justice. The paradigm case approach is preferable in this respect to Rawls' account, as it does not restrict the kinds of moral and political issues that a person may regard as sufficiently weighty to warrant a communicative breach of law in their defence. A disobedient's principled opposition may find its source in her comprehensive doctrine, and provided that her reasons are potentially persuasive to those who do not share her ethical or religious outlook, her disobedience may be justified. On my view, it is within the scope of public discourse to justify civil disobedience performed in support of values other than justice.

Now, in what circumstances might a person have undefeated reasons to engage in civil disobedience? And, what values might her actions champion? In the remainder of this chapter, I examine those six considerations listed above, from the surrounding political regime to the consequences of the disobedience, which are relevant to the justification of civil disobedience. Since these considerations overlap and influence each other, they must be taken together to determine the extent to which a given act of civil disobedience is justified. Before proceeding, let me clarify what kind of justification is at issue. My comments here focus upon the moral justification of civil disobedience. In Chapter Six, I briefly address the question of legal justification, an issue which naturally bears upon my analysis of how disobedients should be treated by the law. As Gardner notes, legal reasoning, like all practical reasoning, holds that one should act for an undefeated reason. In the case of a breach of law, all reasons are defeated except for those permitted by the law; and therefore, to have legal justification, one must act for one of those permitted reasons.[16] In my

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[16] Gardner (1996), 117.

discussion on punishment, I consider briefly the view that there may be legal justification for civil disobedience.

3. Conscientious Commitments

As noted both above and in Chapters One and Two, subjective intrinsic reasons of self-respect and moral consistency support acting in ways harmonious with one's moral commitments. A sincere conviction that some policy or decision is wrong commits one not only to avoiding that decision and to judging the conduct of people who pursue such decisions as being wrong, but also to communicating this judgment in some situations. When the object of a person's judgment is a law, her conviction gives her subjective intrinsic reasons to dissociate herself from this law and to communicate her dissociation to the government and society. When the object of her judgment is a non-governmental policy or a foreign policy, her conviction gives her reason to communicate her condemnation of it both to its authors and to those who permit it to be applied.

Subjective intrinsic reasons can transcend comprehensive moral outlooks because they are reasons to which we are all sensitive though our views differ as to the content of the commitments that generate these reasons. In short, although we may not necessarily share a disobedient's view, we can appreciate that she finds it difficult to adhere to laws or to refrain from effectively challenging policies which contravene her moral commitments. That said, subjective intrinsic reasons are almost invariably overridden or outweighed by countervailing objective reasons and instrumental reasons against an action.

Returning briefly to the topic of excuse, note that subjective intrinsic reasons not only give one reasons of self-respect to act, but also, more hazardously, give one

reasons to think one has reason to act. In short, they give one reason to think that there are *objective* reasons to act, which may not be the case since one's conviction may be oriented toward poorly founded commitments. In such cases, subjective intrinsic reasons contribute to excusing one's action, not to justifying it. To be justified in her action, a disobedient's conviction must be well-founded, that is, she must have objective intrinsic reasons deriving from a respect for the value of considerations that are objectively valuable. I shall consider two sources of objective reasons: the law or policy she opposes and the political regime in which she acts. These reasons presuppose a certain conception of the responsibilities of a government and the structure of a political community, namely, that citizens may have legitimate expectations of their government, of the laws it enacts, and of the legal framework it develops which accommodates various non-governmental policies and institutions. These expectations are rooted in an understanding of the state and the law, not as a purely coercive system, but as a normative system that makes normative claims about both people's actions and the right of authority to use coercive measures. The law is understood to have a right to enforce its norms, but not to demand compliance with, or to threaten sanctions for disobedience of, any given law. After examining these sources of intrinsic reasons, I shall consider sources of instrumental reasons including the social setting, the strategy employed, and the potential consequences of the action.[17]

4. The Law Opposed

When a law is in some non-trivial sense inappropriate, misguided, or wrong, a person has reasons to communicate her opposition to that law through civil

[17] Although I speak primarily of laws in the next section, my comments apply equally well to non-governmental policies and institutions which the government accepts as lawful.

disobedience. The moral defects of a law can take many forms and can arise at different stages in the life of that law: in the manner of its development and enactment, in its content, in its application, or in its impact when combined with other laws. My comments here concern the reasons for civil disobedience that arise when laws or policies contravene the central values or genuine public ideals of a society such as equality, democracy, justice and so on.

First, a law is defective when it arises from an improper motivation on the part of lawmakers. John Finnis, for one, argue that, if a lawmaker uses her position not to serve the interests of the community, but to further her own goals or to promote the interests of friends and relatives, or to hinder the aims of persons or groups to whom she is hostile, then the law is, with respect to its motivation, unjust.[18] I would maintain, by contrast, that while such a law is procedurally unjust or improper, it is more noteworthy that it also contravenes values and ideals like trust, stability, transparency, integrity, and respect for citizens and for democracy. Note that these defects do not necessarily translate into defects in the content of the law; the law itself may be perfectly reasonable despite the impropriety of its motivation.

Presumably, the justificatory support that this improper motivation gives to civil disobedience is not weighty since, as Finnis points out, most legal systems do not let the exercise of constitutional powers be challenged on the ground that the exercise was improperly motivated. But, this justificatory support is nonetheless real in the context of morality; the potential disobedient need not consider constraints on judicial review when assessing the moral worth of the laws enacted by her government. Her concern is whether the improper motivation of the law generates an undefeated reason to engage in civil disobedience against that law. On its own, it may not, but in

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[18] Finnis, John (1980), *Natural Law and Natural Rights*. Oxford: Clarendon Press, 351-66.

conjunction with other considerations, it may provide justification for civil disobedience.

A second, related defect derives from the manner in which a law is developed and enacted. There may be good reasons, for example, to protest against a law established without the full participation of all adult members of society since such a law contravenes the ideal of democracy.[19] That a particular law was formulated before suffrage extended to women or minorities, for example, offers a disobedient reasons to demand that the law be reconsidered in light of modern values. Once again, this defect need not translate into any moral defect in the content of the law; the law may well be one that a society guaranteeing universal suffrage would enact. The moral defect lies, in this case, in the perpetuation of the past injustice of lawmakers' disregard for the views and interests of a large segment of the adult population. Of course, it is important to choose one's battles. Disobedients cannot oppose every law enacted in this way. The point is simply that the method of enactment offers a legitimate ground for opposing a law or policy.

Third, given that authority and lawmaking are distributed amongst various bodies and departments of a government, there are reasons to object when individuals or departments unwittingly or wittingly stipulate policies that lie outside their jurisdiction. This act of *ultra vires* is, says Finnis, an abuse of power and an injustice to those treated as subject to it.[20] The injustice is 'distributive', he suggests, to the extent that the lawmaker improperly assumes too much power and 'commutative' to the extent that she improperly aims to subject others to her decisions. Again there are values and ideals other than justice such as democracy and integrity which are threatened by such practices. And, once more, the substance of the law or policy need

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[19] C.f. Pogge, Thomas (2004), 'Historical Injustice: The Other Two Domains' in *Justice in Time: Responding to Historical Injustice*. Lukas Meyer (ed.), Baden-Baden: Nomos Verlag.
[20] Finnis (1980), 352.

not be misguided or wrong in any significant respect. Like the other defects noted above, this abuse of power gives a citizen reasons to dissociate herself from that law and from the process that gave rise to it, though how weighty those reason are remains unclear. The strength of reasons depends, in part, upon the implications that this abuse of power has for individuals and the society. As a precedent, for example, it may have significant implications.

Fourth, there are weighty reasons to dissociate oneself from a law that is morally defective in its content. If the substance of a law unfairly discriminates against individuals or groups of people, or if it applies to an area of people's lives in which the law does not belong, or if, when considered in combination with other laws, it treats people wrongly, or if it undermines other important concerns like the environment or animal rights, etc. then there are reasons favouring civil disobedience, particularly direct civil disobedience, against that law.[21] If that law is rooted in a liberal, well-ordered, reasonable regime, then the law contravenes the basic moral principles and values upheld by that society. And, if that law is rooted in an morally objectionable regime, then it and the body of law of which it is a part breach fundamental moral principles to which the civil disobedient affirms her commitment by protesting against such laws (I return to regimes below). Taking the recent and ongoing US action in Iraq as an example, both those harmed and those not harmed by this policy have an exclusionary reason not to respect it. They have both reason to dissociate themselves from it as a breach of international law which has caused massive damage to a people and to relations with a region and reason not to be swayed by reasons to respect this policy such as personal benefit or fear for personal security.

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[21] I consider in the next section whether the justifiability of direct disobedience differs from that of indirect disobedience.

Fifth, a law may be morally defective in its application. If a law is reasonable in its substance, but applied to a community in such a way that it has seriously untoward effects for individuals or for the society as a whole, then it may be seen as misguided or wrong. Similarly, a law which is reasonable and sound when enacted may become inappropriate or wrong when enforced in conjunction with other laws. This generates reasons not only to protest against the particular law, but also to challenge those laws that combine with it in harmful ways.

A law that is not morally defective in these or other non-trivial respects may be regarded as reasonable and sound. As we saw in the previous chapter, often such laws align with fundamental moral principles, and thus give citizens various reasons (unrelated to political obligation) to adhere to those laws. Although these reasons weigh heavily against opposing such laws (through civil disobedience or otherwise), their force is not absolute. If a reasonable law is rooted in an objectionable regime, for example, the breach of that law to protest either other laws or the regime as a whole (i.e., indirect civil disobedience), may well be justified. It is more difficult to make a case for civil disobedience against a reasonable law when that law is rooted in a reasonable and well-ordered political regime. But, even here, the force of the reasons against civil disobedience is not absolute. One could argue that, even in a reasonable society, there is value in communicating to the government and the public through civil disobedience. Having dispelled in Chapter Two qualms about the moral presumption against disobedience of the law, we can see the value in communicating dissent through civil disobedience: such communicative and conscientious breaches of law can prolong or reinvigorate democratic debate and help to ensure that the law does not become an uncomprehended prejudice upheld by a docile and unreflective majority. Dissent through civil disobedience provides a means of entering into a moral

dialogue with lawmakers either to bring about a better legal system or to ensure that the present system remains vital and reflective. As I explicate in Chapter Four, forcing lawmakers to account for their decisions (no matter how reasonable) is beneficial for the common good, and this generates a reason to undertake civil disobedience.

That the disobedience would be undertaken for this reason is important for justification. An action can only gain justificatory support from a given reason when the action is actually done for that reason. Disobedience that promotes governmental legitimacy and accountability, but aims only to serve the personal interests of disobedients, may have little or no justification. In such cases, the disobedience, at best, may be excused. The above comments turn on the understanding that the disobedience in question meets certain conditions regarding its character and consequences (which I take up in Sections 7 and 8). Having considered objective reasons relating to the law opposed for engaging in civil disobedience, we may now place that law and the disobedience against it in the context of the surrounding political regime.

5. Political Regime

When a regime is morally objectionable in some significant respect (e.g. it is systematically unjust or repressive or illiberal, etc.), its moral defectiveness generates a reason, perhaps even a protected reason, to dissociate oneself from the policies of that regime and its government. The protected reason might be described as follows: the fact that the regime is grossly unjust or illiberal, say, is both a reason for a person to dissociate herself from it and to communicate her dissociation and disapprobation through civil disobedience and a reason not to be swayed by reasons to adhere to the laws of this regime (such as her unwillingness to expose herself to censure or

punishment). The reasons a disobedient has for dissociating herself can be characterised more specifically in terms of moral commitments. To communicate solidarity with those whom the regime harms, to affirm an adherence to certain values and principles and thereby to retain her self-respect, and to serve the general community and society of which she is a member, are each considerations that fill out the public reasons a person has to dissociate herself through civil disobedience from an opprobrious government and its policies.

Some argue that, in such a case, there are no reasons that speak against civil disobedience, and a person is *morally right* to civilly disobey the laws of the regime. This is the view espoused by David Lyons who claims that the Jim Crow laws, British colonial rule in India, and chattel slavery in antebellum America offer three refutations of the notion that civil disobedience requires moral justification in morally objectionable regimes.[22] According to Lyons, there can be no moral presumption in favour of obedience to the law in such regimes, and therefore no moral justification is required for civil disobedience. 'Insofar as civil disobedience theory assumes that political resistance requires moral justification even in settings that are morally comparable to Jim Crow,' says Lyons, 'it is premised on serious moral error.'[23]

But, Lyons leaps too far with this claim. The presence of an objectionable regime is insufficient to remove any call for justification for civil disobedience. The most that Lyons should claim is that, given there is no moral presumption in favour of general obedience to law in such regimes (or indeed in any regime as we saw in Chapter Two),[24] there can be no call for justification of civil disobedience *on those*

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[22] Lyons, David (1998), 'Moral Judgment, Historical Reality, and Civil Disobedience' in *Philosophy and Public Affairs* Vol. 27, No. 1, 38-9.
[23] Lyons (1998), 39.
[24] I understand Lyons's idea of 'moral presumption' in favour of obedience to refer to the view that obedience to the law requires no moral justification, the view upheld by some defenders of political obligation. In Chapter Two, I rebutted the claim that adherence to the law requires no moral

grounds. But, a legitimate call for justification could be made for a variety of other reasons. Although there is no moral presumption in favour of *general* obedience, it is reasonable to assume that a morally objectionable regime will possess some laws that align with fundamental values and principles which one has good reason to respect. The intrinsic and instrumental reasons discussed in the previous chapter highlight possible grounds for a call for justification of civil disobedience in these circumstances. Justification is called for, irrespective of the surrounding political regime, when civil disobedience takes a form that violates the basic rights of other people.[25] And, justification is called for when, regardless of its form, civil disobedience involves greater injustice or oppression than that perpetuated by the political regime. That these calls for justification may well be met by the disobedient is no reason to deny their presence. Therefore, although the persistence of an objectionable regime provides at least a partially justificatory explanation for civil disobedience, it does not eliminate the requirement for such an explanation to be given. It does not make civil disobedience right *tout court*. Whether an explanation is required depends upon the combination of the character, circumstances, and consequences of the civilly disobedient action.

And yet, absent constraints on its character and consequences, civil disobedience undertaken in a morally objectionable regime for the reason that the regime is illiberal or repressive or unjust may be an instance of the complicated case

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justification. Adherence to the law must be judged by the same considerations as disobedience of the law, that is, by its character and consequences.

[25] Although Lyons declares that he is not concerned with the definition of *civil disobedience*, he does understand *civil disobedience* to refer broadly to principled non-violent disobedience to law. Initially, it might seem that this neutralises the challenge that civil disobedience calls for justification when it takes certain forms; since civil disobedience is non-violent, on Lyons view, it does not take forms that violate people's basic rights, and therefore, we cannot argue that there is a call for justification of civil disobedience on such grounds even in morally objectionable regimes. But, actions need not be violent to breach people's basic rights. Even were we to accept Lyons's conception of civil disobedience as non-violent, he would still have to address cases where civil disobedience takes forms that breach people's basic rights and thereby requires justification.

noted in Chapter Two. The justification which this reason for action gives to a disobedient is such that her action, assuming it meets a certain moral standard, ceases to be a violation of a requirement. And therefore, although the call for justification is not removed, when that call is met in such circumstances, the civilly disobedient action is not wrong. More concretely, civil disobedience in a reprehensible regime may be seen as analogous to self-defence in that disobedients undertake to aid either a particular constituency of which they are members or other constituencies in society of which they are not members from the tyranny of the state.

On a related note, let me consider a point pertaining to both the circumstances and the consequences of civil disobedience which focuses on the receptiveness of disobedients' primary 'hearer' (in this case, the government of a bad regime). As noted in Chapter One, communication depends as much upon the hearer as it does upon the speaker: successful communication requires that the hearer be receptive and attentive to what is being communicated. From this it may seem that, for communication through civil disobedience to be justified, a person must address hearers who have the potential to be receptive. A disobedient cannot have an undefeated reason for taking a communicative action like civil disobedience (or any form of protest), so the argument goes, when she does it to engage with an authority that will neither listen nor respond to her communication. She may have reasons to communicate to other hearers – fellow dissenters, the international community, those harmed by governmental or non-governmental policies – but she cannot have an undefeated reason, on this view, to communicate to her primary hearer, the policymakers, when that hearer will not attend to her communication.

In reply, first, as time proves, often civilly disobedient communication does reach its primary intended hearer. It may take many years, and it may occur through

indirect channels, but, as the historical examples noted by Lyons highlight, civil disobedience can be extremely successful in reaching the government of an unjust or illiberal regime. The British no longer rule India, and African Americans no longer struggle for legal recognition of their basic rights. Second, civil disobedience seems most justifiable in societies whose leaders and prominent members are inattentive and unresponsive to people's needs. In a reasonable and well-ordered society, rare as that society might be, citizens have available to them alternative avenues of communication and political participation, avenues that, presumably, would be effective means to produce reform. However, the liberality of a regime does not necessarily generate reasons against using civil disobedience. Civil disobedience can contribute to the common good even in well-functioning, liberal regimes by forcing champions of the dominant opinion to defend their views. However, it is only when we have considered the force of all relevant considerations for and against civil disobedience that we can judge whether a given act of civil disobedience is justified, unjustified, wrong, or right. The justificatory support that the surrounding regime can offer for civil disobedience undertaken for that reason does not necessarily outweigh other factors that may speak against the civilly disobedient action. The character and consequences of an act of civil disobedience must be brought into the calculus before we can argue persuasively for its justification (or for its moral rightness). Before turning to those features, I shall consider another aspect of disobedients' circumstances.

6. Social Setting

The actions taken by other political actors, particularly other dissenters, give a disobedient reason to act in certain ways and not others. If her dissent will go

unheeded or will be misinterpreted because of other forms of protest that occur simultaneously, or if her disobedience will undermine the efforts of other activists with whom she feels kinship, or if the combined efforts of all dissidents in the community to achieve their various ends will generate long lasting hostility toward dissent on the part of authorities and the public, then a person has good reasons, maybe even exclusionary reasons, either not to engage in civil disobedience at this time, or not to choose particular forms of disobedience. In the case where it is impossible to communicate successfully with the government and the public through disobedience, she has a reason not to try to persuade the government and society of the rightness of her position. One could go further and say that she has no reason to try to do this. She still has every reason to persuade the government and society, but no (derivative) reason *to try* to persuade the government and society at this time. She may disobey for the reason that this affirms her own moral commitments, or that this communicates her solidarity with the victims of the law (if they exist), but not for the reason of trying to persuade policymakers to change the law or policy in question. While I think this claim has some plausibility in this case, I would question the general claim that one has no reason to try when it is impossible for one to succeed.[26] I defend my view on this point in Section 8.

Conversely, when a person's communication through civil disobedience will be better felt or better understood in the present social environment than it would be at another time given other activists' dissent or other political actors' non-dissenting actions, then she has good reasons to engage in particular kinds of civil disobedience at this time. In other words, when circumstances are such that the actions of others

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[26] We may distinguish between cases where an approximation of the impossible has value and cases where it does not.

complement her communicative aims, then she has reasons to undertake civil disobedience.

A person also has reasons to bring about the kind of social environment conducive to the communication of her position. Specifically, she has reason to persuade other disobedients to act in concert with her since, as Rawls notes, disobedients can undermine each other's efforts by engaging in distinct pursuits simultaneously.[27] The ideal solution, says Rawls, is a cooperative political alliance amongst minorities to regulate the overall level of dissent. When such coordination is achieved, the circumstances of the social setting should be such that they offer the disobedient sensitive to their implications justificatory support for her civil disobedience. (I return to this point and note some difficulties with it in Chapter Four.)

Civil disobedience, as a communicative enterprise that promotes moral dialogue with lawmakers, only finds complete (or even partial) justification when its means and mode of communication and its effects reach a certain moral standard. It is to these features that I now turn.

7. Means and Mode of Communication

Having noted various features that generate reasons for civil disobedience, I now consider which specific acts of civil disobedience gain justificatory support from these reasons. The particular action that a person performs and the manner in which she performs it matter greatly for questions of justification since, as Gardner and Macklem note,

> Sometimes people perform actions for reasons which do not in fact support their performing those actions but which support their performing other actions instead.

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[27] Rawls (1971), 374.

> They have those reasons, for it would be logically possible for them to do, for those reasons, as those reasons would have them do. Unfortunately, what they actually do for those reasons is something else.[28]

Concerning civil disobedience, a person may have reasons for engaging in one form of disobedience, but choose to engage in another form that is not supported by these reasons. For example, she may have an undefeated reason to participate in a road block because this action is well suited to her concerns and is one that her society and government understand and respond well to or because this action has a public impact that does not harm the interests of others; but, she has no undefeated reason, say, to trespass on government property or to engage in strategic violence. In taking the latter actions, she is guilty of a certain error of judgment about which actions are supported by reasons that admittedly apply. Given her error, the best she could claim is that her conduct is excused, as she had reason to believe that she had reason to undertake that particular form of civil disobedience.

When, by contrast, a person's civilly disobedient action is supported by undefeated reasons that apply to her situation then her choice of action is justified. The justification for her action stems from its appropriateness as the action to take. Its appropriateness is structured in part by the various considerations noted earlier such as the reasonableness or unreasonableness of the political regime, the tone of the social environment, the actions taken by other political participants, the nature of the law at issue. All of these factors bear on the appropriateness of a given action and the manner in which it is performed, and thus determine to what extent the reasons that support it provide a justification.

The civil disobedient also must consider the appropriateness of directing those strategies either at the law she opposes or at another law which she does not oppose. On some occasions, direct civil disobedience may be justified where indirect civil

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[28] Gardner and Macklem (2002), 458.

disobedience is not or vice versa. In the case of indirect civil disobedience, other things being equal, disobedients have no objective reasons to breach the law that they breach, and therefore the justification for their disobedience must turn on the subjective intrinsic reasons to make their protest known, the objective reasons to protest in some way against an objectionable policy, and the instrumental reasons favouring indirect action in this case over direct action. For both indirect and direct action, the political environment, the social setting, and the law under consideration must be taken into account when assessing the reasons that a disobedient has for pursing one course of action over another. In cases where direct disobedience will involve a serious breach of fundamental moral principles, for example, indirect disobedience might offer a more justifiable option. But, in cases where indirect civil disobedience will be either misconstrued or viewed in isolation from the law opposed, then direct disobedience, assuming it meets certain moral requirements (which are determined by the content of the law opposed), may have greater justification.

The appropriateness of a disobedient action also depends upon the mode or manner in which it is performed. One might argue that, to avoid undermining her cause, a disobedient must use means and modes of communication that neither are offensive to the government and the majority nor warrant censure on the part of the government and the majority. To do otherwise, seemingly would prevent her from engaging successfully in a moral dialogue with government and the public. Her reasons for action, on this view, would not be potentially persuasive to groups and individuals who would rightly be offended by her manner of communication. An example of an offensive mode of communication might be to misrepresent

antipathetic opinions, or to suppress certain facts, or to distort features of the debate.[29] When a dissident does this, she plays into the hands of dominant opinion by undermining her own credibility. Thus the claim is that, to gain some credence, she should represent herself and her opponents accurately and charitably. Another example of an offensive mode of communication might be to use invective, sarcasm, intemperance, and violence. Since such weapons provide government and the public with an excuse to ignore or to censure a dissident, she has good reason to avoid these modes of communication.

Now, this may seem to be the view I developed in Chapter One, where I argued that, to be sincere and serious in her aim to bring about a lasting change in policy, a disobedient must recognise that certain modes of communication would hinder her effort to engage policymakers in a moral dialogue, and therefore must be avoided. The modes of communication I have noted here, however, need not be seen in this light since such methods sometimes will serve rather than hinder a disobedient's sincerely held objectives. Sophistry, distortion, and invective do not always work against a civil disobedient, nor do they always cause harm to individuals or the society. And even coercion, as I have argued, may offer a legitimate intermediate way of proceeding: sometimes the only way for a disobedient to get a minority view on the table is through the use of limited coercion. Concerning sophistry and invective, sometimes the only way to make a view heard is to allow, or even to invite, society to ridicule and sensationalise it as intemperate and irrational. As noted in Chapter One, controllers of mainstream media give defenders of unpopular views few opportunities to support their positions unless they resort modes of communication with sensational news value. Concerning violence, as noted in

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[29] John Stuart Mill considers the damaging effects of this mode of communication in *On Liberty* (1999), 98.

Chapters One and Two, sometimes the only way to preserve and to protect the rights and interests of individuals and the collective is to use violence against the coercive measures of the state. And so, we see that a disobedient may have undefeated reasons to use modes of communication seemingly at odds with the social and political climate.

In the earlier discussion in Chapter Two of violence and coercion, I defended the claim that violence and intermediate coercion *per se* do not support the view that civil disobedience as a practice is wrong. There are, however, cases in which the use of violence or intermediate coercion would be wrong, such as when those actions breach the rights of others or have seriously untoward consequences for the society. Then we must consider whether these modes of communication are justified. Once again, to judge the extent to which a violent action, or any action, is justified, requires assessment of the relevant factors, and thus forces us to proceed on a case by case basis. One cannot consider acts of civil disobedience without reference to certain aims and purposes; the key aims, as we have seen, fall within a framework of conscientious communication which constrains modes of action. In many cases, particularly paradigm cases of civil disobedience which exemplify conscientiousness and communication, the circumstances, character, and consequences of strategic violent civil disobedience will be such that, even if it be wrong, it will have some justification.

These comments speak to the justifiability of paradigm cases of civil disobedience. But, what can we say about the justifiability of non-paradigm cases? A non-paradigm case of civil disobedience is a breach of law that does not exemplify to an appropriate degree some or all of the key features of civil disobedience. Such an action, I believe, may nonetheless be justified, though the degree to which it is

justified will depend, in part, on how it diverges from paradigm cases. In situations, for example, where an act of civil disobedience does not exemplify the feature of communication, it actually may have greater justification than a paradigm case does. As noted earlier, sometimes disobedients and other dissenters undermine each others' efforts in pursuing divergent communicative projects simultaneously. Consequently, much can be said in these situations in favour of the disobedient who dissociates herself from a law she opposes, but does not muddy the waters by communicating her objections at this time. In situations, by contrast, where an act of civil disobedience lacks the feature of conscientiousness, this action will have little or no justification. Conscientiousness is intimately linked with sincerity, moral consistency and self-respect; the latter require that a person recognise the subjective intrinsic reasons she has relating to her self-respect to act in ways that accord with her moral commitments and values. An act of disobedience that lacks moral consistency and sincerity is one that is not taken for the reasons supporting that action. And, since being justified is to act for the undefeated reasons favouring that action, such non-paradigmatic civil disobedience lacks justification.

Before turning to the consequences of civil disobedience, I wish to return to the issue of over-intellectualisation noted briefly in Chapter One. I argued there that my view of civil disobedience does not fall prey to the charge of over-intellectualisation, as I endorse a broad understanding of communication and allow for spontaneous disobedient action. However, one might argue that I over-intellectualise the practice of civil disobedience by focusing on the reasons that a disobedient has for taking certain actions and avoiding others. In reply, a disobedient need not deliberate to have reasons, and to act in accordance with these reasons.

Deliberating about what to do, observe Gardner and Macklem, is itself something one does:

> It is an action (or activity) preliminary to other actions (or activities). As such there are ordinary reasons in favour of and against engaging in it. It follows that deliberating about what to do is not always the best way to do as the reasons that figure in one's deliberation would have one do, for that equation would eliminate the reasons for and against deliberation itself.[30]

In a similar vein, Bernard Williams points out that, sometimes an agent who deliberates may be unable to do what she would have been able to do had she not deliberated.[31] Had the tightrope walker not reflected upon the height of the wire, for example, she might have been able to complete her routine flawlessly, but since she did deliberate about the danger, she consequently is unable to perform at all. This reasoning may be applied to civil disobedience. Although a disobedient who is justified acts for undefeated reasons, she need not deliberate about those reasons in order to act for them. And, in some cases, it is in her interests not to deliberate. Since her actions will expose her to the risks of censure and punishment, she may do better by her reasons for civil disobedience if she does not deliberate about her proposed action. Moreover, acting spontaneously, like acting covertly, may serve a disobedient's communicative aims since not deliberating about what action to take, and so not declaring in advance what that action will be, denies authorities and political opponents the opportunity to undermine her efforts to communicate to policymakers and the public. Therefore, disobedient actions supported by undefeated reasons need not be undertaken as a result of deliberation.

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[30] Gardner and Macklem (2002), 461.
[31] Williams, Bernard (1995), 'Moral Incapacity' in *Making Sense of Humanity and Other Philosophical Papers:" 1982-1993*. Cambridge: Cambridge University Press, 52.

8. Consequences

It is a matter of controversy whether consequences can offer justificatory support for actions and, more generally, whether consequences can be reasons for action. In *The Morality of Freedom*, Raz offers the example of taking an injured person to the hospital. The reason for bringing injured people to a hospital, Raz says, is (barring special circumstances) an outcome reason. It is a reason for action based on the value of the outcome of that action. 'Acting in this way will secure their health which, since it is a valued outcome, is also a reason for bringing it about.'[32] Raz contrasts outcome reasons with action reasons. The latter are based upon the value of a particular agent (or class of agents) performing a certain action (including the bringing about by those agents of a certain outcome). Parents, he says, have both an outcome reason and an action reason to show concern for their children's welfare. The outcome reason is satisfied when the parents employ teachers and child minders; the action reason is satisfied only if parents personally involve themselves in their children's affairs. I find the notion of an *outcome reason* troubling. Since a reason is a fact that speaks in favour of an action, an outcome reason would be a fact – the outcome – which, given its value, speaks in favour of the action that produced it. There are two difficulties here. The first is that outcomes or consequences result only after the action occurs, which means they cannot speak in favour of the action that produced them. They cannot be said to speak in favour of anything until they are brought about. And, even if they could, there is a second difficulty, namely, that no person could act for such reasons. A person's action is justified when she performs it for an undefeated reason. In order to act for an undefeated reason (or for any reason),

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[32] Raz, Joseph (1986), *The Morality of Freedom*. Oxford: Clarendon Press, 145. See Raz, Joseph (2005), 'The Myth of Instrumental Rationality' in *Journal of Ethics and Social Philosophy*, Vol. 1, No. 1, 2-28, for a discussion of facilitative reasons, which I take to be Raz's refined conception of outcome reasons. *Facilitative reasons* are reasons to facilitate the realisation of anything of value whose realisation is not deeply impossible.

a person must have that reason in her mind as her reason when she acts. She cannot act *for* a reason of which she is unaware. Since the consequences of her action cannot be known to the agent when she acts, she cannot act for such reasons. To grant justificatory force to consequences, therefore, would be to take into account reasons for action of which the agent is unaware at the time that she acts.

So, the individual who takes an injured person to the hospital cannot know when she acts that the valued outcome of securing the other's health will result. She can know only that most probably it will have this effect since doctors tend to heal sick and injured people. Similarly, the parent cannot know when she employs a teacher for her children that this will serve their welfare. She can only know that most probably it will since trained teachers tend to promote the welfare of their charges. These probabilities suggest the way in which outcomes relate to reasons: probable consequences, not actual consequences, are reasons for action. We may call such reasons probable-outcome reasons. Such reasons may be contrasted with what John Gardner calls 'reasons to try', which are outcome reasons and thus face the epistemic problem noted above. On Gardner's view, we have no (derivative) reason to try where it is impossible for us to succeed. I shall suggest that this view requires some refinement since it disregards both cases where success and failure form a continuum rather than a binary distinction and cases where there is value in approximating success. I shall then consider to what extent probable-outcome reasons offer justificatory support for actions.

Gardner distinguishes between a person's reasons to try and her reasons to succeed. A reason to try, for example, to save a drowning person by jumping in the sea to rescue her derives from a reason to save her when trying to save her will contribute to saving her. This claim turns on what Anthony Kenny has described as

the logic of satisfactoriness: a person has reason to do what is sufficient to achieve what she has reason to achieve. There are at least two contexts, Gardner argues, in which, one has no reason to try that derives from a reason to succeed even though one has reason to succeed. The first is when succeeding would be impossible; the second (which I noted above in relation to the tightrope walker and which I consider briefly in Chapter Five) is when one would better act as one's reasons would have one act if one does not try to do as those reasons would have one do. Focusing on the former, as indicated earlier, sometimes a disobedient has every reason to persuade authorities and society of her view, but no derivative reason *to try* to persuade them through her disobedience since, in the present political climate, her actions will hinder rather than further her aim to persuade. Conversely, in some circumstances, a disobedient may have reason to try to do something, but no reason to succeed. If, for example, her political efforts will be blocked by another group of dissenters, whose cause she does not support, if she does not contribute to their movement, then she may have reason to try to aid their objectives, but no reason to succeed. And, while one might think that she has reasons to *appear* to try, not reasons to try, to aid the other group, the risk that her duplicity would be detected and undermine her own objectives is sufficient to give her genuine reasons to try. These cases differ, however, from those in which one has a reason to try as well as a reason to succeed even though one will not succeed. In brief, we can distinguish between cases where approximating the impossible has value and cases where it does not. In some cases, such as persuading society to change its practices or saving someone's life, 'almost' carries no weight. There is no value to one's trying since one does not succeed. But in other cases where striving for an impossible goal, a genuine ideal, means one will better approximate that ideal than

one would have done had one aimed at a lesser, realisable goal, then 'almost' has great value.

Since a genuine ideal offers a truly admirable end to pursue, the value of that end gives one reason to realise it. And when that end is for whatever reason unrealisable, its value gives one reason to approximate it as closely as possible. And, often one will realise a better approximation if one tries to achieve the ideal itself. As C.A.J. Coady observes, 'it seems to be a psychological fact about people that they can reach remarkably high levels of performance by aiming at a perfection or advanced state that they know or believe to be beyond them.'[33] Their action is marked by the hope that they might surprise themselves and surpass their apparent limitations. Therefore, one has reason to try to realise a genuine ideal although one will not succeed. In the context of civil disobedience, one has reason to strive for genuine ideals of democracy, justice, equality and so on through political engagement even though in most political climates one will not fully succeed. Having such goals puts a different spin on such actions as trying without success to persuade society to change its policies. Although there may be no reason to facilitate the particular objective of persuading society at present (since one will not succeed), there is reason to try to further the ideals which such actions support.

Returning to probable-outcome reasons, if a person's action is likely to produce a good outcome, but in fact does not produce that outcome, her action is wrong from one perspective, but justified if the probability of good consequences generated an undefeated reason to act. It may simply be moral bad luck that things did not work out in the way supported by the probability. If her action is likely to produce bad consequences, but in fact produces good consequences, we might say that, from a

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[33] Coady, C. A. J. (2005), 'Concerning Ideals', Uehiro Lectures in Practical Ethics, St Cross College, Oxford University, May 2005. (Forthcoming)

particular point of view, her action was morally right. The actual consequences of her action speak to the rightness or wrongness of that action, and the probable consequences of her action speak to its justification. On this reasoning, it is inaccurate to say something like 'the ends justify the means' or 'an action was *justified* because it had good consequences'. That it had good consequences makes it right, from a certain point of view, irrespective of the reasons the agent had for doing it. But, that it had good consequences does not bear on its justification; the justification is determined by the reasons for which the agent acted.

To this account of the justificatory force of probable consequences, three objections might be raised. First, the severity of the probable negative consequences of civil disobedience is so great that, no matter how unlikely their occurrence, they offer strong, if not exclusionary reasons, against performing disobedient action. Second, the most we can say is that an agent has an undefeated reason to think that a good outcome will result from her action; in other words, the most she can derive from probabilities is an excusatory explanation for her action. Third, probabilities are not facts about the world, and since reasons are facts, probable consequences are not reasons, and thus cannot contribute to the justification of civil disobedience (or any other action).

In response to the first objection, we have seen that often the severity of whatever negative consequences might arise from civil disobedience, particularly paradigm cases of civil disobedience, is not great. And, in those cases where the negative consequences would be egregious, and as such perhaps would generate protected reasons against civil disobedience, we must assess the force of those protected reasons, and determine what reasons we could offer in defence of civil disobedience. Even so, those who dissent recognise that civil disobedience is not

always viable. If disobedience will cause great harm by prompting, for example, the dissolution of the present regime in favour of something far worse, then it may not be appropriate to use civil disobedience. As Andrew Sabl observes:

> The problem here, and it is indeed a real problem, involves not the balancing of duties but the assessment of social risks. For the practice of civil disobedience often requires that we achieve justice in one area while placing in jeopardy, or at least temporarily ignoring, laws and social practices that undeniably ensure justice in others.[34]

The benefits of civil disobedience depend in part upon the initial marginal status of the cause. Support for a dissenting position often does (and should) grow slowly, thereby allowing society to adjust to a new outlook without disintegrating into warring factions. Reasons for civil disobedience must be weighed against the potential costs of such action, and sometimes disobedience must be avoided because there is a possibility that seriously untoward consequences may result from proceeding too swiftly.

In reply to the second objection, if probabilities can offer reasons for a person to think that she has reason to act, then they can also offer her reasons to act. An agent can claim justificatory support from probable consequences if we accept that probabilities are facts about the world. This is the third objection, that probabilities are not facts, to which we may reply as follows. That a certain outcome is likely to result from a given action does have a basis in fact. We have, as Mill observes, the whole past duration of the human species to draw upon for examples; throughout its history, humanity has been learning by experience the tendencies of actions and by this time must have acquired reliable beliefs as to the effects of different actions.[35] Probable consequences find their basis in facts about the world, and as such are reasons for action which can contribute to the justification of civil disobedience. Probable

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[34] Sabl, Andrew (2001), 'Looking Forward to Justice: Rawlsian Civil Disobedience and its Non-Rawlsian Lessons' in *The Journal of Political Philosophy*. Vol. 9, No. 3, 313.
[35] Mill, John Stuart (1991), 'Utilitarianism' in *On Liberty and Other Essays*. Oxford World Classics. Oxford: Oxford University Press. 155-6.

consequences must be considered in combination with those features noted above when determining the extent to which an act of civil disobedience is justified.

9. Summary

Some may claim that there are other factors relevant to the task of justifying civil disobedience that I have not discussed in this chapter such as a disobedient's willingness or unwillingness to accept punishment for her conduct or her decision whether to use civil disobedience only as a last resort. I would deny that these considerations bear on the justifiability of civil disobedience. I shall take up the issue of acting as a last resort in the next chapter. Looking briefly at punishment, which I mentioned in Chapter One, a disobedient's willingness to accept punishment is not a reason, in itself, to engage in civil disobedience. And, although her willingness may reflect a certain fidelity to the law, it need not do so. Often a disobedient's reasons for accepting punishment are strategic. As King says, 'If you confront a man who has been cruelly misusing you, and say "Punish me, if you will; I do not deserve it, but I will accept it, so that the world will know I am right and you are wrong," then you wield a powerful and just weapon.'[36] And, even if the disobedient's reasons for accepting punishment do include a fidelity to law, this fidelity is immaterial to the moral status of civil disobedience given that, at best, we have ordinary reasons to adhere to the law.

This discussion has highlighted numerous factors relevant to the justification of civil disobedience. My claim has been that these factors must be taken together in order to assess the justifiability of an act of civil disobedience. When a disobedient's action is sensitive to the social climate, performed through means and modes of

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[36] Washington, J. M. (ed.) (1991), *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* San Francisco: Harper Collins, 348.

communication appropriate to the context, and has good probable consequences, then, if that action is somehow morally problematic, it is nonetheless justified. This is no less true when the disobedient action involves strategic violence or intermediary coercion. A disobedient's use of violence may be wrong to the extent that it harms the interests of others, for example, and yet, it may be justified to the extent that it is appropriate to the context, has good probable consequences, and is undertaken in a manner sensitive to the current political environment. The reasons supporting an act of civil disobedience constitute a full justification when they collectively offer an explanation for that action that persons who may legitimately demand justification could, despite divergent outlooks and backgrounds, find intelligible and persuasive.

Now why is civil disobedience not necessarily *right* when it has these features? In Chapter Two, we saw that it is rare that an action is right all things considered. For an action to be right there must be no protected reasons against performing that action, and given the variety of first-order principles that bear on human choice and agency, protected reasons almost invariably surface against a morally worthy project. I suggested, however, that in circumstances such as those generated by a morally objectionable regime, civil disobedience that is appropriate given the social setting, the law opposed, and the probable consequences may be right when done for the undefeated reason that the regime is morally opprobrious. In taking appropriate actions for this reason, a disobedient no longer violates a requirement. I also suggested that, irrespective of the political regime, there may be cases of civil disobedience for which it is difficult to distinguish a denial of wrongdoing from an assertion of justification. An act of civil disobedience that seems negligent toward some personal or public duty is not wrong when it is shown to preserve a more stringent duty, perhaps the duty not to respect a law (even in a fairly reasonable

regime) that grossly mistreats some persons. Assuming this action takes an appropriate form, is sensitive to the social climate, and has good probable consequences, it is not wrong given the undefeated reason for which it is taken.

To conclude, as a complex, multifarious practice undertaken in a host of different contexts, civil disobedience can be analysed only on a case by case basis taking into account the competing claims made by the various considerations noted here.[37] Although those claims, in some circumstances, render civil disobedience wrong, and perhaps unjustified, in many cases these considerations identify weighty reasons for engaging in civil disobedience, be it paradigmatic or non-paradigmatic. When those reasons are undefeated the civil disobedience is justified.

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[37] I undertake a modest 'case-by-case' analysis in Chapter Five.

4. Justification and Rights

The idea of a right to civil disobedience is often discussed in relation to the justification of civil disobedience, just addressed in Chapter Three. There are two prevailing positions on these related issues, both of which will be challenged in this chapter. John Rawls, on the one hand, identifies three conditions for justified civil disobedience (it is undertaken 1) as a last resort 2) in defence of justice and 3) in coordination with other minority groups) and argues that, when these conditions are met, one may suppose that, even in a just or nearly just society, a person has a right to civil disobedience.[1] Joseph Raz, on the other hand, rejects both that a justification entails a right to act and that a right to civil disobedience exists in all societies. Raz argues that, while civil disobedience is often justified and even obligatory, it is not a general moral right.[2] Only in an illiberal regime, says Raz, is there a right to civil disobedience and this right is reserved for those citizens whose rights to political participation are violated. Such citizens have a right to reclaim that portion of their political participation rights which are not recognised in law. In a liberal regime, there is no right to civil disobedience, Raz maintains, since, by hypothesis, the law adequately protects citizens' rights to political participation. While I agree with Raz that questions of justification and questions of rights are distinct, I think that more can be said in defence of a right to civil disobedience than either Raz or Rawls allows. Whereas I shall engage with Raz on the nature of the grounds for this right, I shall engage primarily with Rawls on the nature of its limits. My task of defending a general right to civil disobedience is made more difficult by the fact that, when it

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[1] Rawls, John (1971), *A Theory of Justice*. Cambridge, Mass: Harvard University Press, 375.
[2] Raz, Joseph (1979), *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 262-275.

comes to a right to act, I remain neutral about disobedients' objectives and motives: I maintain that *ceteris paribus* space must be made for the bigot under the umbrella of a right to civil disobedience.

After addressing some conceptual issues in Section 1, I explore in Section 2 the grounds for a right to civil disobedience. An individual's interests both in acting in accordance with her conscience and in participating in the political realm generate rights which are central to her comprehensive right to be treated as a full member of her society. These rights, individually and collectively, incorporate a right to civil disobedience. I then examine Raz's notion of a *double harmony* between right-holders' interests and others' interests to determine more fully the weight and significance of a right to civil disobedience. In Section 3, I both explicate the proper limits of this right (partly through a critique of Rawls' three conditions) and link this discussion of rights to the discussion in Chapter Three of justification.

1. Conceptual Issues

Rights are commonly understood either as entitlements to things or as protected options for action. Whereas the former provide the right-holder with positive benefits in the form of services and negative benefits in the form of non-injuries, the latter outline and protect for the right-holder a sphere of autonomy and liberty of action with which interference by others is restricted. Using Hohfeld's analysis, John Mackie describes rights of conduct as the conjunction of an agent's claim-right against others giving others a duty of non-interference, and her liberty-right to act in the absence of a duty not to act.[3] The latter component means that the action is one that the agent is not morally required not to perform. Thus, on Mackie's

[3] Mackie, John (1978) 'Can There Be a Right-based Moral Theory?' in *Midwest Studies in Philosophy*, Vol. 3, 350-359. Cited in Waldron, Jeremy (1981), 'A Right to do Wrong' in *Ethics*, Vol. 92, No. 1, 5-35.

view, there can be no right to perform a morally wrong action since wrong actions are acts we are morally required not to perform. As Jeremy Waldron points out, however, Hohfeldian liberty-rights or privileges were designed to cope with the analysis of normative systems in which duties perfectly correlate with claim-rights as they do (for the most part) in contract, tort, and property law. In such systems, one person's privilege just is another person's lack of a claim-right with respect to that action. The realm of morality, by contrast, is not so tidy. There are some actions, says Waldron, 'that are impermissible, some actions that we have a duty not to do, because they are infringements of the rights of others. But actions may also be morally impermissible or more generally subject to moral criticism for other and more subtle reasons.'[4] An action may be vicious, cowardly, inconsiderate, destructive, wasteful, etc., and, contra Mackie, there is much more to the question of whether one can have a moral right to act wrongly, says Waldron, than simply whether moral rights can conflict.

The contrast between Mackie and Waldron highlights several points. First, having a moral right does not mean one's action is immune to criticism. Whether one's action is all things considered morally right, wrong, justified or unjustified will depend upon the nature of any requirement or ought violated and the reasons one had for violating it. Relatedly, moral rights differ from legal rights, not on grounds of enforceability (a factor commonly cited to distinguish the two, which ignores that some legal rights are not enforced and many moral rights are enforced through convention and social censure), but on grounds of institutional recognition and justness of claim. Moral rights lack institutional recognition but identify a strong moral reason to protect certain interests (I return to this in a moment). Legal rights, by contrast, possess institutional recognition but do not necessarily protect important

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[4] Waldron (1981), 24.

interests. The law can acknowledge the force of moral rights through its response to those who exercise them. While I shall reserve my comments on how the law should respond to civil disobedience for Chapter Six, let me note that rule departure (discussed briefly in Chapter One) offers one way, and sometimes the only way, for judges, law enforcers, prosecutors, etc. to recognise normative protection for civil disobedience.[5]

Second, we must establish the proper limits of rights before we assess the uses that people make of rights. It is at best confusing to begin with the idea that people have a right to act wrongly and then to try to establish which vicious, wasteful, cowardly or otherwise poor actions they have rights to take. The distinction between protecting choices and evaluating or guiding choices becomes clearer when we establish the parameters of protected action before judging the uses people make of that protection. This does not mean, however, that we should refrain from analysing actions until we have identified those parameters. Analysing the merits of a type of conduct is a separate project from determining its limits as a right. The results of the former analysis may be superimposed upon the latter to assess persons' uses of a given right. I sketch an outline of this superimposition in Section 3, drawing upon the analysis of civil disobedience undertaken in Chapters Two and Three.

Third, given their Hohfeldian baggage, the terms *privilege* and *liberty-right* are ill-suited to characterise moral rights of conduct; but this does not make it preferable to describe rights of conduct simply as claim-rights. To go that route invites Robert P. George's contention that many rights of conduct are weaker, 'shadow' rights of duties that government, society, or individuals have, on grounds other than the agent's rights, not to interfere with her objectionable action. Possible

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[5] I note in the concluding section of this chapter some of the duties that a right to civil disobedience generates.

grounds for non-interference with a person's performance of reprehensible acts, says George, are that the interference may be self-defeating or counterproductive, or may prevent one from fulfilling a more compelling obligation, or may put the interferer or a third-party at risk, etc.[6] Such a view takes much of the life out of rights of conduct, though it does highlight the importance of identifying the proper limits of such rights.

Rights of conduct, understood as defeasible normative protection of a certain sphere of liberty or autonomy, generate for others not only certain duties of non-interference as noted above, but also more positive duties of assistance to ensure that this protection is real. As James Nickel observes,

> To provide effective liberties to communicate, associate and move [for example], it is not enough for a society to make prohibition of interference with these activities part of its law and accepted morality. An effective system of provision for these liberties will require a legal scheme that defines personal and property rights and protects these rights against invasions while ensuring due process to those accused of crimes. Providing such legal protection in the form of legislatures, police, courts and prisons is very expensive.[7]

The duties to ensure that this normative protection is real are not restricted to legal provisions. The positive duties generated by rights of conduct can extend to conventional duties such as the duty to ensure that others' rights of citizenship and personal autonomy are respected by the law and society. I return to this in Section 4.

Conceiving of rights of conduct as *defeasible* normative protection highlights the *pro tanto* nature of the duties they generate. Few, if any, rights are absolute (indefeasible) either in theory or in practice. Most rights can be overridden by other values, ideals, principles, or rights when the latter prove to be more compelling. Thus, I need not retain the qualifier '*pro tanto*' in my discussion of a right to civil disobedience. This right, like most others, can be defeated.

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[6] George, Robert P. (1993), *Making Men Moral: Civil Liberties and Public Morality*. Oxford: Clarendon Press, 117-118.
[7] Nickel, James (2005), 'Poverty and Rights' in *The Philosophical Quarterly*, Vol. 55, No. 220, 398.

Turning to the foundation of rights of conduct, I shall adopt Raz's interest theory of rights, which holds that, since typically rights are to what is in the interest of or is valuable to the right-holder, it is plausible to suppose that the interest is the basis of the right. In other words, the justification for a right is that it serves the right-holder's interest.[8] My reasons for adopting this theory are certainly related to its merits, which I explicate below, but also are partly strategic. Since my purpose is to engage with Raz's view of a right to civil disobedience, I shall proceed, as much as possible, on his terms.

A common challenge to Raz's interest theory is that, when the weight of rights diverges from the weight of the interests they serve, the justification for rights must turn on considerations other than interests. This challenge is neutralised somewhat, says Raz, when we appreciate that a person's interest is understood here as that which is good for her, that which makes her life intrinsically better as a human life. Raz states:

> The notion of the good life for a person is closely connected to the notion of the life that a person would (logically) desire for himself, be proud of or content with, etc. By and large it consists of the successful pursuit of and engagement in worthwhile pursuits, activities, and relationships, and in the absence of factors which impede such success. Once the notion of individual well-being is so understood we can...assert that rights are always to what is in the interest of the right-holder.[9]

One merit of Raz's interest theory is that it recognises the significance for persons of having freedom and in being able to control certain aspects of their circumstances according to their will. In general terms, rights of conduct protect those spheres of action that are most important for a person's life to go well as a human life. They comprise the central domains of decision-making that shape her autonomy, integrity, and self-identity. Waldron summaries the liberal consensus on what these are:

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[8] Raz, Joseph (1994), *Ethics in the Public Domain*. Oxford: Oxford University Press, 44-59; Raz, Joseph (1986), *The Morality of Freedom*. Oxford: Clarendon Press, Part III, especially 166-169.
[9] Raz (1994), 46.

> ...individuals' political activities, their intimate relations with others, their public expressions of opinion, their choice of associates, their participation in self-governing groups and organisations, particularly political organisations and trade unions, their choice of an occupation – all these have been regarded as particularly important in people's definitions of themselves.[10]

It is right-holders' interest in freedom that largely justifies the protection of these kinds of conduct. What matters, observes Raz, is not that people engage in conduct like speaking, worshipping, marrying, travelling and so on, but that they should decide for themselves whether to do so. That said, sometimes, more is required to justify a right in a certain context than an appeal to interests in personal liberty. I develop this point in the next section in relation to a right to civil disobedience.

A second merit of Raz's interest theory is that it accommodates justifications for rights which go beyond what is good for the right-holder. Sometimes rights are justified in part by the service they secure for people other than the right-holder. Consider, says Raz, the journalist's right to protect her sources and her expansive right to freedom of expression. The journalist's interests are served by both of these rights. But these rights would not have the same weight and importance that they have, but for the fact that through protecting the journalist's interests, the public interest in the free circulation of information is served.[11] The journalist's rights are justified by the fact that in serving her interests these rights serve public interests and those interests contribute to the weight of these rights. However public interests matter only when they are harmoniously interwoven with the right-holding journalist's interests, that is, when they are served by serving her interests. This

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[10] Waldron (1981), 34-5.

[11] Raz (1986), 247-8. Raz continues: '...aspects of freedom of speech cannot be explained at all except as protecting collective goods, i.e., preserving the character of the community as an open society. The freedom of the press illustrates the point. In most liberal democracies the press enjoys privileges not extended to ordinary individuals. Those include protection against action for libel or breach of privacy, access to information, priority in access to the courts or to Parliamentary sessions, special governmental briefings, and so on. They are sometimes enshrined in law, sometimes left to conventions. The justification of the special rights and privileges of the press are in its service to the community at large.' Raz (1986), 253.

double harmony, says Raz, should not be thought to reduce the justification of the right to the interest of the right-holding journalist alone, though, it is true that her interests must be served for the right to exist.[12]

With these preliminaries in place, the first concern of this discussion then is to determine the scope of and grounds for a right to civil disobedience. Grounds for this right arise from both personal morality and political morality. I explicate the parameters of a right to object with an eye to challenging Raz's claim that this sphere is reserved primarily for conscientious objection. I then consider the nature and limits of a right to political participation as well as those of a more comprehensive right to full citizenship. These interrelated rights, I argue, have as one component a right to civil disobedience.

2. A Right to Civil Disobedience

a. The Right to Object

Although Raz acknowledges that civil disobedience and conscientious objection sometimes overlap, nevertheless he distinguishes the two when it comes to the legitimacy of asserting each as a right and argues that a much stronger case can be made for a right to conscientious objection than for a right to civil disobedience. On Raz's view, whereas the civil disobedient asserts her right to participate in collective decision-making, the conscientious objector asserts her immunity from public interference in actions she regards as private to herself. Operating in the background is the idea that a person should not be held liable for breach of duty (breach of law) if the breach is committed because she thinks it is morally wrong for her to follow the

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[12] Raz's notion of *double harmony* may be understood to speak either to the weight of the right only or to both the weight and the case for the existence of the right. Although I am inclined to adopt the latter interpretation given Raz's comment that the *justification* of the journalist's right does not reduce to her interests alone, nevertheless I appreciate that many readers of Raz would favour the former interpretation.

law on the grounds that the law is morally bad or wrong totally or in part. This *prima facie* right not to be coerced to act against one's conscience is implied, Raz says, in an appropriate interpretation of humanism.[13]

The assumption I wish to challenge is that the argument from conscience underpinning the right to conscientious objection does not apply equally well to paradigmatic civil disobedience.[14] On a certain reading, the argument from conscience applies better to civil disobedience than to (purely private) conscientious objection. Contra Raz, although one of a disobedient's aims might be to assert her right to participate in the decision-making process, this is by no means her only aim, nor indeed her primary aim. As discussed in Chapter One, civil disobedience is associated with the aim to demonstrate protest against, and to dissociate oneself from, certain decisions or policies as well as the aim to bring about through moral dialogue a lasting change in those decisions or policies. A civil disobedient demonstrates her conscientiousness and moral consistency through her willingness to condemn, and to dissociate herself from, governmental and non-governmental policies that she finds morally objectionable. In paradigm cases, her civil disobedience is a communicative assertion that she must distance herself from laws and policies that she thinks it would be morally wrong either to follow or to let stand unopposed.

It is worth noting that there is no criterion of privacy in the suggestion that one (sometimes) should be permitted not to follow laws that one believes it would be morally wrong for one to follow. An assertion of normative protection of conscientious action is compatible with, and indeed supportive of, the communication of one's disapprobation toward the law that one finds morally objectionable. In fact, as I have indicated in previous chapters, not to communicate one's judgment can

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[13] Raz (1979), 276-89.

[14] While Raz indicates that he cannot endorse the idea of a general (legal) right to conscientious objection, he does outline considerations in favour of such a right. C.f. Raz (1979), 276.

reflect negatively on the sincerity of one's conviction. Thus, space should be made within the parameters of the right to object for conscientious communication.

The notion of a 'right to object' actually aligns more readily with acts of civil disobedience than it does with acts of conscientious objection (an ill-chosen term for this practice). To object is to protest, to complain, to offer a criticism, to express an adverse position, that is to say, it is essentially a communicative endeavour. Now, one might say that this is just semantics and that the term 'conscientious objection' refers not to the making of an objection, but to the holding of an objection, which means that the right to object refers to one's moral right to disagree with established policy, not to any right to make known that disagreement through communicative dissociation from the policy. But, again, the issue of sincerity of conviction comes into play. If one sincerely believes a certain policy or law is morally wrong, one has subjective intrinsic reasons to communicate that position even at the risk of censure and punishment. Consider, for example, Thoreau's comment that, 'What I have to do is to see . . . that I do not lend myself to the wrong I condemn.'[15] When one does not make known that one refuses to lend oneself to that wrong, one probably will be counted by others as amongst those who support the wrong since one offers no refutation to that assumption. When, by contrast, one communicates one's dissociation from the wrong in question, one confirms that one does not lend oneself to it. And while the private conscientious objector might not mind that others align her with the wrong she condemns, she should appreciate that more than just her reputation is at stake. To hold an objection and not make it known is small defence for one's commitments.

On my view, one of Raz's examples of conscientious objection – the campaign by members of the Sikh community to wear turbans instead of crash helmets when

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[15] Thoreau, Henry David (1991), 'Civil Disobedience' in *Civil Disobedience in Focus*. Hugo Bedau (ed.), London: Routledge, 36.

riding motorcycles – is better described as civil disobedience because not only do the participants seek to have the law changed to accommodate their religious commitments, but also their disobedience is unavoidably communicative, being in the public eye.[16] Although their primary reason for not wearing helmets is religious not communicative, nevertheless their violation of this law is part of a larger communicative project based upon conscientious commitments which aims to bring about a change in law. The distinction I drew in Chapter One between incidental communication and intentional communication does not affect the civilly disobedient quality of the Sikh protest: their incidental communication in not wearing helmets is part of the intentional communicative project to have the laws changed. In this case, the aim of seeking to bring about through moral dialogue a lasting change in law is underpinned by the aim to act in a way consistent with their moral commitments.

In many cases, a breach of law on grounds of conscientious commitments cannot but be performed in a communicative way. When accompanied by an aim to prompt dialogue in order to change the law, actions like wearing a headscarf in a French school are well described as civil disobedience. They combine a conscientious position toward both the disobedient action and the law with an awareness that the action is not taken (and in some cases cannot be taken) privately.

Other cases, which pertain less to personal morality as such, also show the extent to which conscientiousness lies within the purview of the civil disobedient. For example, not to hinder the building of the new primate research facility at Oxford would make a resident of Oxford who staunchly defends animal rights complicit (in her own eyes) in the abuse of animals that purportedly will take place there. Similarly,

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[16] In his Introduction to *Civil Disobedience in Focus*, Hugo Bedau states: 'First, we can contrast civil disobedience with conscientious objection, by arguing that the two differ in their primary purpose. The primary purpose of conscientious objection is not public education but private exemption, not political change but (to put it bluntly) personal hand-washing.' Bedau (1991), 7.

for Thoreau, to pay the poll tax would make him complicit (in his eyes) in the US government's slave practices. Not to obstruct clear-cut logging projects in British Columbia, Canada, makes BC residents concerned for the environment complicit (in their eyes) in the loss of old growth forests and ecosystems. And again, for Rosa Parks, to follow bus segregation laws would make her complicit (in her eyes) in the wider oppression of black Americans. When she refused in December 1955 to give up her seat to a white passenger, she is quoted as saying 'my feet's weary, but my soul's at rest.' Although apocryphal, the quote captures sentiments that probably underpinned this act: self-respect and moral consistency. In all of these cases, the persons who object could not dissociate themselves from the laws and policies they oppose without some communicative, direct action. In other words, none of these laws or policies admits private disobedience.

In some cases, however, directly hindering the decisions or policies that one condemns is impossible. Foreign policy is one such area. Most of the people who oppose the US invasion of Iraq are not in a position to hinder that action in the way that animal rights activists or environmentalists are in a position to hinder the projects mentioned above. Yet, by not communicating one's objection to the US war in Iraq one lends oneself to the wrong one condemns since one's silence implies that the government has one's endorsement.[17] To show one's condemnation, one may engage in various activities – legal protest, political writing, indirect civil disobedience, etc. – but the last of these cannot be defended as a right on the basis of conscience. The argument from conscience works well for direct civil disobedience, but less well for indirect civil disobedience since, in the latter case, the law from which the person actually dissociates herself (the law that she breaches) is not the law or policy from

[17] One case that I consider in the next chapter concerns the duties that people may suppose they have under international law to identify and oppose war crimes committed by their own government.

which she morally dissociates herself. Since she has *ceteris paribus* no reason of conscience to breach the law that she breaches, she cannot claim normative protection for her conduct on the basis of a right to object. Other grounds are required to support a right to indirect civil disobedience. Of course, as we have seen, indirect civil disobedience can be more *justifiable* than direct civil disobedience is when it causes less harm or, in addition, is a more efficacious means for defending deeply held commitments. But we must say something more to defend it as a moral right.

The relevant consideration for a right to object is whether an agent is given sufficient space to stand up for her commitments. Having a protected sphere in which to dissociate oneself from policies one opposes is essential to personal autonomy and to any right to conscience worthy of the name. This right is also important, I argue below, to full participation in one's society. Having shown that the right to object aligns well with (direct) civil disobedience (better perhaps than it aligns with conscientious objection), I now turn to Raz's more familiar defence of a right to civil disobedience based upon the right to political participation.

b. The Right to Political Participation

In his account of a right to civil disobedience, Raz places great emphasis upon the kind of regime in which a disobedient acts. Raz argues that only in an illiberal regime do certain individuals have a right to civil disobedience:

> Given that the illiberal state violates its members' right of political participation, individuals whose rights are violated are entitled, other things being equal, to disregard the offending laws and exercise their moral right as if it were recognised by law... [M]embers of the illiberal state do have a right to civil disobedience which is roughly that part of their moral right to political participation which is not recognised in law.[18]

By contrast, in a liberal state, Raz says,

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[18] Raz (1979), 272-3.

> ...there can be no right to civil disobedience which derives from a general right to political participation. One's right to political activity is, by hypothesis, adequately protected by law. It can never justify breaking it. Put it another way: Every claim that one's right to political participation entitles one to take a certain action in support of one's political aims (be they what they may), even though it is against the law, is *ipso facto* a criticism of the law for outlawing this action. For if one has a right to perform it its performance should not be civil disobedience but a lawful political act. Since by hypothesis no such criticism can be directed against the liberal state there can be no right to civil disobedience in it.[19]

Before analysing this view, let me note an ambiguity in Raz's claim that there can be no right to civil disobedience which derives from a general right to political participation. Though Raz did not intend this, his statement allows that there could be a right to civil disobedience in liberal regimes which derives from something other than a general right to political participation such as a right to object.

A second point to consider before examining Raz's account is whether a dichotomy between liberal and illiberal societies is tenable. First, the illiberal regime is being assessed here from a liberal perspective, which emphasises concerns that might not be relevant to, or make sense in, an illiberal context. Second, real societies do not align with a dichotomy between liberal and illiberal regimes; rather they fall along a spectrum of liberality and illiberality, being both more or less liberal relative to each other and being more or less liberal in some domains than in others.[20] Given the stringency of Raz's notion of a liberal regime, it is unlikely that any society could be wholly liberal.[21] For the purposes of assessing Raz's view, I shall accept his dichotomy and take up his suggestion that a right to civil disobedience derives from the right to political participation. I shall examine and reject Raz's claims that: 1) a right to civil disobedience only exists in illiberal regimes; and 2) a right to civil disobedience (in such regimes) only applies to those persons whose political participation is not recognized by law.

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[19] Raz (1979), 273.
[20] I thank Mark Reiff and Alan Hamlin for highlighting these points.
[21] Although a liberal regime adequately protects the political participation of its citizens, it may be highly reprehensible in other respects.

Let us begin with the second claim, the implication of which is that, were there any citizens in an illiberal regime whose rights to political participation were adequately protected, those citizens would have no right to civil disobedience (on the assumption that political participation is the only possible ground for a right to civil disobedience). Raz says little about why protected citizens in illiberal regimes would have no right to civil disobedience; but, presumably, the argument is the same as that given for liberal regimes: such citizens have no right of participation to reclaim. In other words, they have no grounds to criticise the government for outlawing certain actions. One may respond not by rebutting Raz's central claim, but by arguing that in such regimes there are no citizens whose rights to political participation are adequately protected, and therefore, all citizens in illiberal regimes have a right to civil disobedience. There are several reasons to take this view. First, for people's rights to political participation to be adequate and meaningful, there must be a substantial political process for them to participate in. When some citizens' rights to participate are not respected, protected citizens are denied a meaningful forum in which to engage in debate and deliberation. In other words, when the participation rights of some citizens are infringed, the participation rights of all citizens are infringed because meaningful participation by any one citizen is tied to all others having their participation rights respected. Protecting some people's participation rights in an illiberal regime is like giving someone a seat at the table, but refusing entry to most of the people whom she would need to talk to for the discussion to be worthwhile.

Relatedly, given Raz's definition of an 'illiberal regime', the views of any protected citizens who believe that non-protected citizens should be included in the decision-making process would have to be ignored or silenced, which suggests that

those 'protected' citizens do not enjoy full participation rights. Essentially, this means telling the person at the table that some of her views cannot be heard because to hear them might unlock the door to the people barred from the room.

Second, Raz offers a very stringent notion of adequate legal protection of political participation, one which perhaps no society could meet: adequately protected citizens are those who have no grounds to criticise the law for outlawing any particular action. This condition not only suggests that the notion of a 'liberal regime' may be too stringent, but also that, irrespective of the regime, few citizens will be in a position to say that their participation rights are adequately protected. Let us assume though, for the sake of considering Raz's account, both that liberal regimes (as Raz defines them) are possible and that, in illiberal regimes, the participation rights of some citizens can be adequately or nearly adequately protected by the law (as might have been the case for slave owners in antebellum America or for Afrikaners in Apartheid South Africa). Do these protected citizens have a right to civil disobedience? Contra Raz, they do for reasons that apply also to the citizens of liberal regimes. In brief, Raz offers an overly narrow notion of participation rights in at least two respects. First, Raz limits his discussion of participation rights to the participation recognised by the law. Second, he limits this right to a participation in the decision-making process, ignoring that individuals' interests in having the liberty to engage fully in their society are sufficient to ground a more expansive notion of participation rights. Such a notion, I argue, accommodates a right to civil disobedience.

Concerning the first limitation, Raz seems to be interested primarily in a legal right to political participation since he focuses on the participation that is adequately respected by the law. I am concerned, however, with a moral right to political

participation.[22] The moral right is in principle more expansive than the legal right is because the latter is bound, where the former is not, by what counts as a legal reason: a legal right to participation cannot accommodate actions that are illegal. But there is no reason that a moral right to political participation must stop at the boundaries of the law.

Yet this challenge to Raz might miss its target if Raz intends that the (legal) participation rights of protected citizens include all valuable forms of participation. For a liberal regime, Raz's claim might be that there can be no aspects to the right to political participation which that society cannot adequately protect since that society, by hypothesis, adequately protects people's rights to political participation. There are two replies to this. First, since a right offers some space to act in objectionable ways, a right to participate should not stop at the limits of valuable forms of participation. That said, every right has limits and some actions fall outside the parameters of a right even though they resemble actions captured by the right. (The right to freedom of expression, for example, does not extend to libel.) Second, it is part of the definition of Raz's *liberal regime* that it adequately protects all and only those kinds of political participation which are legal. Raz's account cannot accommodate the idea that some important forms of engagement are possible only through breach of law. I return to this in a moment.

In asserting a *moral* right to participate (in decision-making), protected citizens do not necessarily criticise the law for ruling out certain actions, because they might not believe that the action they take should fall under their legal participation.

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[22] Raz states that where there is a moral right, there is a presumption for giving that right legal recognition. C.f. Raz (1979), 262. It is unclear to me why this would be so. For certain areas of our lives where we have moral rights, there is no presumption in favour (and probably a presumption against) recognition in law. The slogan that, amongst consenting adults, 'the state has no business in the bedrooms of the nations', for example, highlights that the law should remain silent on some aspects of people's lives.

Indirect civil disobedience, for example, while it involves a criticism of some aspect of current policy, is not a criticism of the law for outlawing the action taken. (Often disobedients agree with the law that trespassing, for example, should be illegal.) Direct disobedience, moreover, need not be founded on any claim that the action should fall under legal political participation. Disobedients may believe, for example, that the action should be legal for reasons of personal morality, not political participation. In both contexts, disobedients assert that there are moral reasons for guaranteeing defeasible normative protection for their conduct (i.e. for not punishing their disobedience in the way that the state punishes ordinary offences).

But, given that there are adequate legal channels for participation, do protected citizens have any interests sufficient to ground a right to resort to illegal forms of participation? I believe they do, but these interests are not captured by the relatively limited idea of a right to take part in the decision-making process. Being allowed to participate in decision-making is but one aspect of the powerful need to be recognised as a full member of the community. Persons have weighty interests having the liberty to lead lives as full citizens.[23] Full citizenship is not just participating in the political realm through legal channels; it includes the freedom to lead an autonomous life, to have family and friends, to have employment, to associate with whom one wants, to pursue certain aspirations, to hold views, and to defend those views. These interests generate not only a right to be in the world, but also a right to engage in one's society (to some extent) in the ways that one sees fit. Much civil disobedience, by both persons who enjoy participation rights and persons who do not, may be recharacterised in terms of asserting a right to full citizenship. The disobedience of Rosa Parks, for example, may be seen as an assertion of her right to be in the world

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[23] I do not understand 'citizen' in any strict legal sense here.

and to enjoy the benefits of full citizenship. Civil disobedience by white Americans during the same period (either in favour or against segregation) may also been seen as their assertion of the same rights in response to what they saw as an attack on core values of their society. And, in response to the challenge that such citizens need not resort to civil disobedience because legal channels of participation are open to them, we may observe that not all important forms of citizen engagement can be captured by the legal rights of citizens. Philosophical discussions of principled disobedience from Socrates' defence in the *Apology* onward have emphasised the role of disobedience as an expression of citizenship. In breaching the law, a paradigmatic civil disobedient indicates that *this* is the way she must participate. She has certain conscientious commitments and cannot distance herself from policies she opposes through either legal channels or private disobedience alone. We see here how closely linked are participation rights with the right to object discussed above. In my earlier comments I treated the right to object as a component of personal autonomy. But, that right, given the communicative demands it places upon those who exercise it, falls within the domain of political morality as well. Having a right to object, to communicate effectively one's position, and to dissociate oneself from policies one opposes is part of being treated as a full citizen. An individual need not be oppressed and indeed the regime need not be objectionable for her to have citizenship interests sufficient to protect some of her illegal engagement.[24]

Though rare, sometimes societies recognise and cultivate a forum for citizen engagement through strategic civil disobedience, seeing it as a way to promote change without requiring government to initiate controversial policies. It becomes part of the accepted morality that people employ civil disobedience as a way of engaging fully in

[24] The limits of this protection I explicate in Section 3.

their community (and not simply to assert their right to participate in the decision-making process). On these rare occasions, people recognise that society won't collapse, as Dworkin observes, if it tolerates some disobedience.[25] In fact, it probable will benefit from doing so.[26] Having shown the interrelation between an expansive right of participation and the right to object, we may turn to the idea of double harmony between the interests of a civil disobedient and the interests of the community to acquire a better sense of the weight and force of this right.

c. Double Harmony

The grounds offered above for a right to civil disobedience pertain to an individual's interests in being allowed both to object to policies that she opposes and to participate fully in her society. The weight and force of those interests depend in part upon the interests of the community which are served by a disobedient having some space to engage in conscientious breach of law. We may bring this out by considering the analogous case of freedom of expression. Raz has observed that freedom of expression serves to protect not only the interests of those who have it and may wish to use it to express their views, but also the interests of both those who have an interest in acquiring information from others and those who are neither speakers nor listeners. 'If I were to choose', says Raz, 'between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option.'[27] A freedom such as expression is not always valuable to the person who has it. That we have certain freedoms matters partly because they contribute to the common good. Just as the journalist's

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[25] Dworkin, Ronald (1977), *Taking Rights Seriously*, London: Duckworth, 206.
[26] C.f. Sunstein, Cass (2003), *Why Societies Need Dissent*. Cambridge, Mass: Harvard University Press.
[27] Raz (1994), 54.

right to freedom of expression is grounded in part in the interests of the community being served through the right-holder's interests being served, so too is this true for a dissenter's right to challenge dominant opinion. Raz observes that '...while political theorists often highlight the protection for the individual dissident which [a right to dissent] provides, in practice its primary role has been to provide a collective good, to protect the democratic character of the society.'[28] Since there is no inherent moral difference between legal and illegal forms of dissent, we may say something similar for civil disobedience.

Consider, for example, the interests that citizens have in hearing all points of view or the interests they and the government have in not becoming the unreflective defenders of prejudices (even if the views they defend have legitimacy). We assume our infallibility when we claim that certain views should not be tolerated and, when we silence them, we deny ourselves the opportunity to strengthen the arguments against those views. In serving a disobedient's interests, a right to civil disobedience serves society's interests through exposing others to different views, holding government accountable, and reinvigorating democratic discussion. Civil disobedience, as I discuss in the next chapter, can rectify deficits in democratic dialogue by focusing attention on neglected issues. And, civil disobedience can perform these services even when its practitioners are mistaken either about the facts or about their principles. It is partly through its formal features as performative protest that civil disobedience serves community interests; thus, the weight of this right does not depend upon objectively valuable exercises of it. With that in mind we must consider where the line is to be drawn between the kinds of disobedience that fall under the right and those that do not.

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[28] Raz (1986), 253-4.

3. Limits to the Right to Civil Disobedience

Having defended a moral right to civil disobedience, we now must consider the proper limits of this right. Specifying the parameters of a right helps to reduce conflict between that right and other rights or moral considerations. Moreover, specifying the proper limits of a right is necessary to determine whether a given action is either a good or bad use of that right or not an exercise of the right at all. To establish the parameters of a right, we begin by identifying the particular kind of conduct a given right aims to protect, that is to say, the paradigm action under that right. Much of that work we have done already since we teased out in Section 2 the kinds of action central to and representative of conscientious conduct and citizen participation, two domains which not only belong on any liberal list of self-defining spheres of action, but also ground the right to civil disobedience. The proper limits of these rights do not align with the boundaries of either the law or private disobedience on moral grounds, but provide substantial space for communicative disobedience founded upon deeply and conscientiously held beliefs.

Moreover, we know what paradigm action the right to civil disobedience protects since we examined in detail in Chapter One the features of paradigm cases of civil disobedience.[29] In brief, a right to civil disobedience protects those conscientious and communicative breaches of law which aim to demonstrate protest against a policy and to bring about through moral dialogue a lasting change in that policy. Recall the limits that these aims place upon the modes of communication a conscientious disobedient reasonably may employ in their pursuit. Also recall that the paradigm case

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[29] It is not automatic that the paradigm case of a type of action is the paradigm action that a right to that type of action would aim to protect. In the case of civil disobedience, however, a paradigm case aligns more closely with persons' fundamental interests in self-respect and citizenship than non-paradigm cases do.

does not have built into it objectively valuable goals or motives. Thus the substance of disobedients' commitments and goals is irrelevant to the limits of their right to civil disobedience though highly relevant to our assessment of the moral quality of their conduct. All civil disobedience (irrespective of disobedients' motives or objectives) which is conscientious, communicative, aiming both to persuade and to engage in moral dialogue is protected under the right to civil disobedience. So, although the comparative value of civil disobedience exercised in defence of a worthless objective would be modest, nevertheless that action, when it does not impinge upon others' (or the agent's) ability to make self-defining choices, is protected by the right to civil disobedience. Similarly, although some people may have good grounds to demand justification for a person's civil disobedience (when, for example, she condemns their having certain rights fundamental to their lives going well such as a right to abortion), nevertheless her action, when it does not *in itself* impinge upon others' ability (or her own ability) to make self-defining choices, is protected by the right to civil disobedience. As I noted at the outset, my account is intended to give the bigot the same right to civil disobedience as the saint. I appreciate that this has an unpalatable aspect, but it is a credible position both since the interests grounding the right apply equally to all persons irrespective of their views and since certain restrictions on mode of action are imposed by the features of the paradigm case, thereby ruling out extreme forms of action. Note that these restrictions differ from those identified by Rawls. As noted above, according to Rawls, we may suppose that a person has a right to civil disobedience when her action meets the three conditions of being undertaken 1) in response to clear and substantial breaches of justice, 2) as a last resort, 3) with the coordination and cooperation of other minority groups.[30] Rawls' first condition may

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[30] Rawls (1971), 371-7.

be set aside since, as noted above and in Section 1, an action need not have objective merit to be a candidate for normative protection. His other two conditions I take up in a moment.

With a paradigm case of civil disobedience in mind, we may ask how far an action can drift away from that paradigm and still claim normative protection under this right. In Chapter One, we saw that the features associated with paradigm cases may be regarded as items on a list or as matters of degree or as some combination of the two. I stipulated there that an action may be regarded as a paradigm case of civil disobedience if it exemplifies many or all of the relevant features to an appropriate degree. Although the paradigm case approach makes room, where a definition could not, for some oddball cases that do not fully exemplify all of the key features, there nonetheless are actions that deviate too much from the paradigm to fall within the sphere protected by this right. Whether non-paradigmatic civil disobedience falls within or without the domain of the right depends upon the manner in which and extent to which that disobedience deviates from the paradigm case. Civil disobedience, for example, that is frivolous or merely contrary (i.e. not conscientiously motivated), while it finds no support from the right to object, does find support from rights of participation and thus *ceteris paribus* falls under the right to civil disobedience. By contrast, civil disobedience that lacks any communicative aspect cannot properly be called civil disobedience and thus falls outside the right to civil disobedience (though it may find protection under other rights relating to personal morality). Similarly, civil disobedience that employs poor or bad modes of communication falls too far away from the paradigm in failing to adhere to the restrictions on modes of communication imposed by the forward-looking, conscientious aims of paradigmatic civil disobedience.

Thus, even civil disobedience undertaken in pursuit of a genuinely valuable objective falls outside the right when disobedients employ poor or bad modes of communication. The 'badness' of the mode of communication is not necessarily due to an inherently objectionable aspect of the action; it may be due to the circumstances. For example, vigorous communicative disobedience undertaken during a time of peace and security has different ramifications from such disobedience undertaken during a national crisis. In the latter case, although this vigorous dissent is taken in defence of well-founded goals and uses means which otherwise would be acceptable, it both causes or risks great harm in this state of emergency and cannot reasonably be described as persuasive since the extremity of the situation rules out the possibility for deliberative discussion between government and citizenry. In brief, disobedience that accords with the paradigm action this right is meant to protect may be impossible in these circumstances. Nevertheless, the disobedient could have strong reasons (unrelated to interests in freedom of conscience, participation or citizenship) to take this action, that is, reasons of duty, moral consistency, or respect for others (though that respect might not further their interests). Suppose the government handles the emergency badly or makes rapid decisions that have long-term implications. Depending upon the nature of the emergency, civil disobedience, however inappropriate its use, may be most justifiable in these circumstances because the disobedient ensures that, when the community is disrupted by the shock of crisis, an attempt is made to hold authorities accountable for their decisions. What such cases show (with a nod to Raz) is that circumstances are relevant to whether a disobedient's action falls under the right to civil disobedience.

What I regard as poor modes of communication differs from what Rawls regards as such. Contrary to Rawls, I reject the idea that civil disobedience must be

undertaken both as a last resort and in coordination with other minorities to fall under the right to civil disobedience. Rawls himself acknowledges that the 'last resort' criterion is a presumption: 'Some cases may be so extreme that there may be no duty to use first only legal means of political opposition.'[31] But, even in non-extreme cases, 'last resort', by itself, offers little opposition to protecting civil disobedience. First, as a notion, 'last resort' is ambiguous at best.[32] Second, the constraints on how citizens treat each other in a system of fair cooperation do not rule out civil disobedience since civil disobedience often offers as viable an option for political action as legal protest does. Moreover, as Rawls himself observes, civil disobedience can help to foster stability in a society.[33] Thus, there is no need to exhaust all legal options before undertaking civil disobedience.

Rawls' criterion of coordination with other dissenters is more compelling than that of last resort since the actions taken by other political actors may give a person reasons to pursue one course of conduct over another. If her communicative disobedience will go unheeded or will be misinterpreted and so on, then a person has good reasons either not to engage in civil disobedience at present or not to choose particular forms of disobedience. While there is some merit to this condition, presumably a person could still be justified, and thus on Rawls' view have a right to act, without meeting it; in some contexts either there may not be time or an opportunity to coordinate with others or others may not be willing to coordinate. Only in rare cases (where, for example, lack of coordination would have disastrous effects for either the right-holder's or others' interests) would the requirement for coordination push an action outside the sphere protected by a right to civil disobedience.

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[31] Rawls (1971), 373.
[32] C.f. Walzer, Michael (2004), *Arguing about War*. London: Yale University Press.
[33] Rawls (1971), 383.

A final, important issue concerning the parameters of the right to civil disobedience is whether it excludes all violent action from the protected sphere. We may take it that it does not since, as argued in Chapter One, violence is not, by definition, at odds with the conscientious communication and persuasive aims of paradigmatic civil disobedience. Nor is it, by definition, a poor mode of communication. That said, violence is not in itself a feature exemplified in paradigmatic civil disobedience; it is merely compatible with the key features which distinguish this practice from more extreme forms of protest. Attention must be given to the kind of violence employed and the ramifications of employing it. Only in cases where the violence does not seriously breach the rights of others or have seriously untoward consequences for the society can such conduct fall within the right to civil disobedience. Whether that violent disobedience is justified is another matter, which we have already investigated.

4. Summary

I have argued both that individuals have interests in having a certain freedom to engage in conscientious and communicative breach of law and that these interests are sufficiently weighty to ground certain duties in others. I shall conclude my discussion of the right to civil disobedience by foreshadowing my discussion of lawful punishment in Chapter Six with a sketch of the kinds of duties that a right to civil disobedience generates. Since the right in question is a moral right, not a legal right, the accommodation that society should make for those who exercise it is less easily characterised than that which derives from legal rights. Nevertheless, several plausible duties may be identified. First, this right generates a certain duty not to interfere with the action without further justification. For other citizens, this could

mean not undermining disobedients' efforts either by forewarning authorities of the intended action or by infiltrating that action in ways that would negatively alter its character or society's perception of it. In addition, it could mean not reporting the disobedience in the media more critically than is necessary and not misrepresenting the practitioners and their aims to others. Moreover, not interfering could mean opposing or criticising the action only on the basis of its merits, not on the basis of its mode of communication as civil disobedience. Finally, not interfering could include warning potential disobedients of the likely costs of breaching the law. For authorities, a duty of non-interference could include allowing the disobedience to occur and not intervening until either after the event or after the situation becomes more serious. Similarly, it could include neither sabotaging nor infiltrating an action with the purpose of undermining its integrity or society's perception of its merits. It could also include neither provoking dissenters nor responding with unnecessary violence or excessive force. While the strength of these duties depends partly upon the strategies that disobedients use, it is important to remember that these right-holders are constrained in their modes of communication by their persuasive aims, so the duties just listed will be in play for any disobedience that falls under the right to civil disobedience.[34]

Second, the right generates some more positive duties of assistance to ensure that the protection is real. For ordinary citizens, this would mean supporting disobedients' moral right to engage with their society as they do as well as championing the participation rights of other citizens when their rights are not recognised by authority. More generally, it would mean incorporating into the accepted morality recognition that there is a place for civil disobedience within

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[34] I argue in Chapter Six that, in some contexts, civil disobedience aggravates an offence. However, this only happens when the disobedience involves objectionable modes of action: such actions fall beyond the moral right that I have defended.

legitimate political engagement and personal morality. For lawmakers and enforcers, positive duties could include exercising discretion when deciding whether to arrest, to charge, to go to trial, to convict, to sentence and so on. This could mean being sensitive to a disobedient's motives and commitments and being able to distinguish her offence from seemingly similar offences that lack a principled motivation. At all stages in the legal process, authorities have opportunities to show their tolerance of a little disobedience. I return to these issues in Chapter Six. In the next chapter, I develop more fully my view of the morality of civil disobedience, which gives attention to how disobedients view themselves and their role in society.

5. Disobedience and Ideals

Often a person's reasons for engaging in civil disobedience stem from deeply and conscientiously held commitments. Sometimes these commitments are well-founded and sufficiently weighty to justify a communicative breach of law in their defence. Other times, however, they are not. In the latter case, the disobedient might have reason to believe that her commitments are genuinely valuable and her actions justified, but she is mistaken and, at best, her conduct is excused. I undertake in this chapter to explicate the nature of disobedients' commitments, good and bad, by situating the reasons for which disobedients civilly disobey the law in the context of a pursuit of ideals. An ideal, as a conception of perfection or a model of excellence, offers a comprehensive end toward which a person may orient her thoughts and actions and through which she may seek to effect substantial change in perspectives or practices. Whereas some ideals are personal (e.g. model parenting, athletic excellence, intellectual achievement), others are public (e.g. collective flourishing, equality, justice).[1] Civil disobedience, as a paradigmatically communicative practice, is oriented principally toward the latter. And, while not all civil disobedience is marked by a pursuit of such ideals, much of it, justified and unjustified, may be interpreted in this way; and civil disobedience which lacks an orientation toward ideals may be explicated through its contrast with disobedience that is so oriented.

The first aim in this chapter is to vindicate the concept of *ideals* as a moral category and to locate this concept in relation to more familiar moral concepts such as *duty*, *virtue*, and *the good*. The second aim is to mobilise the concept of *ideals* in

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[1] My focus is on substantive ideals, not deliberative ideals. For a brief account of the two, see Rosati, Connie (1998) 'Ideals' in *The Routledge Encyclopedia of Philosophy*. E. Craig (ed.), London: Routledge. Retrieved 8 March 2005 from http://www.rep.routledge.com/article/L038SECT3.

understanding historical and contemporary cases of civil disobedience. A third, more general aim is to further the returning interest amongst moral philosophers in ideals by offering an account that relates ideals, particularly public ideals, to duty and virtue through responsible citizenship.[2] Persons who commit themselves, both normatively and motivationally, to the realisation of genuine public ideals demonstrate responsible citizenship or civic virtue.[3] And it is this responsiveness to public ideals and the duties they generate which leads these persons to engage in civil disobedience. Their disobedience sharply contrasts with disobedience that lacks a normative and motivational commitment to genuine ideals. Assuming the latter disobedience is oriented toward ideals at all, it represents either 1) a commitment to false ideals, or 2) a pursuit of ideals that is motivationally dubious though the means and/or the end may be respectable, or 3) a pursuit that employs questionable or even reprehensible means, or 4) some combination of the three.

As these possibilities suggest, various sub-categories of ideals are relevant to civic virtue (and to respect for ideals generally), namely, value ideals, character ideals, and admirable modes of pursuit. Although these categories overlap, broadly speaking, genuine value ideals are ends (like states of affairs) toward which a person may orient her thought and action; character ideals are dispositions to respond to the right reasons and to act for those reasons in pursuit of value ideals (or other ends); and admirable modes of pursuit are exemplary modes of conduct taken in the pursuit of value ideals or ordinary goals.[4] After teasing out these categories of ideals in Section

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[2] I understand *responsible citizenship* to be an approximation of the ideal of civic virtue. This ideal sets an extremely high standard of citizenship. The person who demonstrates responsible citizenship has done much to pursue the ideal of civic virtue but has not realised, and may not be able to realise, that ideal.

[3] By normative and motivational commitment, I mean that the person, first, is sensitive to certain reasons, and second, actually acts for those reasons.

[4] Character ideals and admirable modes of pursuit are also ends in themselves though they may contribute to the pursuit of more easily recognised ends like value ideals.

1 with an eye to locating them in relation to other moral concepts, I elucidate in Section 2 concerns about false ideals, improper motivations, and extremism in modes of pursuit, which together underpin much of the current wariness about ideals. I argue that concerns about extremism and improper motivation are misdirected, at least when it comes to genuine ideals, because genuine ideals place certain constraints upon the means and motivations that may legitimately be employed in their pursuit. The nature of the constraints depends upon the nature of the ideal. Concerns about false ideals and their overlap with extremist action and improper motivation are well-founded however, and disobedient actions taken in their name may recommend a harsh response from society or the law as I will discuss in Chapter Six.

This analysis of ideals is then applied to the political activism of some historical and contemporary disobedients. In the lives of Mohandas Gandhi, Martin Luther King Jr, and Nelson Mandela, for example, we find personal and public commitments intertwined in a striving for something finer for their people or perhaps even for humanity.[5] I begin my consideration of these three disobedients by explicating Gandhi's moral outlook, which itself may be understood in terms of ideals, namely, the moral ideal of exemplary action. I then examine in Section 3 Gandhi's, King's, and Mandela's contributions to their respective movements in order not only to assess the merits of their efforts, but also to explicate various properties that seem to mark such pursuits of ideals: imagination, innovation, loneliness, and a noble sense of purpose.[6] This last mirrors a feature of paradigmatic civil disobedience, namely, conscientiousness. I conclude Section 3 by noting in relation to pursuits of

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[5] I shall assume that the work of these activists is well known, and that the analysis of ideals is best served by discussing their aims and activities together, though this may anticipate my analysis of each activist's commitments.

[6] Many of these features could mark pursuits of false ideals.

ideals some concerns about necessity, violence, tragedy (as discussed in Chapter Two), and circumstance-relativity.

Although Gandhi and King and perhaps Mandela are often identified as the paradigmatic civil disobedients, the paradigm may be shifting since much recent civil disobedience aims not to guarantee recognition of a people's rights, but to challenge policies within liberal democracies. When I say the paradigm may be shifting, I do not mean that the key features exemplified in these historical paradigms are not the key features exemplified in contemporary civil disobedience. I mean rather that both disobedients' modes of communication and their aims for policy change are evolving. In Section 4, I examine civil disobedience undertaken in defence of concerns such as the environment, animal rights, anti-globalisation, and nuclear disarmament. Through my treatment of these and other cases, I tease out the relation between justified civil disobedience, responsible citizenship, and the pursuit of ideals. I thereby lay the foundation for my analysis in Chapter Six of how civil disobedience should be treated by the law.

1. Ideals and Virtue

In his Uehiro lecture 'Concerning Ideals', C.A.J. Coady identifies four features of ideals which distinguish such ends from ordinary goals (and *mutatis mutandis* ordinary values).[7] First, ideals are more comprehensive and general than most goals are. Second, they garner esteem from the person who pursues them, something which a goal need not do: 'An ideal', says Coady, 'is estimable for those who pursue or acknowledge it in that they must rank it highly as a good.' Third, ideals are more pervasive or even constitutive than ordinary goals are. Anyone who is

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[7] Coady, C.A.J. (2005, May), 'Concerning Ideals', Uehiro Lectures in Practical Ethics, Oxford University. (Forthcoming)

possessed of an ideal, suggests Coady, 'acts now in the light of that ideal and does not merely do certain ideal-neutral things that will bring about the ideal in some remote future...the ideal comes to exist to a greater or [lesser] degree in the agent as the agent seeks to live it.' Finally, ideals often are to different degrees and for different reasons unrealisable, a feature most thinkers who have considered ideals regard as vital to distinguishing them from ordinary goals. While I prefer to characterise ideals as, at least in principle, realisable (though this may clash with a commonsense notion of *ideals*), I appreciate that in most, if not all, cases a person will be unable to realise fully her ideals. This feature and the others just listed require explication, and each is considered at different points in this discussion.

a. Value Ideals

Genuinely valuable ideals may be understood in terms of what is admirable, exemplary and commendable. Such ideals are, of course, not the only things that are admirable, but it is a common feature of genuine ideals that they are admirable. What is admirable may be distinguished from what is good.[8] Whereas wearing a sweater when it is cold may be a good thing to do but is not admirable, putting one's life at risk to save another is admirable as is assisting another when there is no potential cost to oneself. Genuine ideals, as comprehensive ends, offer a standard of excellence which guides people in the development of aspects of their lives, be it character, motivation, action, goals, commitments, or relationships. If the model offered by an ideal is genuinely valuable, then everyone has reason to admire both it and any success someone has in realising it.[9] If, however, an ideal is false and the model it

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[8] The adjective 'good' should be distinguished from nouns like 'a good' and 'the Good'. The latter are closely linked to ideals since genuine ideals are amongst the great goods people seek.

[9] Although all ideals (genuine and false) seem estimable to their pursuers, only genuine ideals actually are estimable.

offers is not admirable, then people have reason not to admire either it or someone's efforts in realising it. People actually may have reason to condemn it. And, where two persons disagree over the admirability of some ideal, one of those persons is mistaken. This does not mean, though, that she is mistaken about what she herself has reason to do. We may distinguish between what people have reason to admire or commend and what they have reason to pursue themselves. One may admire the world-class athlete or the virtuoso without having reason to regard these ideals as ends one ought to strive for oneself. In fact, one's commitment to one's own legitimate ideals may be incompatible with a commitment to other equally admirable ends. This incompatibility, which I explore further below, need not diminish one's regard for alternative ideals since, as P.F. Strawson notes, the steadiest adherence to a single ideal picture of life may coexist with the strongest desire that other incompatible ideals should have their steady adherents too.[10]

However, not all ideals are optional in this respect. Some ideals recommend themselves to all and give all a reason to pursue them. Certain character ideals, like honesty, for example, recommend themselves to all. At the same time, such ideals can be particularly salient to specific roles or ways of life. As Coady notes, '...although the ideal of truth, for instance, has an objective claim to the attention of all, it may have a special role in the lives of intellectuals, just as the ideal of justice must concern everyone, but [has] a special significance for judges.' Justice and truth concern everyone because they are public ideals (though, in different clothes, they can be personal ideals as well and could well recommend themselves to all in that shape too). Public ideals, as a class, recommend themselves generally and this is partly because excellence in them comes to be seen as contributing to the common wealth of the

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[10] Strawson, P.F. (1974), *Freedom and Resentment, and Other Essays*. London: Methuen and Co., 28.

culture. As John Skorupski observes, public ideals are seen not just as ideals of individuals but as ideals of the society.[11] Of course, some people are better placed than others are to pursue public ideals such as justice or equality. The point is simply that all people have reason to be concerned with such ideals.

The issue of *how* ideals are to be pursued is particularly salient in the context of public ideals since, at some level, lack of agreement and coordination about the admirability of the ideal and the appropriate way to pursue it can hamper progress toward that ideal. Gandhi, for example, did not want the nationalist movement in India to be a project of the elite. He wanted all Indians including peasants and untouchables to be part of the resistance to British rule. And, although Gandhi's satyagrahi (trained, non-violent resisters) were particularly well-placed to pursue the political ideal of a free, democratic, undivided India and to provide leadership through their non-violent disobedience, nevertheless it was only in making his ideal the objective for all that Gandhi could hope to approximate it. But the coordination required for the pursuit of such public ideals operates at quite a general level since forceful disagreement sometimes better enables a people to approximate an ideal than lack of opposition does. Often it is only through a collision of perspectives that people appreciate the drawbacks of a particular approach. Such dissent may be seen as a contribution to, rather than a detraction from, the coordinated effort.

It is worth pausing on the distinction between personal and public ideals for a moment to note that many so-called personal ideals – rich, long-lasting relationships or positive self-development – require social support to be pursued in meaningful ways. Moreover, the contribution made by any success in realising such ideals is not limited to the individual and her close relations: the cultivation of personal ideals

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[11] Skorupski, John (2001), 'The Future of Ideals' in *Philosophy and the New Millennium*, supplement to *Philosophy*, Royal Institute of Philosophy, Anthony O'Hear (ed.), Cambridge: Cambridge University Press, 197.

contributes to the common wealth of the community. Similarly, many so-called public ideals have a personal dimension in that, although common to the community, they influence, inspire, and benefit the individual as an individual. To judges, for example, justice has a distinctly personal dimension. Yet, despite the overlap between personal and public ideals, the distinction between them is worth sustaining, as it helps to specify the orientation of a person's pursuit. Consider Mandela's ideals, which began as personal goals and only over time evolved into personal ideals and then into public ideals with a distinctly personal focus. In his autobiography, Mandela states:

> At first, as a student, I wanted freedom only for myself, the transitory freedoms of being able to stay out at night, read what I pleased, and go where I chose. Later as a young man in Johannesburg, I yearned for the basic and honourable freedoms of achieving my potential, of earning my keep, of marrying and having a family – the freedom not to be obstructed in a lawful life.
>
> But then I slowly saw that not only was I not free, but my brothers and sisters were not free. I saw that it was not just my freedom that was curtailed, but the freedom of everyone who looked like I did…and that is when the hunger for my own freedom became the greater hunger for the freedom of my people.[12]

Mandela's statement highlights the process he underwent as he learned to look beyond his personal situation to strive for the betterment of his people, a process necessary to the development of responsible citizenship or civic virtue. Before considering such issues of character and motivation, let me note a further feature of public ideals.

There is a close link between public ideals and communication. Whereas one can pursue personal ideals in private, one cannot pursue public ideals in a meaningful sense without communicating one's position to other members of society. Or, to put the point more subtly, one cannot pursue a public ideal without ensuring that, at some level, that ideal is taken up by others in the society (one may find it necessary not to advertise one's own contribution). Gandhi appreciated the importance of

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[12] Mandela, Nelson (1994), *Long Walk to Freedom: The Autobiography of Nelson Mandela*. Toronto: Little, Brown and Company, 624.

communication, which is why his commitment to a moral ideal of exemplary action (which I explicate below) brought with it a commitment to spin-off ideals concerning how societies should be structured so that the models people set for others to follow could have maximum publicity. Gandhi held an ideal of peasant communities organised in small panchayat or village units, as these communities could best approximate the family, where examples are visibly set. The publicity necessary to set an example or to communicate a commitment is, however, not the publicity discussed in Chapter One which John Rawls identifies as a defining condition for civil disobedience. The kind of publicity that is conducive both to civil disobedience and to the pursuit of public ideals communicates that certain actions have been taken and the reasons for which those actions were taken.[13] Through this kind of publicity, civil disobedients offer an orientation toward certain ends for others to consider. When persons' challenges to law are well-founded and significant and arise from sustained, deep conviction, their decision to engage in civil disobedience may be seen as the product of a fervent commitment to their society, a commitment which underpins their aim to lead that society to redraw some of its moral boundaries. Such commitment may be understood in terms of responsible citizenship or civic virtue.

b. Character Ideals and Civic Virtue

A virtue is a character trait or disposition to act for certain good reasons. It not only makes a person responsive to normative reasons to do things in a range of contexts, but also gives her the motivation to do those things for the right reasons.[14] Civic virtue then is the disposition, first, to identify the normative reasons to

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[13] Raz, Joseph (1979), *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 265.

[14] C.f. Audi, Robert (1998), 'A Liberal Theory of Civic Virtue' in *Social Philosophy and Policy*, Vol. 15, No. 1, 149-70.

participate responsibly in society and to contribute to its flourishing, and second, to act on the basis of those reasons when making a contribution.[15] Tricky cases are those where one would better do as the right reasons would have one do if one acted not on the basis of those reasons. Such cases, which usually turn on the agent's inability to master her emotions or her enthusiasm, would be rare when a person possesses sufficiently the relevant virtue since she would be able to comport herself as the right reasons recommend. However, in those rare cases where she would do better by those reasons to act for other reasons, the virtue would supply her with reasons that are motivationally respectable though they are not the reasons whose normativity she is respecting.

Now, what does it mean to participate responsibly in society? On my view, this does not mean respecting the law because it is the law. In Chapter Two, I challenged the claim that there is a *pro tanto* moral obligation to obey the law because it is the law. Our responsibilities as citizens are actually more expansive than a *pro tanto* obligation to follow the law would allow. Responsible citizenship extends beyond duty to the virtues of civility and forbearance, and moreover, to supererogatory acts like those noted by James Boswell: 'I would have every breast animated with the *fervour* of loyalty; with that generous attachment which delights in doing somewhat more than is required, makes "service perfect freedom".'[16] Putting issues of supererogation aside for the moment, Boswell's endorsement of loyalty and service picks out the key feature of civic virtue, which is the disposition to further in the right way public good over personal good.[17] The responsible citizen does not give

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[15] I argue in Section 4 that civic virtue need not be bound by national borders.
[16] Boswell, James (1901), *A Journal of the Tour of the Hebrides with Samuel Johnson*. London, Dent. Cited from Green, Leslie (2002), 'Law and Obligations' in *Oxford Handbook of Jurisprudence and Philosophy of Law*. Jules Coleman and Scott Shapiro (eds.), Oxford: Oxford University Press, 544.
[17] See Dagger, Richard (1997), *Civic Virtues*. Oxford: Oxford University Press, 14. See also Burtt, Shelley (1990), 'The Good Citizen's Psyche: On the Psychology of Civic Virtue' in *Polity*, Vol. 23.

priority to the flourishing of the community to such an extent that she ignores her own children. Rather, being motivated by a strong sense commitment to the community and by an awareness of the specific duties that arise from this commitment, the responsible citizen gives priority to the community over her individual advantage when the two conflict.

Civic virtue may be recharacterised, without spoiling its essence, as a responsiveness to public ideals. In fact this recharacterisation brings out at least one aspect of Boswell's notion of generous attachment, namely, the strength of the attachment. As noted at the outset, ideals are distinctive for their constitutiveness and pervasiveness: a person animated by a public ideal comes to possess that ideal to a greater or lesser degree as she seeks to live it. The second aspect of generous attachment is its generosity, which I associate with supererogation and which I consider below. Civic virtue, on this picture, requires both an appreciation for the reasons which those ideals give her to take certain actions and the motivation to act for those reasons.

This responsiveness to public ideals also brings with it an attention to the particular duties that stem from those ideals. Those duties sometimes include challenging the government or the dominant position. As Richard Dagger notes,

> To be virtuous, then, is to perform well a socially necessary or important role. This does not mean that the virtuous person must always go along with the prevailing views or attitudes. On the contrary, Socrates and John Stuart Mill have persuaded many people to believe that questioning and challenging the prevailing views are among the highest forms of virtue. In making this case, though, they rely on the claim that the social gadfly and the unorthodox thinker are really promoting the long-term interests of society and thereby performing a social role of exceptional value.[18]

I noted above the value of dissent as a contribution to the collision of antipathetic outlooks, but would observe that the contribution of an irresponsible or frivolous gadfly is often nothing compared to the contribution of committed citizens who both

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[18] Dagger (1997), 14.

appreciate how far their society falls below an admirable regime and communicate their awareness through concerted action.

The attitude with which these citizens act is as important to their contribution to the pursuit of ideals as the particular actions they take. Their motivation toward an ideal determines, first, whether they reasonably may claim to pursue that ideal, and second, assuming they may, whether they have any hope of success. Gandhi, for example, may reasonably claim to pursue the ideal of non-violence since in his life and work he acted according to a very stringent notion of non-violence which eschews even criticism of others. On Gandhi's view, dissociating oneself from a policy must not be marked by the condemnation and critical judgment typically associated with civil disobedience. It can and must be done with a 'pure heart'. The attitudes of Gandhi and his non-violent resisters are characterised by Bilgrami as follows:

> The 'satyagrahi'…has to show a certain kind of self-restraint, in which it was not enough simply not to commit violence. It is equally important not to bear hostility to others or even to criticise them; it is only required that one not follow these others, if conscience doesn't permit it. To show hostility and contempt, to speak or even to think negatively and critically, would be to give in to the spiritual flaws that underlie violence, to have the wrong conception of moral judgment. For it is not the point of moral judgment to criticise.[19]

While we may dispute Gandhi's definition of *violence* and its implications for political activism, my aim here is to highlight how important his pure-hearted motivation was to the integrity of his pursuit of a non-violent ideal. If Gandhi's pursuit of that ideal of non-violence had taken any other form or exhibited any other attitudes, it could not have been regarded as a genuine pursuit. As we shall see, other disobedients like King and Mandela also adopt a pure-hearted attitude toward those whom they seek to challenge (though Mandela's stance is more complicated since he advocated violent resistance). King's pure-hearted attitude toward his opponents,

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[19] Bilgrami, Akeel (2002), 'Gandhi's Integrity: The Philosophy Behind the Politics' in *Postcolonial Studies,* Vol. 5, No. 1, 83.

including the white clergy, comes out in his Letter from Birmingham Jail: 'In deep disappointment, I have wept over the laxity of the church. But be assured that my tears have been tears of love. There can be no deep disappointment where there is not deep love.'[20] Such an attitude, while it may not be necessary for a genuine pursuit of a moral reformation in political relations, may make that pursuit easier to realise. Moreover, such an attitude is obviously necessary when the ideal one pursues rules out attitudes other than pure-hearted love. I consider in the next section how this pure-heartedness may be reconciled with my understanding of civil disobedience as dissent which communicates condemnation of law or policy.

Characterising civic virtue in terms of a responsiveness to public ideals is consistent with appreciating that civic virtue is itself a character ideal. As a model of participation, civic virtue offers an extremely high standard for citizens to meet, requiring not only that they place community concerns before personal concerns when the two conflict, but also that they both be aware of the practices and policies that would serve common flourishing and be able to act on the basis of the right reasons to contribute to that flourishing. On a commonsense reading, responsible citizenship may be seen as a less stringent, more easily realised approximation of the ideal of civic virtue, an approximation which many disobedients deserve credit for cultivating.

Civic virtue and responsible citizenship both require a certain kind of communication, namely, an appropriate civic voice. Part of civic harmony in a framework of pluralism and disagreement, says Robert Audi, 'consists in using that voice as the primary mode of communication in debating issues important for citizens...'[21] An appropriate civic voice requires the kinds of communication, discussed in Chapters One and Three, that allow a person to claim with legitimacy

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[20] King, Martin Luther Jr (1963), 'Letter from Birmingham Jail'. Reprinted in *Philosophy of Law*. Fifth Edition (1995), Joel Feinberg and Hyman Gross (eds.), Belmont: Wadsworth, 119.
[21] Audi (1998), 164.

that she aims to persuade others of the merits of her view. We saw in those chapters that, for communication through civil disobedience to be justified, a person's reasons for action must meet not only certain subjective conditions of moral consistency and self-respect, but also certain objective conditions of intelligibility to others. The kinds of reasons that count toward the justification of civil disobedience depend in part upon the parties to whom justification is owed: it must be possible to offer reasons for a disobedient's action which would satisfy those who may legitimately demand justification and who might not share her moral outlook. When a disobedient can do this then she communicates with an appropriate civic voice.

c. Admirable Modes of Pursuit

The link between persuasive communication and an appropriate civic voice extends beyond the reasons an agent has for her actions to the actions themselves and, in particular, to the mode or manner in which those actions are performed.[22] Value ideals place certain constraints on the actions that may legitimately be taken in their pursuit. The nature of these constraints depends upon the nature of the ideal; the constraints upon the legitimate pursuit of an intellectual ideal (requiring effortful study and intellectual curiosity), for example, will differ from the constraints upon the legitimate pursuit of a moral ideal (requiring consideration for the character and consequences of one's conduct). When the modes of pursuit of a genuine value ideal are in keeping with the spirit of that ideal and are taken for the right reasons, then those modes are genuinely admirable. The strangeness in characterising modes of pursuit as the proper elements of a category of ideals lessens when we appreciate that

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[22] *Means*, as noted in Chapter One, are the types of actions that people take (speech, writing, trespass, etc) and *modes* the manner in which these actions are taken, be it violently or peacefully, collectively or individually, etc. For simplicity, I shall use the phrase 'modes of pursuit' to refer to both the means and modes of action.

acting in an exemplary way and for the right reasons can be an end in itself even as it contributes to the realisation of ideals more easily recognised as ends. It is central to Gandhi's morality, for example, that leading an exemplary life by setting a good example through one's pursuit of certain aims is an intrinsically valuable end.

Like value ideals and even character ideals, modes of pursuit may recommend themselves in some contexts, but not in others. Given the differences in the contexts people face, it is understandable that an admirable mode of pursuit in one case might not be an admirable mode in another even when, at an abstract level, the people seek the same ideal. For example, although at some level Gandhi, King, and Mandela strove for the same ideal of inclusive democracy, Mandela found that, while he admired Gandhi's non-violence, he could not adhere to it in his own efforts in South Africa.[23] Relatedly, in a given context, there can be more than one admirable way to pursue an ideal. The way that Gandhi pursued his ideals through stringently non-violent resistance, for example, was not necessarily the only admirable way or even the most admirable way to seek independence for India (granting that Gandhi's way was admirable).

Also like character ideals and value ideals, admirable modes of pursuit are more pervasive and constitutive than ordinary goals are. A model action performed on one occasion in the right way for the right reasons is not in and of itself an ideal since it lacks the comprehensive and pervasive aspects of ideals. Single instances of model conduct may contribute to genuine (though momentary) pursuits of ideals, but those actions only contribute to an ideal mode of pursuit when couched within a general framework of such conduct.

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[23] I consider non-violence in Section 3.

To introduce my discussion in the next section of how the pursuit of ideals can go awry, let me note two ways in which admirable motivations and admirable modes of pursuit can pull apart. Whereas a person who has some success in realising a character ideal will take the right action in the right manner for the right reasons, a person who lacks the right disposition may fail to do this either by acting for the right reasons while taking the wrong action or by taking the right action for the wrong reasons. (A person might also take the wrong action for the wrong reasons, but such action does not represent a division between admirable motivation and admirable conduct.) In the first case, she lacks an appreciation for which actions these normative reasons indicate she ought to take. As noted in Chapter Three, a person may have reasons for engaging in one form of disobedience, but choose to engage in another form that is not supported by the reasons which admittedly apply in this context. Her conduct in such a case is at best excused. In the second case, the person lacks the proper motivation although she does as those reasons would have her do. She performs an action which she has undefeated reasons to perform, but not for those reasons (nor for other respectable reasons which would allow her better to adhere to the relevant normative reasons). Her action in this case may be permissible or even obligatory, but it is not taken for the right reasons. Before considering improper motivation, extremism, and false ideals more fully, I wish to specify how ideals, as I have characterised them, relate to other moral categories.

d. The Place of Ideals in Morality

As stated above, ideals provide standards of excellence which guide people in the development of aspects of their lives. Such development can pertain to categories like duty, motivation, virtue, and principle, to which people are more accustomed to

focusing their attention. In many contexts, genuine ideals shape right action, but since ideals are several and often incompatible with each other, the right action as it is specified by one ideal or set of ideals may differ greatly from that specified by an another, and in all likelihood respecting equally the duties presented by each will be impossible. However, duties also exist which do not seem to depend upon ideals. Keeping good promises, for example, needs no comprehensive conception of perfection to recommend itself to all as a practice, though such a practice can be part of such a conception. The point is not that ideals replace duties or are the only source of duty, but rather that ideals lie closer to the centre of morality than is generally acknowledged. Ideals underpin many duties, yet also clash sometimes with the demands of duty. As the examination of historical and contemporary cases of civil disobedience will suggest, genuine ideals are no less admirable for their conflict with duties, and can show to an extent where the limits of duty lie. This claim must be tempered since not all ideals warrant equal consideration when either they or the duties they generate come in conflict. Ideals of style and their attendant obligations, for example, should take a backseat to ideals and duties which recommend themselves to all.

The relation between ideals and duty is complicated by the fact that some ideals may be named by the same terms as some duties. Imperfect duties like beneficence, charity, generosity, and fidelity are primary examples. Explanations for this overlap differ. Bernard Gert, for one, argues that beneficence and other 'imperfect duties' are really only ideals.[24] Audi, by contrast, argues that where beneficence and fidelity are the ideal, they represent a level of actual commitment higher than that required by duty. Simply meeting duties of beneficence and fidelity would not entail

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[24] Gert, Bernard (2005), *Morality: Its Nature and Justification*. Oxford: Oxford University Press, 17. Gert states that '…duties of imperfect obligation are not duties any more than false friends are friends.'

realising ideals thereof.[25] Ideals (positively) exceed what duty requires, says Audi, and are in that sense supererogatory. Of the two accounts, Audi's is preferable in one respect since it acknowledges the comprehensive and constitutive aspects of ideals. However, not all adherence to ideals is supererogatory. Given that certain ideals can be particularly salient to specific roles, respect for those ideals may prove obligatory for persons in those roles and supererogatory for the rest of us. Moreover, as I suggest in Section 3, it may be appropriate sometimes to blame someone who fails to realise her aspirations, which suggests that pursuit of certain ideals is not supererogatory. In contrast with both Audi and Gert, I would suggest that, while ideals like beneficence and generosity may give us all imperfect duties of beneficence and generosity, they give persons in roles for which those qualities are particularly salient a more general obligation to further these ideals as much as possible. We can see from this the extent to which ideals and duty are interdependent and often mutually reinforcing.

2. The Dangers in Ideals

A question that arises is whether it is undesirable sometimes for people to take up another person's pursuit of a genuine ideal. There are several contexts in which this might be so. First, people might misidentify the admirable aspects of a given pursuit, in which case their efforts to contribute could produce the opposite of a valuable result. Second, some ideals like humility or chastity or revolution through pure-hearted, non-violent resistance are best pursued by a small number of persons who have undergone a process of self-purification. Such people, having acquired a disposition that brings these ideals potentially within their reach, are better placed than others are to pursue those ends. Not only are such persons more likely than

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[25] Audi, Robert (2004), *The Good in the Right*. Oxford: Princeton University Press, 170.

others are to succeed, but also the pursuit by all of such ideals would be disastrous in its cost to other genuine ideals. Promotion of ideals as a domain requires that different people pursue different ideals incompatible with other ideals. If all people devoted themselves to the realisation of humility, chastity, or Gandhi's notion of non-violence, for example, then not only would society fall to ruin, but all other ideals and excellences in human life would be lost.

Just as dedication by all to a single ideal would be a dangerous thing, so too would be over-zealous dedication by any one person to an ideal, particularly to a public ideal. Public order, as Rescher observes, is a good. 'But when, like Robespierre, one sacrifices multitudes on its altar, things have gone too far.'[26] It is largely such threats of single-minded fanaticism that underpin the recent wariness about ideals in western philosophy. But, ideals are not inextricably linked to the fanaticism that Isaiah Berlin and others have feared.[27] This is shown, for example, in Gandhi's account of morality as an ideal of exemplary action. For Gandhi, morality is not about principles, but about exemplary acts of conscience. Morality involves setting an example through one's life and action which one hopes others will follow. The emphasis on hope, rather than on expectation or demand for adherence to some moral standard, stems from Gandhi's rejection of a right to criticise others if they somehow fall away from one's moral outlook. Gandhi maintains, says Bilgrami, that, while we may sometimes be confident in our grasp of the truth or in the worth of our values and actions, we are not entitled thereby to criticise others for not taking the same approach because criticism is a form of violence; and there is no true non-violence until criticism is removed from the realm of morality. Bilgrami states that,

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[26] Rescher, Nicholas (1987), *Ethical Idealism: An Inquiry into the Nature and Function of Ideals*. London: University of California Press, 126.
[27] See Berlin, Isaiah (1990), 'The Pursuit of the Ideal' in *The Crooked Timber of Humanity*. London: John Murray.

> In Gandhi's writing there is an implicit but bold proposal: "When one chooses for oneself, one sets an example to everyone." That is the role of the satyagrahi. To lead exemplary lives, to set examples to everyone by their actions. And the concept of the exemplar is intended to provide a wholesale alternative to the concept of principle in moral philosophy.[28]

Bilgrami's interpretation of Gandhi's philosophy diverges from the standard view which regards Gandhi's modesty about moral judgment as an Enlightenment position akin to Mill's, which warns against a conviction that we have obtained the truth. Gandhi's modesty, says Bilgrami, stems from no such diffidence about the truth, but from an avoidance of the hostility and contempt that give in to the spiritual flaws underlying violence. I shall accept Bilgrami's interpretation of Gandhi unchallenged, as it offers a fruitful contribution to our analysis of ideals.

Thus, on Gandhi's view, a wholehearted pursuit of ideals is compatible with holding one's moral values modestly and eschewing criticism of others. One can appreciate the rightness of one's commitment and actions without adopting attitudes of condemnation, hatred, and obsession which purportedly haunt ideals. When others act in ways contrary to one's pursuit of an ideal, one simply does not follow them, but hopes they will come to see the value in one's views and conduct. All this suggests that, although ideals sometimes are abused, ideals need not be condemned for some inextricable association with fanaticism.

A different response from Gandhi's to the problem of extremism is offered by King:

> But though I was initially disappointed at being categorised as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love: 'Love your enemies, bless them that curse you…' Was not Amos an extremist for justice: 'Let justice roll down like waters and righteousness like an ever-flowing stream.'…Was not Martin Luther an extremist: 'Here I stand, I cannot do otherwise, so help me God.'…So the question is not whether we will be extremists, but what kind of extremists we will be.[29]

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[28] Bilgrami (2002), 86.
[29] King (1963), 118.

By embracing the term 'extremist', King seeks to neutralise it, showing that it is not only compatible with the best of views, but also exemplified in the lives of great people. Certainly, the term 'extreme' need not carry negative connotations. Most ideals are themselves extremes since the pursuit of an ideal is often the pursuit of an upper limit, the height of which is unknown. The aim is to run faster than we think possible or to hone our rational faculties beyond their apparent limits or to treat well all people including those who abuse us. Extremes like these are true excellences, the great goals of humanity, and to be wholeheartedly committed to their realisation is, as King claims, meritorious. Being an 'extremist' in this sense is no epithet.

But, King's argument must be qualified by an appreciation that the way in which one advocates the realisation of an ideal is equally important. Remember Robespierre's overzealous pursuit of 'public order'. It is this kind of extremism – the excessive attachment and zeal – which opponents of ideals find disturbing. But, what these challengers miss is that a pursuit which takes the form that Robespierre's did cannot be regarded as a genuine pursuit of the ideal of public order since it clashed with the spirit of that ideal. Public order in the best sense does not require the mass slaughter of one branch of society. Rather it requires conduct that both respects the rights and dignity of all citizens and ensures that a 'positive peace' may be sustained. Similarly, the ideal of peace requires, at least, peaceful modes of pursuit in its name. Peace protesters who act violently cannot legitimately claim to act in pursuit of this ideal. To say otherwise, is to lose sight of the nature of this ideal and its constitutive, pervasive features. Thus, genuine ideals themselves preclude certain kinds of extremism. Ideals also place certain constraints upon the reasons for which people legitimately may act in their pursuit. A person who pursues peace for reasons of self-promotion, for example, does not act in an exemplary way; her conduct lacks the

appropriate disposition for a sustained and meaningful pursuit of such a value ideal, and so cannot be regarded as a genuine pursuit of that ideal.

In the end, although King embraces the term 'extremist' and Gandhi rejects it, their responses complement each other and highlight the importance not only of the ends one seeks but of the mode of pursuit and motivation one adopts in seeking them. The person who advocates the realisation of an ideal in a manner in keeping with the spirit of that ideal can claim the title 'extremist' proudly.

While concerns about improper motivation and extremism in action may be put aside when it comes to genuine ideals, such dangers arise in relation to the pursuit of false ideals. False ideals are ideals in the sense that they are conceptions of perfection, but they are conceptions that have no objective value. The Nazi ideal of racial purification, for example, reflects, as Rescher observes, a misbegotten desideratum in which perfectly good values like communal solidarity, group loyalty, and pride in heritage overdevelop into something monstrous, usurping the space created when other less parochial and more human values were abandoned.[30] Such ideals invite corrupted motivations and extremist modes of pursuit (though it is not necessary that the three perversions coincide).

In what follows, I apply my analysis of ideals to some historical and contemporary cases of civil disobedience. I return to the issue of realisability noted at the outset and identify certain obstacles to the realisation of public ideals like motivation and surrounding circumstances, noting ways in which these obstacles may be overcome. I also explicate various features that mark historical pursuits of public ideals, specifying more fully the relation between ideals and duty and highlighting the tragic aspect of ideals. Finally, I note concerns about necessity and violence,

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[30] Rescher (1987), 125.

identifying a possible paradox in the pursuit of ideals since sometimes actions that cannot constitute a genuine pursuit of an ideal better serve that ideal than genuine pursuits do. But first, I show that the pure-heartedness discussed above can be reconciled with the condemnation exemplified in paradigmatic civil disobedience.

3. Historical Paradigms

a. Pure-heartedness

Gandhi's statement 'My life is my message' shows how constitutive of his life he took his political and moral commitments to be.[31] There is something self-congratulatory in the phrase, but in Gandhi's case, as in the case of some other dissenters, the conviction seems apt. The phrase not only is revealing of Gandhi as a person devoted to the pursuit of a seemingly impossible end, but also says something true of humans generally: it is in how we live and act that we show who we are, not just in what we profess. In Gandhi's case, his rhetoric was matched by action (so concerns about consistency may be laid to rest), and both sprang from his understanding of morality in terms of an ideal of exemplary action.

Unlike Gandhi, I do not believe that ideals and their pursuit can offer a wholesale alternative to the concepts of *moral principle*, *duty*, and *judgment*. One danger in characterising ideals in terms of exemplary action is that it implies a certain narcissism in suggesting that the exemplary person presents herself as one who can set an example for everyone. Gandhi overlooks that the pursuit of ideals is not primarily about setting examples. In the context of public ideals, it is about justice or peace or equality and the process necessary to achieve those ends. And that process may require pursuing, for example, a character ideal like non-violence. Some of this

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[31] There is a dispute over whether Gandhi uttered this statement or wrote it down before leaving Calcutta for Delhi in 1947 in the hope of ending violence there between Hindus and Muslims.

Gandhi may be able to accommodate if he understands an exemplary person to be one whose reasons for action do not include setting a good example for others; that she does so is incidental to her pursuit of a given value ideal.

Another danger in Gandhi's approach is that it seems to silence opposition where opposition would be appropriate. A person is well-placed to demand justification from another for his action when she has a certain standing relative to that person and a *prima facie* cause to ground her objection. Gandhi would not endorse this language since to demand a justification implies a judgment or criticism of the other's action and this, like the notion of *objection*, invites violence (very broadly understood) into morality. But, concerns about justification are relevant to Gandhi's morality since they speak to the reasons a person has for pursuing a given end. As Gandhi himself maintains, it is not simply what one does that matters, but also why one does it. His concern about pure-heartedness may be recharacterised in terms of a concern about the reasons for which a person acts, a concern which, as noted earlier, shapes what counts as a legitimate pursuit of ideals. If we focus our attention on the agent, and not on the people to whom (in my view) she owes an explanation for her action, we find common ground between Gandhi's position and my own. Both highlight the importance of the agent's attitude toward her conduct. Her ability to defend her reasons for action is one mark of conscientiousness, a trait closely linked, I shall argue, to the pursuit of ideals.

Gandhi's account thus should be seen as applying primarily to motivation since his own disobedience, like King's and Mandela's, is actually a form of condemnation although their attitude is purportedly one of pure-hearted love for the people they oppose. Mandela, for his part, was questioned upon his release about his attitude toward white people, as many expected him to harbour anger and resentment

toward whites. But, he asserted that he felt none. In prison his anger toward whites diminished, but his hatred of the system grew (a sentiment which distinguishes him from Gandhi and which points to the incommensurability of their specific ideals). Mandela's famous policy of reconciliation nevertheless resembles Gandhi's pure-hearted resistance and King's non-violent direct action since all three men acknowledged that the way they and their followers pursued their ends and the attitudes they adopted toward those ends were crucial both to their success and to the integrity of their projects. History would suggest that, in each case, their activism was undertaken for good reasons and done with the aim to realise a public ideal in a manner in keeping with that ideal.

b. Imagination and Motivation

The realisability of an ideal depends in part upon the innovation, imagination and commitment of the persons seeking to realise it. The lack of imagination shown in the 1960's by many white American moderates both in their conception of public ideals and in their appreciation of how far their society fell short of them, for example, may have not only underpinned their criticism of King and his activism, but also slowed the US civil rights movement. Although these people have some appreciation for the plight of black Americans and believed that an integrated, equal society would be preferable to segregation and inequality, they could not drum up the motivation to do their part in support of a state of affairs they regarded as valuable. At most, they paid lip-service to this admirable end. As Thomas Nagel observes,

> It is possible for individuals to judge from an impersonal standpoint that a certain form of collective conduct or a certain set of interpersonal relations would be good – or better than what we have now – without being thereby sufficiently motivated to do what would be necessary to play their part in such an arrangement.[32]

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[32] Nagel, Thomas (1991), *Equality and Partiality*. New York: Oxford University Press, 29.

This lack of motivation can arise when an ideal is not motivationally reasonable. An ideal is utopian, says Nagel, if, however attractive it is to contemplate, people are not motivated to follow it. If people find it difficult or even impossible to live as a theory or ideal requires or to adopt the relevant institutions, these things should carry some weight against the ideal.[33] And yet, people simply may need to be educated properly about the ideal to find the motivation to follow it. In King's America, it was not impossible for some at least to follow the ideals that King and his associates set. Many African Americans and a handful of whites sought to live as these ideals suggested, and found that it was possible. The apathy of white moderates, therefore, did not stem from any motivational unreasonableness in King's ideals as such. Rather, it stemmed greatly from a lack of imagination and a refusal to conceive of the plight of others as their own. King states, 'I suppose I should have realised that few members of the oppressor race can understand the deep groans and passionate yearnings of the oppressed race, and still fewer have the vision to see that injustice must be rooted out by strong, persistent and determined action.'[34]

Innovation, imagination, and motivation are required not only in the conception of ideals, but also in their pursuit. To pursue an ideal, one must conceive of it, develop it in one's mind, and structure one's life and actions around it. One must both be open to alternative approaches to living and learn not to be swayed by a natural concern for self-preservation. This last feature, which many white moderates were unable to demonstrate, is a mark of sincere dedication to an ideal. Both Gandhi and King recognised the difficulty in putting aside personal concerns for the sake of an ideal, which is why they trained themselves and their followers not to respond when attacked with violence and not to feel hatred toward those who attacked them.

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[33] Nagel (1991), 21.
[34] King (1963), 118.

They willingly exposed themselves to the risks of punishment and censure and they did it for the right reasons: to further the interests of their communities in the hope of realising genuine public ideals. As Thoreau notes, only a very few people – heroes, martyrs, patriots, reformers in the great sense – serve their society with their consciences in this way, and so necessarily resist it for the most part, and are commonly treated by it as enemies.[35] And the greatest sacrifice comes from those who have most to lose: the few white people who committed themselves wholeheartedly to the civil rights movement and demonstrated their dissociation from the law through disobedience showed not only a strong sense of duty toward their fellow citizens, but also some greatness in accepting significant burdens when they were not directly harmed by established policies. They and their African American associates displayed responsible citizenship through their sincere and serious commitment to genuine public ideals.

c. Circumstance Relativity and Violence

The realisability of an ideal also depends upon the circumstances in which one seeks to realise it. In some cases, the prevailing circumstances are such that no one in those circumstances is presently capable of achieving the ideal. The unrealisability of the ideal in defeating circumstances, as Coady calls them, shows neither that the ideal is unrealisable *tout court* nor that it has no present implications. Acknowledging the ideal should lead an agent in those defeating circumstances to do what she can to change the circumstances, or, if this impossible, to take up whatever opportunities result from changes in those circumstances (however induced) to move in the direction of the ideal.

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[35] Thoreau, Henry David (1991), 'Civil Disobedience' in *Civil Disobedience in Focus*. Hugo Bedau (ed.), London: Routledge, 30-1.

Coady identifies one consequence of defeating circumstances: the present unrealisability of the ideal. But, there could be at least two others. The first is the impossibility of *pursuing* the ideal in question, let alone realising it. The second is the impossibility of pursuing the ideal in a manner that is genuinely admirable (which might amount to the same thing given the constraints that genuine ideals place upon legitimate pursuits). One worry about circumstance-relativity is that defeating circumstances may be invoked when they are not present. People might claim that certain modes of action are unavailable when actually they are available. This was the crime of white moderates who called King's disobedience 'untimely and unwise'. In asking King and his associates to wait for a better season, they implied that, in the present circumstances, these objectives were unrealisable and dangerous. In Mandela's case, however, the invocation of defeating circumstances seems more plausible. During the crackdown in the 1960s and 1970s, the ANC and its associates found it extremely difficult to take meamingful steps toward public ideals of democracy and equal liberty. The extremity of the situation led many to employ violent tactics.

Concerning his endorsement of strategic violence, Mandela states that he followed the Gandhian strategy of non-violence for as long as he could:

> ...but then there came a point in our struggle when the brute force of the oppressor could no longer be countered through passive resistance alone. We founded Unkhonto we Sizwe and added a military dimension to our struggle. Even then, we chose sabotage because it did not involve the loss of life, and it offered the best hope for future race relations.[36]

If we grant that Mandela faced defeating circumstances which rendered it impossible to pursue his public ideals through non-violent means, we must ask whether those

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[36] Mandela, Nelson (2000, 3 January), 'The Sacred Warrior' in *Time*. Retrieved 27 June 2005 from http://www.time.com/time/time100/poc/magazine/the_sacred_warrior13a.html

means which he could and did use were in keeping with the spirit of the ideals he sought.

As we have seen in previous chapters, violence is not in itself at odds with the conscientiousness and communication exemplified in paradigmatic civil disobedience. Nor is it by definition coercive. Some violent measures can eloquently communicate a person's frustration and conviction while leaving the targeted audience with a variety of possible responses. Nor does violence necessarily speak ill of a person's pursuit of public ideals. The use of violence can support rather than undermine the values and ideals to which justified civil disobedience contributes. Mandela's use of sabotage, for example, was preferable for the reasons he gives to other forms of violence, and it aligned as well as can be expected with the public ideals he sought. This is implied in the fact that Mandela was able to defend his reasons for employing such measures. When questioned after his release about his ongoing commitment to the armed struggle Mandela maintained that there was no contradiction between this and his advocacy for negotiations with the de Klerk government for democracy. It was the reality and threat of armed struggle, he said, that brought the government to the verge of negotiations. He added that 'when the state stopped inflicting violence on the ANC, the ANC would reciprocate with peace.' When asked about sanctions, Mandela replied that the ANC could not yet call for the relaxation of sanctions because the situation that caused sanctions in the first place – the absence of political rights for blacks – was still the status quo. I might be out of jail, he said, but I am not yet free.[37]

Mandela's actions may be compared with the actions of Malcolm X who, like Mandela, endorsed violent strategies. King and Malcolm X, both sons of African American preachers, differed in the goals they sought and the strategies they used to

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[37] Mandela (1994), 568.

pursue them. Whereas King became a leader in non-violent direct action and interracial cooperation, Malcolm X developed a position of armed self-defence and exclusive all-black nationalism. King was very critical of Malcolm X's advocacy of violence which King saw as doomed to create nothing but grief. 'Over the past few years I have consistently preached', says King, 'that non-violence demands that the means we use must be as pure as the ends we seek. I have tried to make clear that it is wrong to use immoral means to attain moral ends.'[38] Malcolm X, however, saw his contributions as necessary to King's work. He said once to King's wife Coretta that 'If white people realize what the alternative is, perhaps they will be more willing to hear Dr. King.'[39] The possibility that Malcolm X smoothed the way for King's pursuit of his ideals complicates the assessment of both activists' conduct. It suggests that the one could remain pure in his mode of pursuit because the other was there to do the more dirty work. That King did not welcome Malcolm X's purported assistance suggests a consistency in King's methods and ideals.

But, Malcolm X's activism highlights a paradoxical aspect to the pursuit of ideals, namely that sometimes one can better promote an ideal through actions which cannot be deemed a genuine pursuit of that ideal than one can through a genuine pursuit. It could be argued, for example, that Malcolm X's activism did not constitute a legitimate pursuit of democracy and equality since he advocated modes of action at odds with those ideals. Malcolm X claimed, for example, that black Americans should achieve their emancipation through whatever means necessary (though there is little to suggest that he engaged in extreme activism himself). Nevertheless it is possible that he did more for ideals of democracy and equality than did many activists who could

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[38] King (1963), 120.
[39] 'Malcolm X' in the *King Encyclopedia*, The Martin Luther King Jr Research and Education Institute Retrieved 15 November 2005 from www.stanford.edu/group/King/about_king/encyclopedia/x_malcolm.htm

claim with legitimacy to pursue those ideals since, as he himself said, Malcolm X made society aware of the alternatives to non-violence.

Then again, one might argue that Malcolm X's activism did constitute a genuine pursuit of democracy and equality and that his methods were simply incommensurable with those employed by Gandhi or King. It is true that, despite the force of his assertions, Malcolm X's activism cannot be labelled extremist since most of his activism came from a pulpit or lectern. His activism may be seen as an eloquent statement of frustration consistent with paradigmatic civil disobedience. The point remains that the line between strategic violence and extremism is a fine one; and although unjustified violence that neither harms others nor has significant consequences is not extremist, nevertheless much unjustified violence is extremist and may be questioned particularly when purportedly employed in pursuit of public ideals.

d. Noble Purpose and Agonising Loneliness

King ends his letter from Birmingham Jail stating that, 'One day the South will recognise its real heroes. They will be the James Merediths, with the noble sense of purpose that enables them to face jeerings and hostile mobs, and with the agonising loneliness that characterises the life of the pioneer.'[40] Here King picks out at least two features of a pursuit of ideals: a noble sense of purpose and agonising loneliness. The former is closely linked, I believe, with the kind of conscientiousness exemplified in paradigmatic civil disobedience. Such conscientiousness combines a sincere and serious commitment with an appreciation that this commitment brings with it certain demands upon the holder's conduct. It requires that a person who sincerely believes

[40] King (1963), 120. James Meredith became in 1962 the first African American to attend the University of Mississippi. His action, at the time, may have been marked by the noble sense of purpose and agonising loneliness that King attributes to him a year later in his Letter, but in later years, Meredith actively distanced himself from the civil rights movement, becoming increasingly conservative in his outlook.

that certain decisions are wrong not only avoid those types of decision herself, but also judge the conduct of those who pursue such decisions as being wrong (however charitably she may feel toward those persons). Moreover, conscientiousness commits her to communicating this judgment in some situations. The person who believes that a law or policy requires revision and that the values behind her judgment are sufficiently weighty to warrant a breach of law in their defence would be morally inconsistent to deny that she has reasons to dissociate herself from the law she opposes. When the ideal a person pursues is genuine then the conviction that marks her disobedient conduct is well-founded, and this gives her good reason to feel a noble sense of purpose. However, that sense of purpose requires both confidence and optimism, attitudes which may be difficult to sustain in the face of continued opposition.

Intuitively, a noble sense of purpose seems more appropriate for the pursuit of ideals than, say, for the performance of duty unrelated to ideals. This may be due to our sense, first, that one should be able to do one's duty (since ought purportedly implies can[41]), and second, that one simply *should* do one's duty: one needs no sense of purpose to do what one ought to do. Concerning ideals, by contrast, it is less clear whether one should be able to realise one's ideals. Many ideals, as we have seen, prove to be unrealisable for various reasons. Moreover, striving for an ideal seems both supererogatory and more difficult than does fulfilling one's duty, making the pursuer of ideals seem noble for her commitments. These intuitions explain why we tend to blame those who fail to do their duty and praise those who live up to their aspirations. But, it is unclear that these are the right attitudes to take in either case. As

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[41] This phrase oversimplifies the relation between ought and can. It is better to say that what one ought to do is constrained by what one is able to do. Suppose I have to give a tutorial in the afternoon, but drink too much wine at lunchtime such that I am unable to conduct the tutorial. In some sense, I still ought to hold the tutorial, but the fact that I am unable to is a constraint upon this.

Coady observes, sometimes it is very hard to do one's duty; and we do well to praise those who do theirs. And, sometimes we do well to blame those whose behaviour fails to accord with their professed ideals. Moreover, as Coady continues, sometimes people may be blamed not just for failing to live up to ideals they have embraced, but also for failing to have certain ideals at all, as in the case of white American moderates who fail meaningfully to embrace the ideals of equality and justice. One might claim that whites simply failed in their duties not in their ideals. But that failure is attributable to the fact that they did not have the right set of ideals. True, this implies that those ideals are ideals they *should have held* (perhaps had a duty to hold), yet that duty may well have stemmed from a more general value ideal which appeals to all. In any case, these points do not undermine the claim that pursuing ideals may be marked by a sense of purpose; rather they suggest that one overstates the point to say that a noble sense of purpose is distinctly appropriate for the pursuit of ideals. Respect for duty as such also may warrant this attitude. Moreover, a noble sense of purpose in the pursuit of an ideal is only warranted when a person's mode of pursuit and reasons for pursuing it are in keeping with the ideal to which she has professed commitment.

The second feature noted in King's statement is the feeling of agonising loneliness (which I am sure could also pick out the person who does her duty when all others shirk theirs). In the contexts we have been considering, where the defenders of genuine public ideals are in the minority, are vilified by some and deified by others, are imprisoned, threatened, assassinated (in the cases of Gandhi, King, and Malcolm X), acute loneliness is a likely (though not necessary) feeling for these pioneers. Perhaps, it is here that the single-minded or 'fanatical' aspect of ideals comes out. To endure such extraordinary treatment and not to lose sight of the end requires self-

isolation in many ways. Ironically, though, the trail-blazer's acute loneliness can combine with a sense that her life is not her own to command. On the day of his release from prison in February 1990, Mandela addressed South Africa and the world from the balcony of the old City Hall in Cape Town.

> I greet you all in the name of peace, democracy and freedom for all! I stand here before you not as a prophet but as a humble servant of you, the people. Your tireless and heroic sacrifices have made it possible for me to be here today. I therefore place the remaining years of my life in your hands.[42]

His language echoes Gandhi's phrase – my life is my message – in the sense that the lives of these men are not seen by them as their own to control. In committing themselves wholeheartedly to a public ideal for their people, they appreciate that their lives as individuals become the common property of those for whom they strive. In his autobiography, Mandela speaks wistfully of wanting to relax with his family and to visit the Transkei after his release. No such opportunity came in the sea of ANC activities and negotiations as well as the continued armed struggle in the early 1990s. At his daughter's wedding sometime after Mandela's separation from his wife Winnie, he said that 'it seems to be the destiny of freedom fighters to have unstable personal lives. When your life is the struggle, as mine was, there is little room left for family. That has always been my greatest regret, and the most painful aspect of the choice I made.'[43] It is in the cost to activists' personal lives that extremism re-enters the scene in a tragic way.

The tragic aspect of ideals is a general feature arising from their plurality. Coady takes the view that conflicts of ideals are less tragic than clashes of obligations are. In the case of ideals, says Coady, we seem characteristically to face postponement rather than outright violation of our ideal. But, what Coady does not consider is that there are time constraints when it comes to ideals. It is only at certain times in one's

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[42] Mandela (1994), 565-6.
[43] Mandela (1994), 600.

life that one has, for example, the physical ability to strive in any meaningful sense for an athletic ideal or the mental ability to strive for an intellectual ideal. The constraints of time and capacity can turn a conflict between ideals into a tragic dilemma because an ideal too long postponed will become an ideal denied; in essence, 'for all sad words of tongue and pen, the saddest are these "it might have been."'[44] Though it may sound odd to hold that an ideal has been 'violated' or 'breached', this is often the effect of postponement. Mandela's opportunities to be an admirable, loving father to his children, for example, diminished or even disappeared when his children were forced to grow up without him. And when he returned to them as a father, they found he was now the father of the nation. It is not simply that one only can do certain things well (or at all) at certain times in one's life such as be a good parent, husband, academic, athlete, but also that if one does not start down the path toward realising those ideals at a certain stage, it is almost assured that one either won't make it or won't get as far as one would have done had one started at the right time. In deciding which path to pursue, one does face a tragic dilemma of ideals since whichever ideal one puts aside probably is forever lost. The tragedy is most acute when one would have more closely approximated the abandoned ideal either than other persons do or than one ever will approximate those ideals that one adopts. The same concern about postponement applies at the community level. In his letter, King quotes that 'justice too long delayed is justice denied.' The postponement of a public ideal can be tragic in the sense that whatever effort people put into it subsequently will be at best a poor approximation of what it could and should have been for those people. African Americans who lived before the civil rights movement, for example, were denied that

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[44] Whittier, John Greenleaf (1854), 'Maud Muller'.

degree of justice which the movement could have given them. In not being taken up during their lifetimes, the ideal was denied to those people.

e. Necessity

At the Riviona trial in 1964, Mandela read a statement which concluded with this explication of his commitments:

> During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony with equal opportunities. It is an ideal which I hope to live for and to see realized. But if needs be, it is an ideal for which I am prepared to die.[45]

Characterising his life's work in terms of the Struggle shifts the focus from the end – the ideal of a free society – to the pursuit itself understood as an ongoing battle. Focusing on the mode of pursuit still can be a focus on ideals since, as I have argued, ideals include not only ends like states of affairs and ideals of character and motivation, but also the modes of action taken in their pursuit. Leading an exemplary moral life can be a good in itself. So, in focusing on the struggle, Mandela did focus on an ideal. However, Mandela's personal identification with 'the struggle' highlights a painful feature of ideals as things which give meaning and significance to a life. What does one do when the struggle ends and the ideal is realised? If and when we realise or approximate our ideals, they can no longer shape our lives and give them the same meaning that they do when we have not attained them. Bernard Williams points out that it is not absurd to take the view that 'although men set themselves ends and work towards them, it is very often not really the supposed end, but the effort towards it on which they set value – thus they travel, not really in order to arrive (for as soon as they have arrived they set out for somewhere else), but rather they choose

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[45] Mandela (1994), 368.

somewhere to arrive, in order to travel.'[46] One would be mistaken to say that, for Mandela, the travelling had intrinsic value and the arriving only instrumental value. Genuine value ideals, by definition, have intrinsic value and Mandela certainly appreciated the significance of the public ideals he sought. The point is that the approximation of an integrated, democratic South Africa which Mandela and others achieved in the mid-1990s would have dislodged the core meaning around which they built their lives. In Mandela's case, the cultivation and maintenance of that approximation of the ideal provided a surrogate for the Struggle, but nevertheless he lost much of that conception of perfection the search for which was the purpose of his life.

Mandela's experiences, like King's and Gandhi's, may be considered through the lens of necessity, the loss of which can derail a plotted course. Harry Frankfurt argues that enlarging the range of available and permitted alternatives invariably entails diminishing the scope of necessity in human life.

> It narrows the extent to which people find that circumstances allow them no choice but to follow a particular course of action...Reducing the grip of necessity may not in fact enhance our enjoyment of freedom. For if the restrictions on the choices that a person is in a position to make are relaxed too far, he may become, to a greater or lesser degree, disoriented with respect to where his interest and preferences lie.[47]

Something like this movement from necessity to disorientation applies to both Mandela and King. Throughout much of his life, Mandela and other black South Africans endured circumstances that severely restricted their options. Their circumstances structured their choices and made plain the cause for which they should strive; their necessity forced their resistance. Similarly, King and black Americans endured the hypocrisy of American democracy and the isolation and exclusion which

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[46] Williams, Bernard (1988), 'Consequentialism and Integrity' in *Consequentialism and its Critics*. Samuel Scheffler (ed.), Oxford: Oxford University Press, 20.
[47] Frankfurt, Harry G. (1999), *Necessity, Volition and Love*. Cambridge: Cambridge University Press, 109.

amounted to a necessity like that confronting South Africans. Interestingly, King's necessity also came from within. As Frankfurt observes, a person's ideals are those concerns, those limits, which she cannot bring herself to betray; they entail constraints that she finds unthinkable to violate. A person who loves nothing has no ideals; for that person, nothing is unthinkable, and there are no limits to what she might be willing to do.[48] For King, his religious conviction imposed limits on his commitments and his means of pursuit. For Gandhi too, great limits were imposed from within by his commitment to non-violence and to a morality of exemplary action. Finding one's necessity within is not necessarily more praiseworthy than finding it without. All of these men loved deeply and devoted their lives to the realisation of genuine public ideals. For both Mandela and King, though, as their efforts paid off, they lost some of that necessity which kept them focused on their objectives.

In Mandela's case, release from prison, the development of a democratic state, and the growth of valuable options for black South Africans would have threatened his sense of identity as a freedom-fighter. In King's case, growing recognition for his movement caused him to lose direction on how to pursue his ends, and consequently, lessened the meaning in his journey. King sought to expand his movement to the North without success. He also turned his attention to less tangible forms of racial discrimination like poverty. In doing these things, he lost credibility and influence over the civil rights movement. These events were perhaps inevitable as the movement lost its original inspiration and as the pursuit for the ideal became difficult in a new and less concrete way. What this suggests is that civic virtue and responsible citizenship are closely linked to necessity; one's sensitivity to public ideals and the duties they generate may be sharpest when society falls well short of one's objectives.

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[48] Frankfurt (1999), 114.

The closer one's society moves toward the goal, the more difficult the goal may be to see.

By way of summary, despite the vicissitudes in their experiences, Mandela, King, and Gandhi recognised that to serve their societies with their consciences, they must oppose them. Their civic commitment, informed by their understanding of certain public ideals, thus led them to engage in civil disobedience. I wish to dispel the idea that these disobedients were saints naturally disposed both to be responsive to public ideals and to engage in admirable civic conduct. Mandela, for his part, worried about being seen as a uniquely virtuous man. He wished to be known as Mandela, a man with weaknesses, some fundamental, who was committed but nevertheless sometimes failed to live up to expectations. Mandela's responsiveness, like King's and Gandhi's, did not stem from a natural goodness or natural sensitivity for public ideals. They acquired that sensitivity through their experiences and observation of oppression, hatred, bigotry, and segregation. At the height of their struggles, the necessity that shaped their circumstances gave them a distinctly clear lens through which to perceive both the flaws in their political systems and the ideals they would have to seek to remedy those flaws. Their ideals in turn gave them a sense of what their specific roles must be. It is ironic, but necessary to their efforts, that these disobedients, who demonstrated the public commitment reflective of responsible citizenship, were at the same time struggling for full recognition as citizens. Their lives juxtaposed heightened political participation with a demand for greater inclusion and official recognition, and their participation contrasts vividly with the apathy of the white populations within their countries whose recognition as full citizens was undisputed.

In the lives of Gandhi, King and Mandela, there are many parallels in the nature and magnitude of the problems they faced, the kinds of responses they offered, and the attitudes they adopted toward both those problems and the people who perpetuated them. Their lack of concern for self, their distress at the state of their societies, their continued optimism and sense of purpose in the face of grave setbacks, their impression that their lives were not their own to control, their sense that their political and moral commitments were constitutive of who they were are hallmarks of responsible citizens. Through their devotion and activism, they contributed to moral transformations in their countries, and thereby forced a redrawing of the boundaries of moral principle.

4. Shifts in the Paradigm

Gandhi's, King's and Mandela's activism is representative of the civil disobedience which aims to guarantee legal protection for the basic rights of a specific constituency. Such disobedience contrasts with much contemporary civil disobedience, which focuses not on basic rights, but on broader issues or special interests such as the environment, animal rights, nuclear disarmament, globalisation issues, and foreign policy. As noted at the outset, I am not suggesting that the features exemplified in paradigmatic civil disobedience have changed through this shift in aims and activities. It is within this framework of conscientious and communicative breaches of law that shifts in the practice of civil disobedience have occurred. Both disobedients' modes of communication and their aims for policy change have evolved.

Disobedience taken in support of concerns like the environment or foreign policy, for example, may be seen as a response to some breakdown in the mechanisms

for citizen engagement in the decision-making process. This breakdown might be termed a democratic deficit.[49] (Of course, it is not only within democracies that citizens defend concerns like the environment or animal rights. The point is just that disobedience of this sort may be understood at least partly in terms of citizens' declaration of a right to contribute to the dialogue on general policy.) Such deficits in that dialogue may be an inevitable part of real democracies, and disobedience undertaken to correct those deficits may be said to demonstrate, to varying degrees, that sensitivity to democratic ideals reflective of responsible citizenship.

Consider, for example, the activism of Sisters Ardeth Platte, Carol Gilbert, and Jackie Marie Hudson, who protested in October 2002 against US military policy by cutting through a chain-link fence in northeastern Colorado to gain access to a Minuteman III nuclear missile silo. Wearing suits labelled 'Citizens Weapons Inspection Team', the three nuns pounded with household hammers on both the 110-tonne concrete cover of the silo and the tracks that support the lid in the event of a launch. Using their own blood, the nuns drew crosses on the silo and the tracks. They then sang hymns and prayed until they were arrested.[50] The three nuns were tried and found guilty, first, of injury to, interference with, and obstruction of the national defence of the United States, and second, of $1,000 in damage to government property. They were sentenced to 41 months, 33 months, and 30 months imprisonment respectively, including 3 years of supervised release. The nuns' previous offences were cited by the prosecution to substantiate the call for stiff sentences.[51]

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[49] See Markovits, Daniel (2005), 'Democratic Disobedience' in *Yale Law Journal*, Vol. 114, 1897-1952.

[50] Cada, Chryss (2003, 27 May), 'Three Nuns and a Test for Civil Disobedience' in the *Boston Globe*.

[51] In 2000, the nuns illegally entered the Colorado Springs Air Force Base, struck a parked Marine fighter jet with a hammer and poured their blood on its landing gear. Charges were dropped.

The nuns' reasons for engaging in civil disobedience relate to a number of concerns, some of which pertain to the protection of basic rights, but others to nuclear disarmament and to US policy in Afghanistan, Iraq, Sudan, and more generally. The nuns argued that, as citizens in a free society, they have a basic right non-violently or symbolically to expose either the threat or the commission of war crimes by their own government. The nuns argued that they acted both out of their religious faith and out of what they perceived as an obligation under the principles of international law, specifically the 1945 Nuremberg Charter, to act against government policies which violate international law. Their objectives were not only to raise awareness about the presence of real weapons of mass destruction – the 49 nuclear missile silos – in northeastern Colorado, but also to embarrass the US government and to focus attention on atrocities committed by the US internationally.

The nuns' activities resemble the work of Gandhi, King and Mandela in that the common good is given priority over individual interest. Not only had the nuns taken similar actions in the past at the risk of imprisonment, but also on this occasion they refused on moral grounds to pay restitution to the US government, for which they will serve additional prison time. However, the nuns differ from the three historical disobedients I have considered in that the nuns' actions reflect a cosmopolitan conception of the common good which transcends national boundaries. Gandhi, King, and Mandela may have aimed indirectly to further the common good of humanity in their efforts to defend their constituencies, but such a cosmopolitan good was probably not their primary concern. One might argue that, in this respect, the nuns' action offers a closer approximation of the character ideal of civic virtue since the nuns' sphere of concern is not restricted to national interests. The expansiveness of

the nuns' conception of the common good speaks well for their commitment to public ideals *tout court*.

The element of necessity, which I suggested earlier was closely linked to civic virtue and responsible citizenship, may seem to be absent in the nuns' case since the pressures they face (threat of nuclear war, perhaps) are less tangible than those endured by Mandela, King and Gandhi which allowed the latter to see clearly the failures of their societies. Even so, necessity, as I argued, can arise from within. The nuns' religious convictions combined with their fervent commitment to peace and international justice gave them a strong sense of obligation and shaped their course of action in light of those ideals.

In view of their commitment to the ideals of peace and international justice, though, one might question whether the nuns' methods were wholly admirable. I have argued that violence is not in itself at odds with the conscientiousness of paradigmatic civil disobedience. However, in the nuns' case, violence is a trickier issue given the nuns' professed commitment to peace. Is beating a silo or pouring one's own blood on military equipment violence? Violence was characterised, in Chapter One, in terms of likelihood of causing injury; the line between violence thus understood and non-violence, if it exists, is difficult to locate. Presumably, the nuns did some violence to themselves to get sufficient quantities of blood to paint crosses on the silo and tracks. And, certainly, they did minor damage to property, which on our commonsense view would be deemed violence. Whether such actions are in keeping with the spirit of the ideal of peace depends to some extent upon how that ideal is specified. We must consider what is important about the ideal of peace as a comprehensive good. Respect for other people, for example, is a central component of such an ideal, a component which the nuns' actions did not contravene. Moreover, the ideal of peace is not simply

(or even necessarily) the absence of violence; it is a much more expansive conception of how societies should co-exist together. One might suggest that, on this basis, the nuns' actions, irrespective of description, were in keeping with the spirit of that ideal.

Just as the nuns must take certain actions and act for certain reasons to claim with legitimacy that they pursue the ideal of peace, so too the staunch animal rights activist and the environmentalist must give attention to certain life-style choices (diet, clothing, energy use, etc.) to claim with legitimacy that they pursue the ideals they profess. They must both be aware of the reasons they have to take certain actions in defence of these ideals and act on the basis of those reasons. Such dissenters thus are more constrained in the actions they legitimately can take than are dissenters who disobey out of mere disagreement. The disagreer, since she has no comprehensive commitment around which she structures her disobedience, may be justified in employing violence, for example, where a committed peace activist would not be. The greater liberty of the disagreer comes however with a price. Her dissent, while it may take the form of disobedience which responsible citizens would employ, lacks responsible citizenship, as it is not motivated by a commitment to public ideals. That such disobedience lacks civic virtue does not mean it necessarily lacks justification. Disobedience based on mere disagreement can be taken for undefeated reasons since the disobedient may have good reason to disagree with the policy in question. Her reasons and her action simply are not couched within a body of conduct which constitutes a genuine pursuit of an ideal and which warrants recognition as responsible citizenship. Justified disobedience which lacks a commitment to ideals still may be a useful vehicle for change. Often, it is through the slow development of collective agreement that dissenters have an impact on government. While the leaders of a movement in all likelihood will be motivated by a deep commitment to public

ideals, many of the participants may not be. They nıay simply add their voices to a growing snowball of public opinion.

Another difference between much contemporary disobedience and historical paradigms is their modes of communication. Many contemporary activists are highly organised, efficient coordinators of large-scale movements. (This is not to say that Gandhi, King, and Mandela were not organised. They were. However, they did not have access to the kinds of technology and communication which contemporary disobedients employ.) By making use of the internet and email, movement leaders mobilise large nunıbers of people and garner publicity for their concerns. Many contemporary disobedients also are fully aware of the legal process and offer guides to participants on appropriate behaviour, the strategic importance of non-violence, the treatment they should expect to receive from authorities, and possible recourse subsequent to arrest.[52] In response to this systemisation of disobedient practices, law enforcers also have developed sophisticated tactics. Police have standard procedures for dealing with protesters who go limp upon arrest, for example. Similarly, some judges have adopted the practice of banning long-time disobedients from attending political marches.[53]

Despite the increased professionalism of much disobedience, contemporary activism often seems less potent than historical civil rights disobedience was. Civil disobedience is a common occurrence now: it goes without saying that a large gathering of protesters will appear at every G8 summit. This lack of novelty renders dissenters less effective in their quest to stir society and government from their

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[52] See 'Civil Disobedience: A Legal Handbook for Activists' (1999-2001), produced by The Environmental Law Centre, University of Victoria. Retrieved 26 August 2005 from http://www.elc.uvic.ca/projects/1999-01/civil_disobedience.html.

[53] Potter, Will (2001, 14 September) 'The New Backlash: From the Streets to the Courthouse, the New Activists Find Themselves Under Attack' in *Texas Observer*. Retrieved 10 October 2005 from http://www.texasobserver.org/showArticle.asp?ArticleID=420.

lethargic complacency on key concerns. The only visible impact that G8 protests have had upon the summits is that the meetings have been moved from city centres to remote places. Perhaps, some of this impotence stems from the fact that contemporary issues are less captivating than people's basic rights are. Environmental ideals or animal rights ideals may be harder for a community to identify with than the desire for recognition and equality. But, as noted above, the same apathy was exhibited by whites toward equality in both Apartheid South Africa and the US civil rights movement. With proper education, such commitment is not an unreasonable demand, though civil disobedience, as it is presently practiced and treated by the law, may not provide the most effective way to foster that commitment.

5. Summary

In this chapter, I have offered an analysis of three categories of ideals linking them to more familiar notions of *duty*, *virtue* and *the good* and arguing that, given their role in shaping our actions, goals, characters and commitments, ideals lie closer to the centre of morality than is commonly recognised. Through my analysis of civil disobedience in terms of a pursuit of ideals, I have explicated ideals as a moral category and civic virtue as an important member of that category. I applied my analysis of ideals to some historical and contemporary cases of civil disobedience, giving attention to concerns about realisability, motivation, extremism in action, and false ideals, noting ways in which some of these difficulties may be addressed. I also elucidated some key features of historical pursuits of public ideals, features which emphasise the potential for tragedy in that pursuit. In addition, I explored concerns of necessity and violence, identifying a possible paradox in the pursuit of ideals since

actions which perhaps cannot constitute a genuine pursuit of an ideal sometimes better serve that ideal than genuine pursuits do.

In summary, putting aside the rhetoric of the disobedients considered here, there are three arguments that support the claim that much civil disobedience involves a pursuit of ideals. The first is an empirical point that many of the dissenters discussed were in fact driven by their commitment to ideals. Mandela, King, Gandhi, and the nuns may all claim with legitimacy to have been motivated by their deep regard for certain public ideals. The second is a conceptual argument that the key features of civil disobedience align with features that mark a pursuit of public ideals (be those ideals genuine or false). The conscientiousness paradigmatic of civil disobedience is captured well by the sense of purpose which marks the life of the pioneering idealist. The communication exemplified in paradigmatic civil disobedience shows an awareness that pursuits of public ideals require certain kinds of public engagement. The third is a theoretical argument that aligns civic virtue with a responsiveness to those public ideals which require their defenders to challenge present policies through a communicative dissociation from those policies. The sense that such ideals are sufficiently important to warrant a breach of law in their defence prompts dissenters to engage in civil disobedience. This disobedience is but an extension of their ideals.

6. Punishment and Communication

Having examined in the previous chapters the moral character of civil disobedience, we may now consider how civil disobedience should be treated by the law. Our concern here is whether, and on what grounds, lawful punishment of civil disobedience is justified. In addressing this question, this discussion of civil disobedience comes full circle and teases out the parallel drawn in Chapter One between the communicative aspect of civil disobedience and the communicative aspect of lawful punishment by the state. As I argued in that chapter, both practices are associated with a backward-looking aim to demonstrate condemnation of and protest against certain conduct as well as a forward-looking aim to bring about through moral dialogue a lasting change in that conduct. The confrontation of these communicative practices not only allows for a direct comparison of their respective justification, but also presses the claim that authorities and disobedients each engage in a moral dialogue.

While my primary concern here is the moral justification of lawful punishment of civil disobedience, my analysis of moral questions pertains to legal questions as well since the moral features of a civilly disobedient action are relevant to how the law legally should respond to that disobedience. In the preceding chapters, I distinguished the following cases. First, sometimes civil disobedience is not wrong. Second, sometimes civil disobedience is wrong, but justified. Third, sometimes civil disobedience is wrong and unjustified but excused. In addition to these cases, there are others not previously considered in this thesis. Fourth, civil disobedience, be it morally right, wrong, justified, unjustified, excused or unexcused, possesses certain attendant features that might either mitigate or aggravate the offence, and thereby

recommend either severity or leniency on the part of the law. (Considerations of mitigation and aggravation, as legal notions, are relevant to determining the appropriate legal response to morally justified civil disobedience as well as to unjustified civil disobedience.) I shall consider a variety of such circumstances including 1) the disobedient's conviction and motivation, 2) the status of her action as civil disobedience, 3) her behaviour subsequent to the offence, and 4) her personal situation and circumstances. Each of the above cases invites a different response from the law. Moreover, collectively, they invite a different response from those that the law might make either to non-political offences or to types of illegal protest which lack the conscientious communication exemplified in paradigmatic civil disobedience. In brief, both the culpability of persons who breach the law in civil disobedience and (often) the harm done by their acts differ from those of other offences. As citizens seeking to engage with policymakers and lawmakers in a moral dialogue, disobedients warrant separate consideration by the law. Non-paradigmatic civil disobedience, while it also warrants a different response from that afforded to ordinary offences, may invite a response resembling those that the law might make to other types of dissent like conscientious objection, on the one hand, or radical protest, on the other.

After outlining some versions of the communicative theory of punishment and indicating why I endorse one version over the others, I consider which responses by the law might be justified for the cases of civil disobedience identified above. To support my claims, I examine some recent legal judgments, seeking to draw lessons from real cases.

1. The Communicative Theory

The three main issues for the justification of punishment, as Andrew Ashworth summarises them, are: Why punish? Whom to punish? and How much to punish?[1] The first question is the most difficult, and not simply because it shapes one's answers to the second two. Let us consider briefly the abolitionist, who challenges the justification of lawful punishment *per se*. One version of the abolitionist critique concerns the notion of *crime* and maintains that breaches of law should be seen not so much as crimes to be punished, but as conflicts to be resolved.[2] Other abolitionist positions acknowledge that crimes do occur and that society can be wronged by them and have a right to take some action, though not punitive action, in response. Simply identifying a crime as a crime serves an important role in that it allows those with grievances to be heard and those with guilt to acknowledge their responsibility. On either of these abolitionist readings, punishment is unjustified since it seeks retributive justice, not restorative justice, aiming to condemn rather than to reconcile hostile parties and to negotiate reparation where necessary. Abolitionism is accompanied by an advocacy of 'informal justice', that is, informal, participatory modes of conflict-resolution, to prevent the state 'stealing' conflicts from the individuals and local communities to whom they properly belong.[3]

Although the abolitionist characterisation of illegal actions in terms of conflict oversimplifies the issue, this characterisation perhaps is appropriate in the context of civil disobedience given the features paradigmatic to that practice. When disobedients breach the law in the conscientiously communicative ways exemplified in

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[1] Ashworth, Andrew (1998), 'Desert' in *Principled Sentencing: Readings on Theory and Policy.* Second Edition, Andrew Ashworth and Andrew von Hirsch (eds.), Oxford: Hart Publishing, 141.
[2] See Christie, N. (1981), *Limits to Pain.* London: Martin Robertson.
[3] Duff, Antony (1998a), 'Crime and Punishment' in *Routledge Encyclopedia of Philosophy.* Edward Craig (ed.), London: Routledge. Retrieved 23 May 2005 from http://www.rep.routledge.com/article/T002SECT5

paradigmatic civil disobedience, they enter into a conflict with authority at the level of deeply held conviction. In this context, a reconciliation of hostile parties may be a more appropriate objective than the condemnation and punishment of disobedients. There are two issues here. First, should the law be engaged in condemning civil disobedients? Second, if so, is punishment the appropriate vehicle through which to communicate that condemnation? Although defenders of restorative justice answer negatively to the second, they might affirm the first since allowing each side to communicate its position is a necessary step to reconciliation. But, despite the appeal of non-punitive, restorative justice, punishment cannot be ruled out as a mode of communication that authorities may use against disobedients because not all conflicts between disobedients and the state merit a reconciliation of perspectives (as opposed to a revision in perspective on the part of the offender). Moreover, it would be a mistake, as Antony Duff points out, not to recognise the contribution that punishment can make to reparation and restoration:

> A crime involves not merely (nor always) material damage to a victim's interests, for which material compensation might be appropriate, but a wrong done by the offender to the victim. An appropriate 'restoration' or 'reconciliation' between them must then involve a proper recognition of that wrong and of its implications…A suitable programme of 'restoration' must thus involve the offender in recognising, repenting, and apologising for the wrong he has done.[4]

Duff observes that this process of restoration involves the same central elements as punishment understood as the government's effort to engage in a moral dialogue with the offender. Punishment, on this picture, not only communicates both disapprobation of the offender's action and a desire for repentance and reformation on her part, but also gives the offender an opportunity to communicate her repentance by accepting the punishment, apologising, and making reparation where possible.

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[4] Duff, Antony (2003), 'Punishment' in *Oxford Handbook of Practical Ethics.* Hugh LaFollette (ed.), Oxford: Oxford University Press, 348.

Duff's account, like most other communicative theories, falls within that family of non-abolitionist positions known as desert theories. Desert theorists are in agreement on the 'whom' and 'how much' issues. Concerning whom to punish, they maintain that only people proved to have committed an offence should be punished. In this opinion, desert theorists differ from deterrence theorists who must allow that people who are not the proper objects of punishment may be punished when this successfully deters actual or potential offenders from breaching the law. As a justification, the deterrence element of punishment falls prey to the Kantian objection that it treats people as brutes not rational agents since it gives people a prudential reason (relating to the prospect of punishment), not a moral reason, to refrain from breaching the law. Deterrence, nevertheless, is part of the forward-looking aim of the communicative theory, but it is not the justification for punishment on the version of that theory I endorse. I will return to this in a moment.

Concerning how much to punish, desert theorists agree that the severity of punishment must be proportional to the seriousness of the crime (or crimes) committed. A central requirement of the principle of proportionality is ordinal proportionality: the severity of punishment must be proportional to that meted out for other crimes of comparable seriousness, and reflect the relative reprehensibility of the offence.[5] The relative seriousness of a crime is determined by both the harm it does or risks and the offender's degree of culpability; the greater the harm or culpability, the greater the justification for punishment. In emphasising proportionality as opposed to rehabilitation or prevention, desert theorists may claim with some legitimacy to offer a just response to criminal wrongdoing.

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[5] Ashworth (1998), 143.

Determining the proportional punishment for civil disobedience, however, is not a simple matter, first, because it requires establishing which offences a given act of disobedience resembles. Possibilities include other politically motivated offences or other offences classified as, say, mischief or property damage (which may not have been politically motivated). Second, it requires analysing the nature of the harm caused or risked by politically motivated offences which often have no specific victim. Third, it requires assessing disobedients' culpability, which, I maintain, differs from that of ordinary offenders. Concerning culpability, not all citizens are the proper interlocutors of authority. Punishment is only appropriate when the offender is a morally responsible agent, capable of grasping and comporting herself in line with the reasons against committing the offence in question.[6] But, beyond that, there is much disagreement over the determinants of culpability. Should intoxication mitigate? Should moral conviction mitigate? Should social deprivation mitigate? Barbara Hudson suggests, for example, that social deprivation reduces culpability because deprivation makes compliance so much more difficult.[7] Deprivation, which can take many forms, is not the only kind of circumstance that can make compliance or non-interference for particular persons much more difficult than it is for the majority of people.[8] Arguments for reduced culpability, on the ground that adherence to the law and the policies it deems lawful is more than usually onerous, apply, I shall argue, to justified paradigmatic civil disobedience as well as to some other acts of civil disobedience.

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[6] C.f. Tasioulas, John (2006), 'Punishment and Repentance' in *Philosophy*, Vol. 81, 279-322.
[7] Hudson, Barbara (1998), 'Mitigation for Socially Deprived Offenders' in *Principled Sentencing*. Andrew Ashworth and Andrew von Hirsch (eds.), Oxford: Hart Publishing, 205-8.
[8] For an examination of social deprivation as grounds for reduced culpability, see Ashworth, Andrew and von Hirsch, Andrew (2005), *Proportionate Sentencing: Exploring the Principles*. Oxford: Oxford University Press, 62-74. The culpability-reduction thesis, argue Ashworth and von Hirsch, does not seem to supply a general basis for reducing the punishment of deprived offenders.

The most difficult question concerning the justification of punishment, as I noted, is *why* punish. We saw in previous chapters that, although they may be wrong, actions performed for undefeated reasons are justified actions. This picture of justification extends to the decision to impose lawful punishment. On my view, since there is no *pro tanto* moral obligation to obey the law because it is the law, the fact that a law has allegedly been breached is not, by itself, a sufficient ground for censure. (Nevertheless, the fact that a law has allegedly been breached is a *necessary* ground for censure.) Punishment therefore can be justified only on grounds unrelated to political obligation. One of those grounds, some might argue, is the law's right to enforce its norms. Although the law lacks the moral right to be obeyed, it has the coercive right to impose sanctions upon citizens who breach its norms. But, having the right to enforce norms does not mean that the enforcement is justified. As we saw in Chapter Four, since the actions protected by rights include some wrong actions and since wrong actions require justification if anything does, such exercises of rights require justification. Therefore, when the state's enforcement of its norms is wrong, to be justified in enforcing those norms and punishing offenders, authorities must act for undefeated reasons. Were the state to act for undefeated reasons, this would contribute to the rightness of the action and could make the enforcement of the law alright all things considered.

Given the burdensome and regrettable nature of punishment (and the potential for it to be morally problematic), we must identify what the reasons for punishment are. Desert theorists are not unanimous over the reasons to punish.[9] Duff, for one, argues that condemnation itself immediately justifies punishment. He maintains that

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[9] Following John Tasioulas, who rejects the sharp distinction between formal censure and hard treatment which Duff and von Hirsch discuss, I shall assume that all punishment involves some hard treatment, that is, some imposition of a burden meant to be experienced as unwelcome. C.f. Tasioulas (2006).

punishment may be seen as a secular form of penance that vividly confronts the offender with the effects of her crime. Punishment, he says, is justified on these grounds even when the offender 1) has no chance to repeat her wrong, 2) has already repented and does not need the censure to persuade her of the law's position, or 3) will remain unpersuaded.[10] Andrew von Hirsch, by contrast, believes that communication of censure alone does not justify punishment; added to it must be the aim of deterrence. Von Hirsch argues that criminal sanctions primarily should serve to support citizens' moral reasons for not breaching the law; and to perform this function of normative communication, moderation in punishment is required because too harsh threats from the law would drown out the moral appeal.[11] But, as John Tasioulas observes, von Hirsch's hybrid approach faces the danger of becoming incoherent, 'since what is introduced as a supplement to censure [namely the appeal to prevention] threatens to subvert the fundamentally communicative character of his theory.'[12] Bringing in deterrence at the level of justification detracts from the law's engagement in a moral dialogue with the offender as a rational person because it focuses attention on the threat of punishment and not the moral reasons to follow this law.

Although deterrence is part of the aim of communicating censure and of seeking through moral dialogue to effect a change in attitudes and values, it can play no independent part in the justification of punishment on a communicative theory except in rare cases like national emergency.[13] Central to the justification of punishment must be its appropriateness as the vehicle through which to communicate

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[10] Duff, Antony (1998b) 'Desert and Penance' in *Principled Sentencing*. Andrew Ashworth and Andrew Von Hirsch (eds.), Oxford: Hart Publishing, 162.
[11] Von Hirsch, Andrew (1998), 'Proportionate Sentences: A Desert Perspective' in *Principled Sentencing*. Andrew Ashworth and Andrew Von Hirsch (eds.), Oxford: Hart Publishing, 171.
[12] Tasioulas, (2006), 286.
[13] C.f. Tasioulas (2006).

deserved censure. That said, not all consequential reasoning is ruled out of the justification of punishment. When deciding on the appropriate punishment, one must consider how the punishment will be received, that is, what form of punishment will most effectively communicate the particular condemnation that the state seeks to convey.[14] And when choosing between two punishments that are equally justified on a desert basis, one must consider their respective benefits, including their deterrence benefits, to determine which is more appropriate. Adducing such consequential considerations as part of the justification for punishment reaffirms the parallel between this practice and civil disobedience since, as discussed in previous chapters, instrumental reasons concerning the most appropriate and effective mode of communication also bear on the justification of an act of civil disobedience.

Like Duff, von Hirsch maintains that punishment is appropriate irrespective of the offender's attitude prior or subsequent to censure. Von Hirsch states that censure 'is not just a crime-prevention strategy…for otherwise there would be no point in censuring actors who are repentant already…or who seemingly are incorrigible...' On von Hirsch's account, any human actor should be treated as a moral agent, having the capacity (unless clearly incompetent) to evaluate others' assessment of her conduct and to respond in ways typical of a deliberating agent.[15] In taking this view, Duff and von Hirsch may be criticised for not fully appreciating the relevance of both repentance and defiance to decisions to punish. When an offender demonstrates repentance prior to punishment, it cannot be disregarded in the determination of the appropriate response by the law. Mercy, says Tasioulas, is a form of charity toward an

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[14] I thank Antony Duff for highlighting this point at the 2006 Socio-Legal Studies conference, Stirling, Scotland.
[15] Von Hirsch (1998), 170.

offender which justifies punishing her less than she deserves according to justice.[16] Since a key aim of punishment, on the communicative theory, is to lead the offender to repent her action and to reform her conduct, when the offender demonstrates prior to punishment that she does repent and has reformed, this gives the law reasons of charity to show mercy toward her and to impose a lesser punishment on her than that which she deserves according to justice. On this nuanced communicative theory, justified punishment is distinguished from deserved punishment and the notion of moral dialogue is filled out in a meaningful way that takes account of the offender's contribution to that dialogue.

One might ask though why, if a key aim of punishment is to lead the offender to repent and to reform her conduct, the demonstration of repentance and reformation should lead only to a lesser punishment rather than to no punishment. Several points may be noted by way of reply. First, although repentance gives the law reason to be merciful, repentance does not justify or excuse that offence. To rectify the damage done through the wrongdoing, the offender has reason to reparate those whom she has harmed and, as noted above, punishment can be part of such a process. Second, the aims of punishment – to demonstrate condemnation, to lead the person to repent, and to deter her and others from further offences – are distinct from the justification of punishment. The justification turns on the seriousness of the offence and the appropriateness of punishment as the vehicle through which to communicate censure for that offence. When the offender demonstrates repentance, the justified punishment may be less than the deserved punishment while still being substantive punishment proportional to the seriousness of the offence all things considered.[17] Repentance, we

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[16] Tasioulas, John (2003), 'Mercy' in *Proceedings of the Aristotelian Society*, Vol. 103, no. 2, pp. 101-132.

[17] John Tasioulas has said that, on his view, repentance sometimes may constitute an undefeated reason to refrain from imposing any punishment. Private correspondence.

will see later, is not the only factor that could recommend mercy on the part of the law (Section 4).

One might also argue that the consideration that repentance warrants a lesser punishment should also apply to the case of the offender who clearly will never repent. In other words, since a key purpose of punishment on the communicative theory is to lead the offender to repent, when she never will repent there is little reason to punish. Although this argument is not forceful since it ignores the law's reasons to communicate condemnation and to attempt to engage in a moral dialogue, it nevertheless highlights the relevance of defiance to the decision to punish. Communication between the law and an offender fails not only when the offender is unable to understand the reasons for the censure or to change her conduct, but also when the offender refuses to repent and to reform her conduct though she understands the message and could alter her behaviour and attitudes if she chose. When an offender denies the justification of the censure communicated through lawful punishment, she may challenge her alleged culpability both through the appeals system and through her behaviour subsequent to punishment. If she continues to act in a way that the law deems punishable, she shows that her position remains unaltered by the government's communication. Persistent defiance by a political offender must be given thoughtful consideration with an eye to appreciating why the offender refuses to repent. It is true that, in some contexts, although punishing this person means not engaging successfully in a moral dialogue with her, that punishment may be justified in the same way that civil disobedience sometimes may be justified when a government is unresponsive (as noted in Chapter Three). The conditions for a moral dialogue in fact are weaker than earlier comments suggest. To satisfy the Kantian requirement of treating an offender as a responsible and rational agent, authority

simply must mete out punishments that authority *could* justify to her as the appropriate response to her conduct. So, even though this offender does not listen and does not alter her conduct, the punishment may be justified as an attempt to engage in dialogue with someone who deserves censure. But, in other contexts, it may be the law and not the offender's position that should undergo revision. Moreover, when deciding how to respond, authorities should be sensitive to the fact that an offender may be defiant toward certain responses, but not toward others. The defiant offender's apparent unreceptiveness may be due to the modes of communication that the authority has adopted to address her. If her reasons for being unreceptive are well-founded, and she would be receptive to other, perhaps non-punitive responses, then it is necessary to consider whether such responses would be more appropriate than punishment is.[18]

In this section, I have briefly outlined different versions of the communicative theory of punishment to highlight some points of disagreement and to note features that a good approach must take into account. First, an approach like Duff's, which, for the most part, leaves preventative concerns out of the justification of punishment is preferable to von Hirsch's which incorporates deterrence into the justification for punishment and thereby hints that humans may be treated as less than fully rational, deliberating, reason-providing beings. Preferable to Duff's account though is one which gives sufficient consideration to an offender's attitudes prior and subsequent to punishment. I endorse a version of the communicative theory which recognises the relevance of repentance and defiance to the final decision on whether and how much to punish since such recognition involves treating people at all stages of the process as reflective creatures capable of both deliberating about moral matters and providing

[18] It is unlikely, for example, that a career-dissenter would be responsive to a ban placed on her being in the proximity of political protests. Judges should consider the likely costs for the disobedient of having such a ban imposed upon her. I consider such a sentence in Section 4.

reasons for their actions and positions. In what follows, I apply this communicative theory of punishment to civil disobedience in its various forms. Many of the issues I raise in relation to one case apply to others, but I endeavour to discuss points where they are most relevant.

2. No Wrong is Committed

A person does no wrong in breaching the law when there is no protected reason against breaching the law. This is most likely to happen when there is a protected reason against following the law. Having put aside the idea that breach of law is morally significant in itself, we may judge the rightness or wrongness of following a law by the moral quality of both that law and the consequences of adhering to it. When it is morally wrong to follow a law, a person may be right to breach it, and this should carry weight in the determination of the appropriate legal response. Many offences, notes Ashworth, have as part of their description the qualification 'without lawful excuse', by which legislatures mean 'without lawful justification.'[19] In other words, when an action that would otherwise be an offence possesses lawful justification it is not an offence. Lawful justification usually has a moral basis: it is commonly recognised, for example, as part of the defence of necessity that it would be unfair to impose criminal liability on objectively reasonable conduct.[20] In fact, as the Nuremburg trials showed, sometimes one may be held accountable for not breaching the laws of one's country.

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[19] Ashworth, Andrew (1995), *Principles of Criminal Law*. Second Edition, Oxford: Clarendon Press, 132

[20] Feinberg, Joel (1995), 'Civil Disobedience in the Modern World' in *Philosophy of Law*, Fifth Edition, Joel Feinberg and Hyman Gross (eds.), Belmont: Wadsworth, 122. There is disagreement as to whether the defence of necessity exists in Britain. See Elliott, D. & Allen J. (1993), *Elliot and Woods Casebook on Criminal Law*. London: Sweet and Maxwell, 314-5.

Recollect from Chapter Two, the difficulty in distinguishing in complicated cases between defences and offences. Sometimes actions are wrong when performed without justification and not wrong when performed with justification. Put differently, some actions do not violate a requirement when performed for an undefeated reason, but do violate a requirement when performed not for an undefeated reason. Consider Kamm's example noted in Chapter Two of A who wants to kill B, who refuses to defend himself against any person but B, and who sets up a situation so that B will attack him, thereby allowing A to respond in self-defence with lethal action. Whereas this act of self-defence is wrong because it lacks moral justification, self-defence performed for the undefeated reason to save one's own life is not wrong because it has that justification. Courts, thus, should punish in the first case (the action does not properly count as self-defence), but *ceteris paribus* they should not punish in the second.

But how should courts decide in the case where there is no lawful justification and yet the breach of law is not in any significant sense morally wrong? How should the law respond to a Gandhi or a Martin Luther King Jr who breaches the law in a conscientiously communicative manner in order to demonstrate protest against genuinely objectionable policies and to bring about a change in those policies?[21] This

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[21] Judge Stephen J. McEwen Jr distinguishes between the defence of justification (which he defines as a denial of responsibility for criminal activity on the ground that the conduct was necessary to avoid a greater harm or evil) and the practice of civil disobedience. He observes that: 'Although the citizenry and even some protesters have failed to realise the considerable distinction between the protester who practices civil disobedience and the protester who enters upon the defence of justification, the judiciary has exhibited such a clear and certain grasp of the distinction that the courts have established conditions precedent to the use of the defence of justification by activists and protesters.' According to McEwen, the defence of justification is only available when: 1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative, 2) the defendant can reasonably expect her action to be effective as the direct cause of abating the danger, 3) there is no legal alternative that will be effective in abating the danger, 4) the legislature has not acted to preclude the defence by a clear and deliberate choice regarding the values at issue. Whereas most protesters used to plead civil disobedience (acknowledging wrongdoing, but acting on the grounds of conscience), most protesters, says McEwen, now plead justification. While McEwen may be correct to distinguish the kinds of defences protesters offer, he fails to appreciate, first, the importance for justification of asserting responsibility, and second, the difference between the classification of a given action and the defence

poses a problem for judges since, on the one hand, judges are sworn to uphold the law and the law has been flouted, but, on the other hand, much of this dissent presumably is objectively reasonable conduct for which it would be unfair for the law to impose criminal liability. Joseph Raz offers an answer here based on distinguishing between how courts should decide cases according to the law and how courts should decide on the cases that come before them. 'Sometimes', he says, 'courts ought to decide cases not according to the law but against it. Civil disobedience, for example, may be the only morally acceptable course of action for the courts.'[22]

As we saw in Chapter One, a judge's decision to rule against the law is closely related to but actually distinct from civil disobedience because, like other deliberate failures by state officials (e.g. police, prosecutors, and juries) to discharge the duties of their office for conscientious reasons, rule-departure by a court, as Feinberg notes, does not typically render the judge liable to punishment. Civil disobedience, by contrast, does render those who employ it liable to punishment.

Putting terminological issues aside, we must ask, on the basis of which reasons may a judge depart from the law? One might argue that a judge is right to depart from the law at least in the same cases where a citizen is right to breach the law and the judge may be right to do so in other cases as well. (For example, the judge may be right to depart from the law in order to recognise the normative protection that paradigmatic civil disobedience deserves. It may be alright for judges to depart from the law when the offence in question is of a particular kind.) And yet, given the obligations attendant to a judge's office, the judge may have either additional reasons

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one might make for that action in a court of law. Many acts of protest that could seek to employ a justification defence (a defence of objectively reasonable conduct) fall under the umbrella of civil disobedience as I have characterised it. C.f. McEwen, Stephen J. Jr (1991), 'The Protester: A Sentencing Dilemma' in *Notre Dame Journal of Law, Ethics, and Public Policy* Vol. 5, No. 4, 987-993. For a contrasting view, see Farrell, Daniel (1977), 'Paying the Penalty: Justifiable Civil Disobedience and the Problem of Punishment' in *Philosophy and Public Affairs*, Vol. 6, No. 2, 165-184.

[22] Raz, Joseph (1994), *Ethics in the Public Domain*. Oxford: Clarendon Press, 328.

or obligations to follow the law or a higher threshold to meet before a breach would be permissible. That said, a rule-departure by a judge sometimes better respects the general obligations and overall goals of a judge's office than adherence to each subsidiary duty would do. As Kent Greenawalt observes, 'Insofar as such breaches are not failures to perform official duties, the notion of performance of duty is made more flexible and instances of clear violation are lessened.'[23] Punishment, on a desert theoretic approach, is inescapably a moral practice concerned with the handing down of deserved censure. When following the law would be morally wrong, the person who breaches the law in protest does not deserve censure, (rather, as demonstrated in the Nuremberg trials, she may have deserved censure had she followed the law) and a judge, given the importance of allowing her flexibility in the performance of her specific duties, would be justified in appealing to this in a decision not to punish. This flexibility should extend, I suggest below, to how a judge decides in cases where civil disobedience is more morally problematic. The normative protection which the moral right to civil disobedience gives disobedients generates certain duties for lawmakers and enforcers to treat such offenders in ways respectful of their conscientious aims and communicative activities.

A second possible context in which a person does no wrong in breaching the law relates to victimisation. The state legitimately plays the role of punisher only when certain conditions are met, one of which is the non-victimisation condition that the offender not belong to a class of citizens who have been victimized by the state in a way sufficient to undermine the reasons those people have to abide by otherwise just criminal laws. [24] This general innocence is based upon recognition that the state in

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[23] Greenawalt, Kent (1987), *Conflicts of Law and Morality*. Oxford: Oxford University Press, 281.
[24] Tasioulas identifies four conditions for the legitimacy of state punishment: 1) state interest in the crime, 2) the non-victimisation of citizens, 3) the rule of law, and 4) state efficacy in inflicting justified punishment without undue costs. See Tasioulas (2006).

question has no grounds to censure these citizens since it has forfeited their trust and thereby forfeited the right to enforce its norms against them. Persons or collectives other than the state, however, may have legitimate grounds to communicate censure to these individuals when they engage in morally reprehensible conduct.

3. Justified Disobedience

In this section, I consider several factors which are relevant to determining the appropriate legal response to acts of morally justified civil disobedience. As discussed in Chapter Three, several factors are relevant to the justification of civil disobedience such as, first, how serious, sincere and committed disobedients are in their actions, second, how well-founded their challenges are, and third, how much harm is done or risked through their disobedience. Rare is the case that civil disobedience (or indeed any action) will be morally right from all valid perspectives. In the typical case, an action is wrong to the extent that it violates one moral value or principle but justified to the extent that it respects or fosters another. An act of civil disobedience, therefore, is wrong to the extent that it violates basic rights, for example, or exposes other people to undue or excessive risks, or shows disrespect for property, or has seriously untoward consequences, or generates hostility and intolerance of dissent. Even in a particularly reprehensible political regime (such as apartheid South Africa or antebellum America), a demand for justification for civil disobedience is legitimate when that disobedience has these features. Such calls for justification nevertheless can be met to the extent that the disobedience is performed for undefeated reasons. As we have seen, the following three types of reasons contribute to the justification of an act of civil disobedience.

When the object of a person's judgment is a law, her conviction gives her subjective intrinsic reasons relating to moral consistency and self-respect to dissociate herself from this law and to communicate her dissociation to the government and society. When the object of her judgment is a non-governmental policy or a foreign policy, her conviction gives her reason to communicate her condemnation of that policy both to its authors and to those who permit it to be applied. But personal conviction alone is insufficient to justify civil disobedience since that conviction may be oriented toward false ideals or poorly founded commitments. To be justified, her conviction must be well-founded; she must have objective intrinsic reasons for taking this action in defence of her commitments. When, in addition, there are instrumental reasons to use a particular mode of civil disobedience as the appropriate and effective vehicle through which to communicate protest and to persuade others of the merits of her view, and she does so with minimal harm and maximal expected good, then her action is morally justified.

When a disobedient is justified in her conduct, censure of that conduct would seem to be undeserved and punishment unjustified. But the story is more complicated than this. The reasons justifying an act of civil disobedience must confront the reasons justifying lawful punishment of persons who breach the law. On the communicative conception I have outlined, both disobedients and authorities seek to communicate disapprobation to each other for certain practices and to persuade each other of the opposing view through 'transparent persuasion' (as Duff describes it when referring to punishment), that is, persuasion which appeals to the very reasons which justify the attempt to persuade. As noted in Chapter One, whereas a deterrent system of punishment aims at prudential persuasion (giving people prudential reasons to follow the law), a desert system aims at transparent persuasion: the moral reasons it offers to

obey the law are the same moral reasons which justify the claim that citizens should obey this law.[25] Similarly, the moral reasons a civil disobedient offers authorities to change certain policies are the same moral reasons which justify her claim that authorities should change those policies. Broadly speaking, civil disobedience can be contrasted with more radical disobedience which, like a deterrence system of punishment, gives people a prudential reason relating to the prospect of harm to follow orders.[26] Since the law, like the disobedient, may have good reasons for its persuasive aims, we must find some way of accommodating each within the law's response to civilly disobedient offenders.

The picture I wish to sketch of the interrelation of the justifications of punishment and civil disobedience both contrasts and overlaps with the picture offered by Lord Hoffman. Drawing upon Ronald Dworkin's *Taking Rights Seriously*, Hoffman suggests that,

> [33]...while the demonstrator or objector cannot be morally condemned, and may indeed be praised, for following the dictates of his conscience, it is not necessarily unjust for the state to punish him in the same way as any other person who breaks the law. It will of course be different if the law itself is unjust. The injustice of the law will carry over into its enforcement. But if the law is not otherwise unjust, as conscription is accepted in principle to be, then it does not follow that because his objection is conscientious, the state is not entitled to punish him. He has his reasons and the state, in the interests of its citizens generally, has different reasons. Both might be right.
> [34] That is certainly the view we would take of someone who, for example, refused to pay part of his taxes because he felt he could not conscientiously contribute to military expenditure, or insisted on chaining herself to a JCB because she thought it was morally offensive to destroy beautiful countryside to build a new motorway. As judges we would respect their views but might feel it necessary to punish them all the same. Whether we did so or not would be largely a pragmatic question. We would take into account their moral views but would not accept an unqualified moral duty to give way to them. On the contrary we might feel that although we sympathised and even shared the same opinions, we had to give greater weight to the need to enforce

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[25] Duff (1998b), 166n. Duff describes the persuasion employed by a deterrence system as 'rational persuasion' not 'prudential persuasion'. Duff's terminology is ambiguous since, as noted earlier, deterrence theories may be criticised for not treating offenders as rational agents capable of responding to the moral reasons they have to follow the law. Since deterrence systems offer prudential reasons to follow the law relating to the prospect of punishment for non-compliance, the phrase 'prudential persuasion' is more appropriate.

[26] In practice, the contrast between civil disobedience and radical disobedience as well as that between desert systems and deterrence systems is not as clear-cut as this.

> the law. In deciding whether or not to impose punishment, the most important consideration would be whether it would do more harm than good. This means that the objector has no right not to be punished. It is a matter for the state (including the judges) to decide on utilitarian grounds whether to do so or not. As Ronald Dworkin said in A Matter of Principle (1985) p 114: 'Utilitarianism may be a poor general theory of justice, but it states an excellent necessary condition for a just punishment.'[27]

Hoffman is right to note that both sides have their reasons and both sides may be right (to a certain extent and from different perspectives), and that the law may be justified in punishing although it sympathises with disobedients' views. Where a particular act of civil disobedience is wrong in some respect but justified, punishment of that disobedience is also likely to be wrong in some respect but justified (justified to the extent it censures that part of the disobedience which is wrong and wrong to the extent it censures that part of the disobedience which is justified). The justification each side has for its action contributes to the rightness of that action. Depending on how strong the justification is, it may make the action alright all things considered.

In my view, Hoffman is mistaken, however, in the reasons he gives for why the law may be justified in punishing justified disobedience. First, Hoffman cites the justness of the law at issue, arguing that, when the law is not otherwise unjust, the state is entitled to punish the conscientiously motivated offender in the same way as any other person who breaks the law. But this assumes that political and non-political offences are comparable. Although, as Greenawalt puts it, ordinal proportionality might seem to recommend a uniform application of legal prohibitions, nevertheless, I maintain, punishment (or at least punishment comparable to that appropriate for ordinary offenders) may be inappropriate for civil disobedients who act with justification since they are unequal in relevant ways to offenders who should be censured. For example, when Sikhs protest the legal requirements to wear helmets

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[27] *Sepet and another v Secretary of State for the Home Department*, [2003] UKHL 15, [2003] 3 All ER 304. Retrieved 5 August 2005 from http://web.lexis-nexis.com/professional/.

while motorcycling and to wear hardhats while doing construction work, the law has reason not punish them given their reasons for offending, which distinguish them from ordinary offenders. The law may be deemed morally problematic in extending to their case. Also, as we have seen, justice is not the only concern which could render a law morally problematic. Other concerns not reducible to justice such as trust, transparency, security, integrity, and democracy could render a law morally problematic. Moreover, as discussed in Chapter Five, much contemporary civil disobedience is undertaken to challenge democratic deficits, that is, breakdowns in the mechanisms for citizens to participate in the decision-making process. Laws passed by a government without proper democratic discussion may be perfectly just in their content, but nonetheless warrant opposition given the manner of their adoption.

Second, Hoffman cites the need to uphold the law, a consideration which we saw above does not determine how judges morally ought to decide cases. As Raz notes, sometimes judges should decide against the law. Third, Hoffman cites pragmatic considerations of utility. Such considerations, however, play only ever a subordinate role in the justification of punishment on the kind of desert theoretic approach endorsed here. Also such considerations would make inappropriate necessary conditions for punishment since they would allow that the case for punishing an offender is defeated, assuming no person is deterred, when society would be happier to have the offender – a celebrity say – back in circulation and the utility of this outweighs the benefits of punishment.

The considerations that Hoffman should have cited relate to the key question of punishment, which is whether punishment is justified as a response to this person. Judges must appreciate (particularly when they sympathise and even share the same opinions) that justified disobedience is disobedience grounded upon deep and

conscientiously held values and commitments which, quite rightly, make it very hard for their holders either to follow laws which contravene those values or to refrain from communicating effectively their objections to laws and policies that they cannot breach directly. This is particularly true for those disobedients who are motivated by a deep commitment to genuine public ideals and not merely by a legitimate disagreement with governmental policy. A satisfactory communicative approach to punishment must recognise that it may be inappropriate to demand repentance from many of these offenders. Since much justified civil disobedience is undertaken in pursuit of deeply and conscientiously held objective values and ideals, demanding repentance would attack legitimate values which the state and society themselves should advocate. There is in fact no ground for mercy in these cases since there is nothing, in these disobedients' goals at least, for them to repent.

However, although disobedients' defence of genuine ideals or significant values does not warrant punishment, the mode of civilly disobedient communication they employ may deserve censure if, for example, it has significant negative effects for individuals or society (some of which might not be foreseeable). Hoffman could have argued that, although such offenders do not deserve punishment for their principled disobedience as such, they deserve punishment to extent that they knowingly or recklessly brought about harmful consequences through their chosen action. How much weight these considerations should be given will depend upon the facts of the particular case.

Some might argue that punishment of justified disobedience is always justified given both how difficult it is to identify accurately which acts of disobedience are really justified, and how inappropriate it is for officials to make such judgments. Greenawalt states that,

> Any principle that officials may excuse justified illegal acts will result in some failures to punish unjustified acts, for which the purposes of punishment would be more fully served. Even when officials make correct judgments about which acts to excuse, citizens may draw mistaken inferences, and restraints of deterrence and norm acceptance may be weakened for unjustified acts that resemble justified ones.[28]

But, we may accept Greenawalt's main point about the difficulty in identifying justified disobedience without endorsing his further point about the social drawbacks which might result even when authorities are lenient only to justified disobedients. As argued in Chapter Two, the fact that civil disobedience may encourage other disobedience is not in itself either an objection to civil disobedience or a reason to punish it. One must show that such general disobedience has negative effects for people and society greater than those generated by the law, effects for which the disobedients may be held liable. As Dworkin observes, there is no evidence that society will collapse if it tolerates a little disobedience.[29]

Also, the fact that not proceeding against justified acts may result in some failure to punish unjustified acts does not make punishment the right response to justified disobedience. The difficulty in distinguishing justified disobedience from unjustified disobedience should lead judges to be cautious, not extravagant, in their assessments of deserved censure. Moreover, as suggested in my comments on restorative justice, the communication of society's adherence to certain values need not always take the form of traditional punishment in cases involving justified civil disobedience. Scheffler observes that,

> Even if punishment is an institution that gives public expression to reactive responses that are constitutive of treating people as responsible agents, it does not follow that the institution is justified. There are many different ways of giving public expression to such responses, and the mere fact that a particular institution serves that function does not mean that it is justified. That will depend on what its other features are.[30]

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[28] Greenawalt (1987), 273.
[29] Dworkin Ronald (1977), *Taking Rights Seriously*. London: Duckworth, 206.
[30] Scheffler, Samuel (2003), 'Distributive Justice and Economic Desert' in *Desert and Justice*. Serena Olsaretti (ed.), Oxford: Oxford University Press, 76.

Although punishment can serve the various communicative aims of a society, it is not the only response that can do so. That said, sometimes the only forms of permissible communication for the state are those involving hard treatment. However, these forms of communication have the potential to be less severe or impersonal than more traditional forms of punishment are. The inappropriateness of imposing customary sanctions in some cases does not leave the state speechless because there are other responses that the state can make to justified civil disobedience. For example, in the case of the 2005 British Columbia Teachers Federation's (BCTF) illegal strike, BC Supreme Court (trial court) Justice Brenda Brown chose not to adopt the customary strategy of imposing heavy fines on the union, but chose rather to freeze the union's strike fund, preventing the union from paying its members their daily strike-pay. In this precedent-setting decision, Justice Brown argued that the BCTF acts through its members to commit the contempt of the court order that required them to return to work and that the BCTF is using its assets to facilitate the continuing breach of that order in part by paying teachers.[31] Her response to the union was to impose a punishment of sorts in denying members their strike-pay, but not the traditional punishment of heavy fines that the union had expected (and that it received a week later after it continued to act in contempt of the court order). In making this judgment, she stepped around the union and addressed teachers directly. Many teachers took the judgement as a challenge to them to show the strength of their convictions, that is, to show whether they would continue the strike without their strike-pay.

As John Gardner observes, there are many types of normative consequences for breach of law apart from liability to punishment, such as a duty to show regret, to

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[31] *BC Public School Employers Association v. BC Teachers Federation* [2005] BCSC 1446.

apologise, to make restitution, and to provide reparation.[32] These actions may be required of disobedients even when whatever wrong they do is fully justified. All legal systems, continues Gardner, presuppose that even fully justified wrongdoing has at least one normative consequence: it makes it the wrongdoer's job to offer up what justification she can as a responsible agent who answers for her own wrongs. In the case of justified civil disobedience, this answering comes almost automatically. Through their effort to engage in a moral dialogue with authority, such disobedients offer their justification for their actions in the form of an account of their values and their reasons for disobeying the law.

In the remainder of this chapter, I shall consider certain features attendant to the performance of civil disobedience such as an offender's general situation, circumstances, and attitude which, although they do not justify the action, are relevant to an assessment of the appropriate legal response to civil disobedience. While I shall focus primarily on civil disobedience which lacks either moral or legal justification, I recognise that mitigating and aggravating circumstances, as legal notions, are relevant to determining the appropriate legal response to morally justified civil disobedience as well. Given the difficulties faced by the law in finding facts about attendant circumstances, punishment which sought to be sensitive to such considerations would be at best an approximation of the justified response. This need not prevent us from reflecting upon the ideal scenario in which the law would be able to obtain all relevant information and to assess what censure, if any, would be justified on that basis.

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[32] Gardner, John (2002), 'In Defence of Defences' in *Flores Juris et Legum: Festskrift till Nils Jareborg*. Uppsala: Iustus Forlag, 8. Retrieved 3 October 2003 from http://users.ox.ac.uk/~lawf0081/biblio.htm.

4. Mitigating and Aggravating Circumstances

Attendant circumstances are the facts surrounding an event that sometimes recommend either an increase or a decrease in the punishment that would otherwise apply. Mitigating circumstances do not legally justify criminal conduct. Rather, they lessen the seriousness of the offence by reducing either the harm caused or the offender's culpability, and thereby recommend a lesser charge or more lenient punishment than would otherwise be appropriate. Aggravating circumstances do the opposite.[33] Note the distinction, not always drawn, between mitigation and mercy. Whereas mitigation speaks to diminished seriousness of the offence, mercy speaks to reasons of charity which recommend punishing the offender less that she deserves (though the seriousness of her offence is undiminished). I noted earlier one possible ground for mercy, namely, repentance, observing that, in the context of morally justified civil disobedience, a demand for repentance (at least for one's aims and values) is inappropriate. In this section, I focus for the most part on mitigating and aggravating circumstances, discussing both those that diminish or heighten a disobedient's culpability and those that diminish or heighten the harm of her actions. However, I also discuss briefly a miscellany of factors which do not clearly speak to either harm or culpability and which both raise the question of the significance of events after the offence and show how difficult it is sometime to distinguish mitigation from mercy.[34]

Although some mitigating circumstances diminish the harm of the offence (e.g. the minor amount of damage done or the offender's minor role in the offence), most mitigating circumstances diminish culpability. Examples include: duress,

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[33] Whereas some mitigating and aggravating circumstances are general to all offences, others are specific to individual offences.

[34] The paradigm example is entering a guilty plea. See Ashworth, Andrew (2005), *Sentencing and Criminal Justice* Fourth Edition, Cambridge: Cambridge University Press, 163-4.

coercion, the following of military orders, insanity, youth, lack of criminal intent, diminished responsibility, and provocation. Many of these circumstances are less applicable to civil disobedience than are other, less commonly recognised mitigating circumstances such as (until recently in the Italian penal code) the fact that the offender acted from motives of honour, that she committed the offence is a state of intense emotion resulting from severe misfortune, or that before the trial she repaired the injury by compensating affected parties.[35]

There is much disagreement across legal jurisdictions about the kinds of factors that mitigate or aggravate an offence. For example, European law differs from Anglo-American law in that it often identifies as mitigation considerations (like the offender's motive in a mercy-killing) which Anglo-American systems take into account only as matters of discretion for the sentencing authority or jury.[36] Moreover, sometimes what is seen as a mitigating circumstance in one legal jurisdiction is seen as an aggravating circumstance in another; whereas in Germany, for example, intoxication is a mitigating circumstance, in Russia it is an aggravating circumstance. More widely accepted aggravating circumstances include planning an offence, operating in groups or gangs, intending to cause more harm than in fact occurred, etc.[37]

Some defenders of desert theory, like Ashworth, argue that the theory should be indifferent to various circumstances.

> Desert theory would seem ordinarily to rule out considerations of race, culture, family circumstances, and employment in determining the severity of sentence: it sets out to be non-discriminatory and, insofar as it results in clear sentencing guidance, it should exclude such factors from the calculation of sentence. But matters such as social

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[35] 'Criminal Law' (2005), *Encyclopedia Britannica*. Retrieved 15 November 2005 from http://search.eb.com/eb/article-25582. In the late 1990s, the Italian government repealed the provisions recognising considerations of honour as mitigating circumstances.
[36] 'Criminal Law' (2005).
[37] Ashworth (2005), 155-9.

> deprivation might be relevant to culpability and might therefore tell in mitigation of sentence.[38]

Putting social deprivation aside, my concern with Ashworth's comment is that it disregards what is best about desert theory in general and the communicative theory in particular, namely that the theory focuses on the offence in question and seeks to give the appropriate response to that particular breach of law. To disregard considerations central both to an offender's identity and to her decision to breach the law goes against the fundamental aim of punishment on the communicative theory, which is to engage with that offender in a moral dialogue. Granted the offender is not the law's only interlocutor, but it is her action to which the law is responding. When the law is insensitive to features that differentiate one offender from another, it fails to understand who its primary interlocutor is. This not only diminishes the value of its communication and the likelihood of success in persuading the offender of the law's position, but also heightens, not lessens, Ashworth's worry about discrimination since insufficient attention is given to the factors that differentiate one offender from another. Ashworth's reply to this might be that not all features that distinguish two offenders speak to culpability. In a narrow sense, that may be true, but in a broader sense these features place the actions in context and give authorities a fuller picture of the offender's own sense of what she did. By acknowledging the relevance of a range of factors, the law offers the offender additional space to account for her conduct.

I shall consider here several features which could mitigate or aggravate a civilly disobedient offence. This list is not intended to be exhaustive, but to pick out features that are particularly salient to the assessment of punishment of civil disobedience. As noted at the outset, these features are: 1) the disobedient's conviction and motivation, 2) the status of her action as civil disobedience, 3) her

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[38] Ashworth (1998), 148.

attitude and behaviour subsequent to the offence, and 4) her general situation and personal circumstances.

a. Conviction and Motivation

When a person's civil disobedience is morally excused, not justified, she has good reason to think that her action is well founded, but she is mistaken because there are no undefeated moral reasons for her conduct. In one sense, she resembles the person whose disobedience is unexcused since in neither case is the conviction well-founded. Each of these disobedients may act from deep commitment to purported values or ideals, but either that commitment is misplaced or her choice of actions to defend that commitment is poor. The difference between these cases is that, whereas the excused person could show that her action is subject to reasons (weak though they are), the unexcused person could not. This difference is relevant to an assessment of each disobedient's overall situation, which I consider below. For now, I shall treat these cases alike since each disobedient exhibits a conscientious commitment to certain values or ideals but is mistaken about their worth, the actions she should take to support them, or both. My concern is whether the conviction and conscientiousness of disobedients speak to their culpability in ways that either mitigate or aggravate their offences.

In previous chapters, I argued that there is nothing inherently valuable in conscientiousness, though it is necessary, at some level, for self-respect, which is inherently valuable. The seriousness and sincerity of paradigmatic civil disobedience do not in themselves lend justification to that disobedience (though they are necessary for that disobedience to be justified) because the moral consistency that accompanies conscientiousness has no objective value when oriented toward a false ideal or

groundless commitment. Although, in some cases, conscientiousness shows that the action was carefully chosen, there is little reason to think, absent an assessment of disobedients' convictions or other factors, that sincerity and seriousness noticeably lessen the severity of a morally problematic breach of law.[39] Therefore, whether moral conviction mitigates or aggravates will depend largely upon the nature of disobedients' commitments and the implications of pursuing them. Some false ideals are less egregious than others are and pursuit of some such ideals causes less harm than pursuit of others does.

But, it is not only the nature of disobedients' convictions and the harm their pursuit might cause which are relevant to the assessment of culpability. It is equally important to consider what the disobedient thinks she is doing when she acts. I suggested earlier that the deep conviction felt by many justified disobedients makes adherence to the law and the policies the law permits harder for them than for people who lack those convictions. Something similar might be said on behalf of disobedients whose commitments are unjustified: the strength of their convictions, however misguided, makes respecting laws and policies that challenge those convictions very difficult. But, whereas the value of justified disobedients' convictions means that there are no grounds to demand repentance and reformation from them, here there are good grounds to demand repentance and reformation since these disobedients' convictions are poorly founded. While these disobedients may think that they can do nothing else, or that honour, moral consistency or self-respect demand that they act as they do in defence of ends they believe are of overmastering importance, this does not excuse or justify their action. It simply places it in context.

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[39] One might argue that sincerity and seriousness are aggravating circumstances in cases where an action taken recklessly or negligently would be less problematic than the same action taken intentionally or knowingly with sincerity and seriousness. This point is consistent with the idea that conscientiousness can accompany spontaneous actions.

Whether that context mitigates or aggravates their offence will depend in part on *how* these offenders came to hold their convictions, an issue I consider below in relation to disobedients' personal circumstances.

Although it is difficult sometimes to separate a disobedient's conscientious commitments from her motivation for taking certain actions, nevertheless we can divorce motives from commitments since a person could either be mistaken about the value of her commitments but act for respectable reasons or be correct in the value of her commitments but not act for the reasons that support those commitments (as discussed in Chapter Five). Concerning the former, the staunch opponent of abortion, for example, is mistaken in her commitments, I stipulate, yet may act for reasons which have weight. Her acting for the reason of valuing human life (assuming her actions are consistent with that value) mitigates her breach of law in defence of her commitments. Concerning the latter, the activist who urges protection of the environment in order to gain political clout acts not for the reasons that actually favour this legitimate commitment: her disobedience is unjustified, as it is not taken for undefeated reasons. In this second case, although the disobedient's motives should aggravate her conduct, nevertheless, since her goal is respectable, subtleties about her reasons for pursuing it will be irrelevant in the eyes of the law given the difficulty the law has in finding facts about such matters. It is only when the goal is reprehensible or the conduct harmful that motives come into play in assessing appropriate punishment.

If we apply this to cases where the goal is reprehensible or the action causes harm, then it seems, at first glance, that a bias-motivated offence warrants a harsher response from the law than does a similar action which lacks the attendant motivation. But, one might claim that the identity of the agent and the nature of the action are both relevant to that assessment. The deep yearnings for freedom which marked the lives

of black Americans and black South Africans during the periods I discussed in Chapter Five probably prompted attacks on whites during those periods (and subsequently) which were motivated by hatred. In such cases, one might argue that the circumstances in which these people lived and the oppression that black people endured mitigated their offences. This does not justify their actions (though it might excuse them since they would have reason to believe they had reason to act); depending on the form those actions took the appropriate response from the law may be severe. If, by contrast, similar hatred prompted a white person from those countries to make a public attack on a black person, the motive *ceteris paribus* would seem to aggravate the offence. The objection raised by opponents of hate-crime legislation is that it does not treat all people equally, but discriminates against certain groups. One must consider not only whether one group has good grounds to resent another and but also, more importantly, whether one person has good grounds to resent another. The intersection of mitigation and ethnicity need not follow traditional lines since any person who is abused or maltreated by a particular group or individual may have grounds for animosity, and this might diminish her culpability and thereby mitigate an attack (political or otherwise) against that group or individual. That a case by case approach is necessary here does not affect the claim that motives can aggravate a political offence.

b. Status as Civil Disobedience

Turning to features of civil disobedience itself, various factors come to mind which could mitigate or aggravate. The fact, for example, that a disobedient acts in coordination with other minorities in the way recommended by Rawls might mitigate her offence. Or the fact that, although her goals and reasons for acting are

questionable, she chooses types of civil disobedience which are less harmful or offensive than they otherwise could be given her commitments, might mitigate her offence. And, the converse might aggravate her offence. The feature I wish to focus on, however, is the status of an action as civil disobedience, a feature which can speak to harm as well as to culpability. In brief, does civil disobedience cause less, more, or equal harm to actions not taken in civil disobedience? And, is a civil disobedient less culpable than, more culpable than, or just as culpable as an ordinary offender? All three positions are found in the law.

Maine Superior Court (trial court) Justice E. Allen Hunter found civil disobedience to be a mitigating factor in his sentencing of Nancy Galland and Richard Stander who were found guilty of criminal trespass during a protest against the US invasion of Iraq at the Bangor, Maine, Federal Building in March 2003. Justice Hunter rejected the prosecution's call for heavy fines and chose instead to sentence the two to 20 hours of community service:

> I remember that in the 1960s there were actions of civil disobedience that, eventually, made our life better...We all have derived benefits from acts of civil disobedience like the Boston Tea Party. That act of civil disobedience has played an extremely important and vital political role in our history...From time to time in our history, we see events that involve civil disobedience that make us all uncomfortable. I'm not sure that's a bad thing. Those of us who prefer the comfort of a status quo are made to feel uncomfortable when we have people engaging in actions which violate the norm.[40]

The judge's reasoning is interesting, as it appeals to the role that civil disobedience has played in American history and highlights the social value of this kind of dissent to the collision of opinions. Justice Hunter also seems to point to a particular benefit of civil disobedience as a practice, not just as one form of dissent amongst others. Unlike mere verbal dissent, civil disobedience involves both a performative act of

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[40] Williams, Lynne (2004, 10 September), 'Restraining Dissent is Harmful' in *Bangor Daily News*. See also Galland, Nancy and Stander, Richard (2003), 'Bangor Judge, Too, Recognises Importance of Civil Disobedience' in *Peace Talk*. Retrieved 16 May 2006 from http://www.peaceactionme.org/dec3disobedience2.html

dissociation and condemnation and a positive stride in a direction other than that pursued by the government or society. Justice Hunter's observation that it may not be bad that disobedients make us uncomfortable parallels the arguments offered in Chapters Two and Five that, despite society's outward animosity toward dissidents and disobedients, such persons often are looked to as the only actors who both will offer a countervailing perspective to that of the majority and will push actively for changes for which the majority feel unwilling or unable to struggle.

A similar view is endorsed by Judge Stephen J. McEwen Jr of the Superior Court of Pennsylvania (appellate court), who maintains that the offender who acts unlawfully as an expression of protest should be viewed in a more favourable light in the sentencing context than the offender who does not act in protest. On his view, certain factors are situationally dominant. First, the character of the offender is a fundamental factor to determining the appropriate sentence. Second, if the protester's sincerity (which is distinct, McEwen notes, from any perceived worthiness of her cause) is sound and intact, then the evaluation of the offender's character must be favourable.[41]

The position we might attribute to Hunter, and, on a certain reading, to McEwen, is that a person who breaches the law in civil disobedience (or rather, in protest, according to McEwen) is less culpable than other offenders are, i.e. has a less guilty mind than other offenders do. Moreover, her offence causes less harm than it otherwise would do because the harm here is balanced by the good done in voicing a different point of view and in making the majority uncomfortable. Moreover, those whom the action harms may perceive it as less egregious than ordinary offences would be since the reasons for the harm are not 'personal' as such but public.

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[41] McEwen (1991), 991.

Therefore, although a legal wrong has been committed, it is a less serious wrong than it otherwise might be because the person was acting in civil disobedience.

If this analysis holds, then the feature of being civilly disobedient, while it would apply primarily to paradigmatic civil disobedience, would mitigate both morally justified and unjustified civil disobedience since both exhibit the requisite sincerity and perform the social service of shaking the government and society from its lethargic complacency. But, despite the value of performative dissent, the direction in which disobedients move presumably is relevant to whether, all things considered, the political nature of their action mitigates or aggravates (or is relevant to) their offence. If that is so, then the status of an action as civil disobedience cannot mitigate in all cases.

The second position found in the law is that the status of an action as civil disobedience has no bearing upon a legal assessment of the seriousness of the offence. Chief Justice McEachern of the British Columbia Court of Appeal writes that,

> Civil disobedience is a philosophical, not a legal principle...Even philosophers agree that those who disobey any law, by civil disobedience or otherwise, must expect to be punished according to law. Civil disobedience is not a defence to any wilful breach of the law.[42]

I assume that when McEachern says that civil disobedience is not a defence, he means also that it cannot mitigate (being a philosophical principle, not a legal principle). While we may put aside the questionable claim that philosophers are in agreement as to whether disobedients must expect to be punished according to law, we should consider whether McEachern would have made this comment had the defendants before him been Nancy Galland and Richard Stander and not Kenneth Loylet Bridges *et al* who in 1988 engaged in picketing and intimidation of the users and operators of the Everywoman's Health Centre Society abortion clinic. Given Hunter's judgment,

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[42] *R. v. Bridges* (1991), 62 C.C.C. (3d) 455 at 458 (B.C.C.A.).

we have reason to think that McEachern might not have argued as he did had disobedients with different aims (and different offences) come before him. And yet, perhaps he would have made the same point irrespective of the kind of civil disobedience he ruled upon since many judges maintain that, even when disobedients' commitments are admirable, civil disobedience does not mitigate an offence. Lord Hoffman, discussed above, takes this stance in arguing that when the law is not unjust, while judges may sympathise with dissenters' views, their duty is to uphold the law and therefore disobedients should not be treated differently from other offenders. The qualification 'when the law is not unjust' is important though, as it suggests that when the law is unjust, civil disobedience even unjustified civil disobedience might find mitigation in its status as an act of conscientious condemnation.

Such, however, was not the view taken by the Justices of the US Court of Appeals for the Tenth Circuit in their judgment of Sisters Platte, Hudson, and Gilbert (whose trespass of a Colorado military base was described in Chapter Five). Here, the Justices adopt a position akin to that of McEachern even though the US military policies challenged are, if not all unjust, deeply flawed. Justice Hartz states that:

> Civil disobedience can be an act of great religious and moral courage and society may ultimately benefit. But if the law being violated is constitutional, the worthiness of one's motives cannot excuse the violation in the...eyes of the law. History has not been short of evidence of the risks, the evils, that can attend subordinating the requirements of law to one's personal view of morality.[43]

The latter part of this quote and Justice Hartz's next sentence imply a stronger judgment of civil disobedience than the claim that it is irrelevant, namely that it aggravates an offence. Justice Hartz quotes Judge (later Justice) Stevens:

> If [Defendants'] theory of defense were valid, the character of [their] conduct would be judged not by the rule of law but by the end which [their] means were designed to serve. . . .
> One who elects to serve mankind by taking the law into his own hands thereby

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[43] *United States of America v. Platte et al* (2005), 401 F.3d 1176 (10th Cir); LEXIS 4458. Retrieved from http://web.lexis-nexis.com/professional/ 25 November 2005.

> demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. [Defendants'] professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.
> A simple rule, reiterated by a peaceloving scholar, amply refutes [Defendants'] arrogant theory of defense: "No man or group is above the law."[44]

In citing this judgment and in highlighting the risks that attend 'subordinating the requirements of law' to one's own moral outlook, Justice Hartz actually suggests that civil disobedience speaks against an offence, as it shows the offender to be one who places herself above both the law and the democratic decision-making process.[45] Further evidence that civil disobedience is regarded in some jurisdictions as an aggravating circumstance is that some judges have adopted the strategy of banning long-time activists from participating in public protests, a decision which seemingly denies the social value of civil disobedience defended by Hunter, Thoreau, Rawls, and many others. Judge Taite, a Texas trial court judge, has applied an anti-civil-disobedience policy in several cases irrespective of the disobedients' aims and offences. In his sentencing of Megan Lewis, an anti-fur trade activist who blocked the entrance to a Neiman Marcus store to protest its support of the fur industry, Judge Taite ordered her to stay away from animal rights protests. According to the *Texas Observer*, Judge Taite has used similar sentences to keep anti-abortion protesters away from abortion clinics. Reporter Will Potter writes,

> [Judge Taite] said Lewis was involved in non-violent civil disobedience in front of Neiman Marcus once before, so he used the sentence to make sure that she wouldn't

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[44] *United States v. Cullen* (1971), 454 F.2d 386, 392 (7th Cir.) (quoting *United States v. United Mine Workers* (1947), 330 U.S. 258, 343, 385, 91 L. Ed. 884, 67 S. Ct. 677 (Rutledge, J. dissenting). Cited from *United States v Platte et al* (2005). One could question whether Justice Stevens, like Chief Justice McEachern, might have argued differently had different offenders come before him. The case of Cullen involved a burglary of a Selective Service office and the destroying of certain records for reasons of religious conviction.

[45] American appellate courts have tended to reject what is called the Nuremburg defence (which the nuns employed), i.e. the defence that one is obligated to highlight that one's government acts in contravention of international law. According to Matthew Lippman, appellate courts reject this defence on the grounds that defendants lack the standing to rely upon defences that indirectly require adjudication of the legality of US foreign policy and national security policy. C.f. Lippman, Matthew (1991), 'Nuremburg and American Justice' in *Notre Dame Journal of Law, Ethics and Public Policy*, Vol. 5, No. 4, 951-977.

> "be back doing the same things again." Sentencing an activist to stay away from protests, Taite said, is no different than sentencing a drunk driver to stay away from bars, or sentencing a pedophile [*sic*] to stay 100 feet away from schoolyards.[46]

The difference, of course, between paedophilia or drunk driving and political protest, as Potter observes, is that the latter is protected under the US constitution.

Returning to the case of Sisters Platte, Hudson, and Gilbert, Hartz is mistaken, I believe, to rely upon a judgment which suggests that disobedients improperly arrogate to themselves licence to disregard the law. Paradigmatic civil disobedients willingly expose themselves to the risk of punishment and censure in order to act in ways consistent with their deeply help commitments and to communicate their concerns to government and society. Disobedients who breach the law out of a sincere and serious commitment, however misguided, act from the strength of their conviction, not from a desire to show themselves to be above the law.[47] Whether they show themselves to be, in their own eyes at least, above the democratic decision-making process is a more pressing question. Daniel Markovits, for one, suggests that political disobedience has the potential to become a form of oppression:

> ...when the underlying political order that has produced the objectionable laws or policies is legitimate, disobedience triggers concerns of political principle as well. It seems, in such cases, that political disobedience risks becoming itself a form of oppression, in which protesters attempt improperly to impose their personal political preferences upon others.[48]

Yet, even were it the case that civil disobedience, however rationally persuasive its practitioners seek to be, is an imposition of their opinions upon others, it does not follow that this imposition is either anti-democratic or a form of oppression. Democratic decision-making is an ongoing process which continues after the votes are

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[46] Potter, Will (2001) 'The New Backlash: From the Streets to the Courthouse, the New Activists Find Themselves Under Attack' in *Texas Observer* 14 September. Retrieved 10 October 2005 from http://www.texasobserver.org/showArticle.asp?ArticleID=420.

[47] I understand the notion of 'putting oneself above the law' in terms of denying the law's right to enforce its norms, that is, resisting the imposition of lawful punishment. One does not put oneself above the law when one denies that there is a moral obligation to follow the law because it is the law.

[48] Markovits, Daniel (2005), 'Democratic Disobedience' in *Yale Law Review*. Vol. 114, 1898

counted and the policies enacted. Defeated parties are fully entitled to continue to challenge the majority position and their doing so, far from being anti-democratic, reflects the true spirit of democracy as a system that accommodates a variety of positions and is sensitive to shifts and changes in perspectives. Moreover, the potential for democratic deficits noted in the previous chapter makes performative dissent all the more vital to the democratic decision-making process. Paradigmatic civil disobedience often shows its practitioners to be sensitive to the obstacles to a fair hearing which legal modes of communication can present.

But, even though civil disobedience as such is not anti-democratic, it involves making it known either before or after the fact that the law has been breached. One might argue that the communicative aspect of civil disobedience aggravates such offences since, as Greenawalt notes, in the realm of public affairs, such disobedience usually is attended by much greater publicity than most surreptitious violations are, and this forces legal authorities to concern themselves with the possibility that law-abiding citizens will feel distressed, insecure and perhaps imposed upon if no action is taken. So, while authorities, says Greenawalt, may quietly let minor breaches pass, failure to respond to violations performed, in some respect, in the presence of authority, may undercut claims that the rules and the persons who administered them deserve respect.[49]

Clarification, however, is required of the claim that the rules of law and their administrators deserve respect. If this claim reflects an endorsement of political obligation, then we may dismiss it, as we have already analysed and rejected the notion of a *pro tanto* general moral obligation to follow the law. But, if the idea of respect relates to authority's right to enforce its norms, then this claim has plausibility.

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[49] Greenawalt (1987), 351-2.

Some response on the part of authority may be required to reassure citizens that the state is fulfilling the duties of its office from which the right to enforce its norms stems. The kind of response that is appropriate and justifiable, however, may not be that prescribed by the law books. To be justified, that response must be respectful of the defeasible normative protection that civil disobedience deserves. As Greenawalt himself notes, in some instances of mass demonstration, dispersement or arrests may be a sufficient response even if prosecution does not follow. Authorities can retain their claim to respect by making an arrest without going to trial or by securing a conviction with an absolute discharge. There are grounds for such measures (beyond the claims of normative protection) when civil disobedience is carried out in an orderly and timely fashion, as this makes enforcing the law relatively easy. It allows authorities to manage and to monitor protests which, were they covert, violent or disorderly, might be unmanageable. This is not to say that covert action or violent action necessarily requires harsher treatment. Nor does it allow that public action which lacks orderliness warrants leniency. The point is that *certeris paribus* certain modes of communication can offer grounds for leniency.

Of the three positions on civil disobedience found in the law, none is entirely acceptable yet each seems appropriate to particular contexts. The claim that the civilly disobedient quality of an offence is irrelevant to an assessment of punishment is implausible except in cases where that quality is not amongst the more salient features of the action. In most cases, and certainly in paradigm cases, the civilly disobedient quality of the offence is an important attendant circumstance which recommends a different response from the law to that afforded to ordinary offences. The appropriate response as either lenient or severe will depend largely upon the nature of the disobedience and the aims of the offenders.

An interesting related issue is that of previous convictions, the effect of which is a disputed area in desert theory. Some desert theorists argue that each offence should be treated in isolation on the grounds that any increase in sentence on account of prior convictions stems from aims of deterrence and social protection inconsistent with desert theory rationale.[50] Others, like von Hirsch, argue that a first-time offender should receive a reduced sentence since this both concedes that humans are fallible and shows respect for their capacity to respond to censure.[51] I disagree with both of these positions since, on the one hand, the dialogue between the law and an offender is an ongoing process, not a series of separate conversations which have no bearing on each other, and, on the other hand, even though the offender's previous good conduct speaks in her favour, the censure appropriate for an offence is not necessarily less for first-time offenders than for other offenders. A first-time offender, for example, who formerly planned several offences but never performed them, has a 'guilty mind' equal to that of a repeat offender.

Concerning civil disobedience, it is unclear whether previous convictions should mitigate or aggravate. Since previous convictions for related acts of civil disobedience indicate the strength, sincerity and constancy of a disobedient's commitments, they show that she wants to be taken seriously and has not been swayed by the punitive responses of the law. However, when civil disobedience lacks justification, the strength of the disobedient's conviction must be balanced against not only her repeated intentional or knowing breaches of law, but also both the unjustified nature of her commitments and whatever harm her offences cause. The balance of considerations suggests that, in such cases, previous convictions aggravate her offence by heightening her culpability. But, in other contexts, where a disobedient is justified,

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[50] Ashworth (1998), 145.
[51] von Hirsch (1998), 193.

previous convictions should mitigate her offence, even though they are unlikely to be seen in this light by the law.

A further issue related to the status of acts as civil disobedience is the use of violence, which would seem to be a natural candidate for an aggravating circumstance, as it presumably increases the harm of an offence. But, the harm caused by violence is sometimes less severe than that caused by non-violent acts and legal acts. In cases where violence is needed to root out state oppression, it would seem to mitigate the offences taken. Nevertheless it may be reasonable to demand repentance and reformation of some kind for any resort to violence, particularly non-self-directed violence. Even an otherwise justified use of violence may be denounced if it incites further unjustified instances of violence. And although violence may eloquently communicate a disobedient's seriousness and her frustration, it changes the nature of the dialogue. It pushes authorities to respond in ways in keeping with their stance on violence, which may be harsher than the stance they would wish to take toward civil disobedience that defends values they can appreciate.

c. Behaviour Subsequent to the Offence

There are various factors for which it is unclear whether they speak to either the harm of the offence or the culpability of the offender, but which still are relevant to the assessment of appropriate legal responses. One difficulty in analysing these factors is to distinguish them from grounds for mercy. A key question for that project is whether events subsequent to an offence can diminish its seriousness. I suggest that sometimes they can.

Factors like the offender's behaviour upon arrest, her ensuing attitude toward her disobedience, and her response to lawful punishment serve to explicate her own

understanding of her conduct. Concerning the first, a mitigating factor in the case of Galland and Stander, according to Justice Hunter, was that they did not go limp upon arrest (a common strategy used by protesters which makes police work harder). Hunter said that this favourably impacted upon his decision.[52] This suggests that disobedients who enhance (or do not reduce) the facility with which the law can undertake its part of the dialogue may cite this in mitigation of their offence.

Whether repentance of wrongdoing lessens either the offender's culpability or the harm of her offence (by lessening the distress for victims and their families) is unclear. Repentance is more likely to speak to harm than to culpability since a subsequent change of heart presumably cannot diminish one's responsibility at the time that one acted. A guilty plea, which can be one way (though not necessarily the best way) of showing repentance, mitigates in some respect since it reduces the impact of the offence (on state resources, victims and witnesses).[53] That said, the effect that repentance *per se* has on the seriousness of the crime seems to be minimal, which suggests that repentance is best treated, as Tasioulas argues, as giving reasons for the law to show mercy and to impose a lesser punishment than that which the offender deserves according to justice. In demanding repentance, though, the law asks her either to give up her deeply held commitments or at least to act in ways inconsistent with her understanding of what is required to respect those commitments. That is a tall order and might recommend that the law be merciful to those whose opinions it cannot accommodate. Although, in the case of unjustified civil disobedience, defiance would seem to aggravate the offence since not only is the offender unjustified in her decision to act, but also she is unrepentant about it, nevertheless the law may have reason to be merciful when, as noted above, the

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[52] Diener, Sam (ed.) (2004, February), 'Maine Judge Praises Civil Disobedience' in *Peacework Magazine*. Retrieved 26 August 2005 from http://www.afsc.org/pwork/0402/040214b.htm.
[53] Ashworth (2005), 170.

disobedient employs less serious forms of disobedience than she might otherwise do. It is true that any disobedience not founded on objectively valid principles and values is rightly vulnerable to punitive measures by the state. But, depending upon how she acts and how she comports herself in relation to the law, authorities may have reason not to punish her severely.

Let us turn briefly to the disobedient's attitude toward the law's response to her offence. An often cited mitigating factor is the willingness of a disobedient to be punished according to law (this does not necessarily mean that she thinks she ought to be punished according to the law, but that she is willing to accept that punishment however unwarranted she believes it is). This willingness is taken as evidence of her good faith and her readiness to deal fairly with authorities, and thereby is said to lessen her culpability. I have argued in previous chapters that being unwilling to accept punishment does not show that disobedients refuse to deal fairly with authorities, just as being willing to accept punishment does not show that disobedients wish to deal fairly with authorities. Given the ambiguities of and the variety of reasons for demonstrating a willingness to accept punishment, this trait is best left out of a discussion of features that mitigate or aggravate an offence.

The impact of factors like a disobedient's attitude subsequent to her offence or her attitude to the punishment imposed must be tempered by an appreciation that some people are better placed than others are to respond to the law in certain ways. A person's personal circumstances and past experiences can shape her ability to respond to the law in ways that the law finds mitigating. For example, a person who has been treated harshly and unjustly by the law in the past may be disinclined or even unable to respond to the law in a manner that would mitigate her offence. In such cases, the law has reasons to be charitable or merciful toward her. Personal circumstances, I

believe, are an area where mitigation and grounds for mercy become entangled. In what follows, I endeavour to locate, if not untie, some of the knots.

d. Personal Circumstances

An offender's personal circumstances, education, culture, and economic situation can have a powerful impact upon her commitments and values as well as her decisions on how to act. To say that culture and upbringing could mitigate an offence seems, in one sense, to deny the offender that reasoning-giving capacity so emphasised by the communicative theory of punishment. In brief, this seems to treat her as a product of cultural and community influences, a being inculcated with certain values and alliances which shape her beliefs and commitments to such an extent that she cannot extricate herself from the perspective imposed upon her and thus engages in civil disobedience in defence of commitments she has not reflected upon or freely adopted. At the same time, taking into account the influences of upbringing, education, and past experiences affords an agent greater space to account for her action by allowing her to offer the full set of reasons she had to believe she had reason to act. On that reading, this approach treats her more fully as a reason-giving agent than would a punitive approach that disregarded such factors.

I noted above the difference between the person who can give reasons for her belief that she had reason to act (the excused person) and the person who cannot (the unexcused person). By including personal circumstances in the category of attendant circumstances and reasons for belief, we expand the scope of the label 'moral excuse'. There are, however, some limits on the means and mode of action which could fall under the umbrella of morally excused civil disobedience. Having good reason to think one has undefeated reasons to act applies only to certain actions in contexts to

which those reasons admittedly apply. For some forms of civil disobedience, one could not claim legitimately to have good reason to believe one had reason to take those actions, though one may have had good reason to believe one had reason to take other civilly disobedient actions.

What one can legitimately claim to have reason to believe also depends in part upon how one came to hold one's beliefs. First, being raised in a closed society where there are few opportunities to hear opposing points of view or to develop a pluralistic outlook might give one reason to believe that the views one has acquired are wholly right and should be furthered when they confront hostile ideas. Second, the strength of collective agreement on certain issues might give one reason to believe those judgments are correct and should be defended when challenged. Third, certain actions by the government may give one reason to believe that the state has attacked one's interests in some way, and this may prompt one to engage in civil disobedience. In each case, however, it is unclear whether the circumstances lessen the seriousness of the offence or simply give us reasons to be compassionate toward the offender. We might say that in each case the offender is responsible for the offence and could and should have thought things through before acting. Nevertheless it is understandable to us why the offender has acted in this way; and this gives us reason to show compassion in our assessment of the proper response. The fact that such cases can be represented in terms of either mitigation or mercy would suggest that sometimes the difference between the two is a matter of degree. The same is true for mitigation and legal excuse: the difference between the two often may be simply a matter of degree and of legal history.

In opposition to the above suggestions, one might argue that it would be intrusive for the law to look at the kind of person the offender is. Rather, the state

should focus strictly upon the act taken. But that approach does not accommodate the fact that different offenders deserve different treatment. In certain contexts, a member of parliament should be treated differently from the average citizen, a doctor or a lifeguard should be treated differently from the Good Samaritan, a judge should be treated differently from an average citizen. Often who the offender is matters for our assessment of the appropriate legal response to the offence.

5. Concluding Remarks

Let me conclude this chapter by noting some ways in which the parallel that I have drawn between the communicative aspects of civil disobedience and lawful punishment might break down. First, these practices differ in their directness. Whereas there is space within an account of civil disobedience for indirect disobedience, there is no such space with the communicative theory of punishment for what one might call 'indirect punishment'. Indirect punishment could be understood as either punishing a person other than the offender in order to punish the offender or punishing the offender for some action other than the offence for which she should be punished. In either case, the punishment would be disproportionate and at odds with a desert theoretic approach which requires that only the guilty be punished and only to the extent that they deserve (and sometimes less than they deserve when considerations of mercy reduce the justified punishment). In neither of these cases could the punishment be justified. Indirect civil disobedience, by contrast, is not necessarily disproportionate on the communicative theory since sometimes it is a more appropriate and less harmful vehicle for communication than direct disobedience is. The considerations of lesser harm and appropriateness adduced in

defence of some indirect civil disobedience apply to that practice partly because it is oriented toward policies and not toward particular persons.

Second, there is a difference in how the practitioners of punishment and civil disobedience perceive their activities. Whereas the state (in a democratic society) may with some legitimacy represent itself as the voice of the people, disobedients may not do this unless the minority for which they speak is in fact the majority. However, they may claim to speak for the interests of the community where their performative dissent serves the genuine ideals and values of that society. Law enforcers and civil disobedients differ most noticeably in how they perceive their contribution to the common good. I argued in Chapter Five that many disobedients, justified and unjustified, approach their political engagement as a pursuit of ideals. This attitude, while it could conceivably be held by a law enforcer, fits less readily with lawful punishment than with civil disobedience. Lawful punishment is unlikely to rectify a democratic deficit or to offer a platform for political engagement and conscientious action or to foster the approximation of great societal goods.

Third, a related difference pertains to the attitude that each adopts toward their activity. It is often argued that the state should adopt an attitude of regret when required to punish its citizens. No comparable attitude of regret may be expected from civil disobedients for the mere act of dissociating themselves from a law or policy they oppose. They have reason to regret any harm they cause through their action or duties they breach by their action, but not to regret the mere act of breaching the law. Fourth, it is also reasonable to suppose that there is a difference in disobedients' and authorities' expectations of how the target audience will respond to the communication. The disobedient, presumably, does not expect repentance from government officials in the way that the law expects repentance from an offender.

Such an expectation on the part of the disobedient would be unreasonable. However, when her challenge is well-founded and her dissent persuasive, she may reasonably expect an acknowledgement of wrongdoing by the government. Moreover, she may reasonably expect reformation in policy if not in government officials' personal outlooks.

There are I am sure other points of contrast between the communicative features of punishment and those of civil disobedience. While interesting, these various warps in the parallel I have identified are modest and do not diminish the usefulness of this parallel both for explicating the key features of these two practices and for analysing their respective justification.

7. Conclusion

Many of the arguments offered in this discussion in defence of civil disobedience are unapologetically idealistic. Civil disobedience is presented not only as eminently defensible, but also as approaching George Bernard Shaw's description of 'the rarest and most courageous of the virtues.'[1] This idealisation of civil disobedience and its practitioners may be seen as a limitation of the thesis in two respects. First, while attention is given to the dangers of ideals, particularly false ideals, only modest consideration is given to particular unpalatable forms of civil disobedience as such. Given my insistence that the moral right to civil disobedience may be claimed by all who employ paradigmatic civil disobedience, it would be worthwhile to confront more fully the implications of protecting civil disobedience taken in pursuit of false ideals or base goals. Second, this normative account of civil disobedience does not reflect the reality of civil disobedience practice. Even where real cases are discussed, they are presented in somewhat idealised terms. This idealisation is useful, however, for constructing sufficiently austere cases for analysis. More generally, the idealised picture offers a fully specified critical standard for this practice. It is in fact a strength of the thesis that, just as punishment theory offers an ideal account of what lawful punishment ought to be, so too this account of civil disobedience offers an account what civil disobedience ought to be to reflect responsible citizenship in its practitioners and to merit leniency from the law. Moreover, this idealisation is preferable to others which both overly restrict the parameters of civilly disobedient action and place such action within the context of an

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[1] Shaw, George Bernard (1903), *Maxims for Revolutionaries* from *Man and Superman*. The full quote reads: 'Disobedience, the rarest and most courageous of the virtues, is seldom distinguished from neglect, the laziest and commonest of the vices.'

ideal society. Given its character as critical standard, my account is not intended to offer a prescription for legal and political reform, but rather to offer a sketch of a philosophically adequate benchmark against which to measure both current practices and reforms of those practices. The major components of the thesis contributing to this achievement are, first, the conceptual analysis of civil disobedience as a practice on par with lawful punishment in its purposes and potential justifiability; second, the analysis of the nature of wrongdoing and of justification both in general and in relation to civil disobedience; third, the critique of recent arguments for political obligation which, if forceful, would have complicated the task of justifying civil disobedience; fourth, the defence of the legitimacy of asserting a moral right to civil disobedience; fifth, the examination of both how disobedients might conceive of their own activism and how their activism may contribute to the common good of their societies; sixth, the exploration and defence of the centrality of ideals to morality; and seventh, the analysis of how the law should treat civil disobedience that either meets or, in certain circumstances, fails to meet the critical standard explored in this dissertation.

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