

Civil disobedience as a democratic practice

by
Nina Maria Pschorn

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Supervisor: Prof. Vasti Roodt
Department of Philosophy

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ABSTRACT

The aim of this thesis is to develop a moral justification for civil disobedience as a practice of democratic contestation. I begin by investigating the problem of disobedience in the context of our obligation to comply with democratic laws. Here I explore five influential theories of political obligation and establish that disobedience is not a violation of all grounds of obligation. Chapter Two sets out the necessary features of civil disobedience. I start by distinguishing civil disobedience from other types of resistance, namely conscientious objection and revolutionary action. Once I have established what civil disobedience *is not*, I move to the defining features of civil disobedience as an illegal act committed by a conscientious agent with a particular communicative aim. In Chapter Three, I address the question of violence insofar as it poses a justificatory problem for an account of civil disobedience. Here I argue against the common assumption that civil disobedience is non-violent by definition, and argue instead that the use of violence is a matter of justification, not definition. By making a distinction between violence that aims to coerce and violence that aims to persuade, I argue that a degree of violence may be permissible insofar as it serves the larger communicative aims of the act and is compatible with the duty to respect the autonomy of one's fellow citizens. The final chapter of the thesis is devoted to the relationship between civil disobedience and the rule of law. Here I demonstrate that the willingness to accept the legal consequences of the law-breaking act is a necessary component of justified acts of civil disobedience. The willingness to accept the possibility of punishment is what exemplifies the civil disobedient as a conscientious citizen who demonstrates respect for the law and for the autonomy of her fellow citizens. It is furthermore a mark of distinction between civil disobedience as a fundamentally communicative act and conscientious objection and ordinary criminal offences. In the concluding part of the thesis, I examine the Rivonia trial as a paradigmatic example of conscientious agents seeking to persuade their fellow citizens, demonstrating their willingness to cooperate with the state and civil society in the future advancement of justice. I further argue that, while the willingness to accept the legal consequences of the law-breaking action is a justificatory feature of acts of civil disobedience, such justification does not require agents to plead guilty and passively accept the punishment. Rather, the civil disobedient aims to persuade his or her fellow citizens and the judicial authority that the act for which he or she is on trial does not constitute a criminal wrong, but that it is the law that is unjust. Under these circumstances, civil disobedience is

not only permissible, but a morally justifiable and even praiseworthy form of political engagement within a democratic society.

ABSTRAK

Die hoofdoel van hierdie tesis is om 'n morele regverdiging vir burgerlike ongehoorsaamheid, as 'n praktyk van demokratiese betwisting, aan te bied. Ek begin deur 'n ondersoek in te stel oor die probleem van ongehoorsaamheid binne die konteks van ons verpligting om aan demokratiese wette te voldoen. Hier bestudeer ek vyf invloedryke teorieë van politieke verpligting en stel vas, dat ongehoorsaamheid nie noodwendig 'n skending van alle gronde van verpligting is nie. In Hoofstuk Twee stel ek die nodige eienskappe van burgerlike ongehoorsaamheid uit een. Ek begin deur 'n onderskeid te tref tussen burgerlike ongehoorsaamheid en ander vorme van weerstand, wat insluit, gewetensbeswaar en revolusionêre aksie. Sodra ek vasgestel het wat burgerlike ongehoorsaamheid *nie is nie*, beweeg ek aan na die bepalende eienskappe van burgerlike ongehoorsaamheid as 'n onwettige daad, wat gepleeg word deur 'n gewetensvolle persoon, met 'n bepaalde kommunikatiewe doel. Hoofstuk Drie handel oor die kwessie van geweld, spesifiek in verband met hoe geweld 'n probleem kan skep vir die regverdiging van burgerlike ongehoorsaamheid. Hier voer ek 'n argument teen die algemene veronderstelling dat burgerlike ongehoorsaamheid, per definisie, nie gewelddadig is nie. Ek stel eerder voor, dat die gebruik van geweld 'n kwessie van regverdiging is en nie van omskrywing nie. Deur 'n onderskeid te tref tussen geweld wat daarop gemik is om te dwing, en geweld wat daarop gemik is om te oorreed, argumenteer ek dat 'n mate van geweld toelaatbaar is, sover as wat dit die groter kommunikatiewe doelwitte van die daad dien, en verenigbaar is met die plig om die outonomie van ons medeburgers te respekteer. Die laaste hoofstuk van hierdie tesis fokus op die verhouding tussen burgerlike ongehoorsaamheid en die oppergesag van die reg. Ek wys in hierdie hoofstuk dat die bereidwilligheid om dieregsgevolge van die oortreding van die wet te aanvaar, 'n noodsaaklike komponent van regverdigbare burgerlike ongehoorsaamheid is. Die bereidwilligheid om die moontlikheid van straf te aanvaar, lig die ongehoorsame burger uit as 'n gewetensvolle persoon, wat respek vir die reg en vir die outonomie van haar medeburgers toon. Dit tref ook 'n verdere onderskeid tussen burgerlike ogehoorsaamheid, as 'n daad wat fundamenteel kommunikatief is van aard, en gewetensbeswaar en gewone misdade. In die afsluiting van hierdie tesis, ondersoek ek die Rivonia-verhoor as 'n paradigmiese voorbeeld van gewetensvolle burgers wat hul medeburgers probeer oorreed, en wat uitwys dat hulle bereid is om saam met die staat te werk vir die vordering van geregtigheid in die toekoms. Ek voer verder aan dat, alhoewel die

bereidwilligheid om dieregsgevolge van wetsoortredings te aanvaar, 'n regverdigende kenmerk van burgerlike ongehoorsaamheid is, vereis sulke regverdiging nie noodwendig dat oortreders skuldig moet pleit en hul straf op 'n passiewe wyse moet aanvaar nie. Inteendeel, die ongehoorsame burger beoog om sy of haar medeburgers en die regsgesag te oortuig, dat die daad waarvoor hy of sy op verhoor is, nie as 'n gewone misdaad beskou kan word nie, maar dat die onregverdige wet die belangriker probleem is. Onder sulke omstandighede is burgerlike ongehoorsaamheid nie net toelaatbaar nie, maar 'n moreel- regverdigbare, en selfs lofwaardige vorm van politieke betrokkenheid binne 'n demokratiese samelewing.

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INTRODUCTION

The anti-Apartheid struggle is undeniably one of the most important examples of political disobedience in the modern era. When the National Party came into power in 1948, the South African government enforced new legislation and amended existing laws in order to lend more power to the national government and to control any opposition against the Apartheid system (Karis & Gerhart, 1997: 47- 48). The policies of South Africa's Apartheid government were met with serious opposition, starting with the African National Congress' adoption of a campaign of mass resistance in 1950. The real turning point in the liberation struggle was the formation of the Defiance Campaign in 1952 (Fine & Davis, 1990: 118). The main objective of the Defiance Campaign was to repeal six unjust laws that the Apartheid government had implemented since 1948: the Pass Laws, the Group Areas Act of 1950, the Suppression of Communism Act of 1950, the Voter's Representation Act of 1951, the Bantu Authorities Act of 1951, and the Stock Limitation Policy of 1950. The first stage of the Campaign was characterised by paradigmatic acts of civil disobedience. These acts included the open refusal to carry passes, the open defiance of 'whites-only' signs in public spaces, and entering 'restricted' areas without a permit (Fine & Davis, 1990: 119). The second stage of the Defiance Campaign saw a significant increase of the number of participants, to the extent that the growing numbers frustrated judicial and administrative processes. The third stage involved mass participation in which politically motivated protests were launched on a country-wide scale (*ibid.*).

Spanning a period of over forty years, the struggle against Apartheid employed various strategies of resistance, including, petitions, consumer boycotts, peaceful protests, silent vigils, the deliberate and open defiance of laws, and acts of sabotage. Acts of resistance that deliberately and openly defy the laws of government in order to protest its injustice are conceptually characterised as acts of civil disobedience. This is the topic with which this thesis is concerned, namely civil disobedience, as a "genuinely political and democratic practice of contestation" (Celikates, 2016: 983). There are some who think of civil disobedience as nothing more than political blackmail, as reflected in Anne Applebaum's criticism of the 2011 Occupy Wall Street Movement, "Unlike the Egyptians in Tahrir Square, to whom both the London and New York protesters openly (and ridiculously) compare themselves, we have democratic institutions in the Western world." (Applebaum, 2011: 11). This view essentially maintains that citizens in relatively well functioning democracies ought

to limit their acts of dissent to the legally-sanctioned channels for expressing political opinion. Others have considered civil disobedience to be an essentially “bourgeois” and politically ineffective form of protest that fails entirely to address the problematic status quo (Celikates, 2016: 982).¹ These extreme views are of course not a complete representation of the varying positions present in the debate on civil disobedience. The traditional liberal view finds its position somewhere in the middle, maintaining that civil disobedience can be an effective and legitimate act of protest, provided that it fulfils a set of (demanding) normative requirements and is carried out under clearly circumscribed conditions.

The aim of this thesis is to show that neither the two extreme positions nor the traditional liberal view succeeds in fully capturing the specific characteristics of civil disobedience as a genuinely political and democratic practice of contestation. I will argue instead that, despite their law-breaking nature, acts of civil disobedience can represent a citizenry that is committed to democratic principles and actively engaged in the democratic process. Specifically, I will show that civil disobedience can be a form of civic engagement on the part of citizens who are conscientiously motivated to communicate their concerns for justice. Under these conditions, an act of civil disobedience should not only be deemed permissible, but rather regarded as a morally justifiable and even praiseworthy form of political engagement.

In order to develop this argument, I begin by analysing the problem of political disobedience within a democracy. The issue of civil disobedience raises important questions about political obligation: what gives rise to political obligations, to what extent citizens are bound by such obligations and whether the failure to fulfil one’s obligation can ever be justified. As Hugo Bedau suggests, the problem of an individual’s relationship to the state and its laws has been a bone of contention for as long as this relationship has been in existence. The question of what the appropriate response should be to unjust law has been debated at least as early as 399 BC, when Crito urged Socrates to flee from his prison sentence in order to avoid the death penalty (Bedau, 1991: 1). Given that citizens in a democracy have an obligation to comply with the (democratically elected and enacted) laws of the government, how could disobedience to these laws possibly be justified? As a first step in answering this question, I investigate five influential theories of political obligation, namely consent, gratitude, fair

¹ See for instance, Peter Gelderloos, 2013. *The Failure of Nonviolence: From the Arab Spring to Occupy*. Seattle: Left Bank Books.

play, membership/ association and natural duty, and conclude that the theory of fair play offers the best justification for political obligation in a democratic society. This justification is rooted in an obligation that individuals have toward one another as citizens. This obligation is essentially characterised by expressing respect for one's fellow citizens as autonomous agents. An extension of this obligation is then that citizens are obliged to respect the law insofar as the law has as its objective the protection and promotion of individual autonomy. However, when the law fails to protect citizens' autonomy and thus undermines the conditions for mutual respect, democracy is better served by resisting the law. The point here is to show that an act of disobedience within a democratic society is not necessarily undermining the foundations of legitimate government and that disobedience to the law can, in fact, be compatible with democratic principles. In this regard, civil disobedience should be recognised as a "democratizing force, not simply a transitory response in extreme and exceptional circumstance but an integral part of any complex democratic society" (Celikates, 2016: 986). In other words, the very presence of political disobedience in a society can show us that it is a democratic one.

The second chapter addresses the particular kind of disobedience that this thesis is concerned with, namely civil disobedience. This chapter aims to provide an account of civil disobedience, which highlights conscientiousness and communication as its principal features. In doing so, this chapter will lay the groundwork to critically assess some of the controversial features posited as necessary requirements for an action to be considered an act of civil disobedience. The requirements of civil disobedience that have been debated in the literature are *non-violence* and *the willingness to submit to punishment*. I will devote a separate chapter to each of these features and discuss why they pose a challenge for developing an account of civil disobedience. Part of the difficulty, I think, can be ascribed to the fact that the features of non-violence and the willing acceptance of punishment form part of the justification for acts of civil disobedience. In other words, these features could rather be used to *justify* an act of civil disobedience, rather than as part of its *description*. I will thus devote the second chapter to discussing the descriptive features of acts of civil disobedience, and the third and fourth chapters to the more challenging discussion of its justification. While many theorists hold non-violence to be a descriptive feature of civil disobedience, I will show why this poses a conceptual problem for clearly defining civil disobedience, and why the question of violence requires a more nuanced approach.

In order to critically assess the descriptive features of civil disobedience, I start with Rawls's traditional liberal definition. However, I further show that, while Rawls's definition is nothing if not systematic and precise, it is ultimately too restrictive in its stringent account of the necessary features for an act of disobedience to count as *civil disobedience*, and furthermore to be considered a *justified* act of civil disobedience. The most controversial of these is the requirement that acts of civil disobedience must be non-violent. This chapter only introduces this as a controversial point, which is then fleshed out in Chapter Three.

Having introduced non-violence as a controversial feature of civil disobedience, Chapter Three addresses the problem of violence in civil disobedience. The central aim of this chapter is to argue against the common assumption that civil disobedience is non-violent by definition, and argue instead that the use of violence is a matter of justification, not definition. This argument is based on distinguishing between violence that aims to coerce and violence that aims to persuade. I argue that persuasion is fundamental to the communicative nature of civil disobedience, in that the agents have to persuade both the authorities and their fellow citizens that their plight ought to be taken seriously and that they are justified in their demands for change. Here I will show that by making a distinction between violence that aims to coerce and violence that aims to persuade, a degree of violence may be permissible insofar as it serves the larger communicative aims of the act and is compatible with the duty to respect the autonomy of one's fellow citizens. Acts of civil disobedience that employ violence as part of its communicative aims to persuade, can therefore still be regarded as a justified form of democratic contestation.

Having explained the conscientious aspect and the communicative aims of civil disobedience in Chapter Two allows me to argue, in Chapter Four, for what I *do* hold to be an uncontroversial and necessary requirement for an act of civil disobedience to be morally justified, namely the willingness of the civil disobedient to accept the legal consequences of her law-breaking behaviour. It is this willingness to accept the legal consequences of one's illegal action that demonstrates respect for the law and a willingness to engage actively with the law. This argument is encapsulated by Martin Luther King's claim in his famous "Letter from Birmingham Jail":

One who breaks the law must do so openly, lovingly and with a willingness to accept the penalty. I submit that an individual who breaks the law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the

community over its injustice, is in reality expressing the highest respect for the law (King, 1986: 55).

Chapter Four aims to show that the willingness to accept the legal consequences of one's action both demonstrates "the highest respect for the law", and functions as an extension of the communicative aims of civil disobedience. King notes that the primary function of civil disobedience is dramatization: "... to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored" (King, 1986 [1963]: 54). The willingness to accept the possibility of punishment is what exemplifies the civil disobedient as a conscientious citizen, as a citizen that demonstrates respect for the law and for the autonomy of their fellow citizens. It is furthermore a mark of distinction between civil disobedience as a fundamentally communicative act, and conscientious objection and ordinary criminal offences, respectively.

However, I further show that, while justified civil disobedience requires citizens to willingly accept the legal consequences, i.e. arrest, imprisonment, they are not required to plead guilty in a criminal trial (Moraro, 2007). Given the conscientious behaviour of the civil disobedient and the willingness to accept the legal consequences of the law-breaking action, it is suggested that the agent should not have to plead guilty and passively accept the punishment. Rather, the civil disobedient should aim to persuade her fellow citizens (as well as the state and judiciary), that since the act does not constitute a criminal wrong and given the aim of the act of disobedience, the punishment is not deserving and not warranted. Here I will refer to the Rivonia trial of 1963-64 as an example of civil disobedience as a communicative enterprise and an act of resistance that, despite its illegality, was fundamentally conscientious. I will refer, in particular, to the famous speech delivered by Nelson Mandela while he was on trial for acts of defiance to highlight and reiterate the features of civil disobedience discussed in the preceding chapters. My point is to show that the criminal trial presents both an extension of the communicative aims of civil disobedience, but it can also be used as an opportunity for the civil disobedient to demonstrate the seriousness and sincerity with which he or she is resisting injustice. In the concluding part of the thesis, I examine the Rivonia trial as a paradigmatic example of conscientious agents seeking to persuade their fellow citizens demonstrating their willingness to cooperate with the state and civil society in the future advancement of justice. I further argue that, while the willingness to accept the legal consequences of the law-breaking action is a justificatory feature of acts of civil

disobedience, such justification does not require agents to plead guilty and passively accept their punishment. Rather, the civil disobedient aims to persuade his or her fellow citizens and the judicial authority that the act for which he or she is on trial does not constitute a criminal wrong, but that it is the law that is unjust. Under these circumstances, civil disobedience is not only permissible, but a morally justifiable and even praiseworthy form of political engagement within a democratic society.

Each of the chapters in this thesis is intended to support the central claim that a justified act of civil disobedience is marked by conscientiousness on the part of the agent and demonstrates a sincere and serious commitment to democratic procedure. This should ultimately be considered not only morally permissible behaviour, but morally justifiable. The overarching aim is to emphasise the crucial place that civil disobedience has in democratic societies and that citizens who break the law in order to communicate their concerns for injustice to their community, can be regarded as ‘upstanding’ citizens; as citizens committed to genuine democratic practice.

CHAPTER 1: DEMOCRACY AND DISOBEDIENCE

1. Introduction

The problem of disobedience arises when there is, at least, some sense of obligation to be obedient in the first place. It is not controversial to hold the belief that in a democracy people have at least some obligations of obedience toward the state and its laws. On the view that I will defend here, this obligation arises from the fact that a democratic system aims to guarantee each of its citizens an equal amount of individual freedom (Christiano, 2008: 12-45). A democratic decision thus gains its legitimacy from the decision-making procedure that it follows in order to resolve “a variety of disagreements in order to get people to treat each other reasonably well” (*ibid.* 239). The same commitment to equality and individual freedom grounds the legitimacy of democratic procedures is also what grounds citizens’ obligation to comply with the laws of a reasonably just democratic state. Within this context, then, acts of disobedience against democratic laws pose a serious justificatory problem. If a particular democratic system can be deemed reasonably just and thus legitimate, it seems to be reason enough to have a political obligation towards the state, that is to say, a moral duty to *obey* its laws.²

Given that the problem of disobedience is so intrinsically tied up with the question of political obligation, this chapter will start with a discussion of the most influential theories of political obligation. This discussion is intended to shed some light on further questions about what political obligation entails, how one acquires such an obligation, and what the implications are for acts of disobedience if citizens are in fact bound by legitimate political obligations. I will then analyse the particular problem of disobedience in tension with our obligation to comply with the legal directives of a (reasonably just) democratic state. The central aim of this chapter is to challenge the assumption that disobedience undermines the principles of a democracy and to point out that acts of disobedience should *not* be viewed as *prima facie* incompatible with a democratic system. This assumption has problematic implications for the disposition of the democratic citizen, and furthermore for what democracy really requires of its citizens in order to maintain and advance justice. This

² Here I borrow the phrase “reasonably just” from Rawls (1971, 53) and I will continue to refer to this phrase in the same way that Rawls uses it as a conception of citizens and society to construct the formal justification of his two principles.

chapter aims to show that while in some cases, one's political obligation towards a democratic state can be fulfilled by compliance, in other cases it can be fulfilled by acts of *disobedience*.

The aim of my argument in this chapter is to challenge the assumption that disobedience is 'bad' *per se*, and that obedience is the mark of a 'good' citizen. My argument is that citizens in a democracy do have some sense of political obligation, but that the requirements for fulfilling this obligation is not always stringent compliance with the legal directives of their government. In order to give a satisfactory account of the problem of disobedience as it relates to democracy, I will first have to address the problem of political obligation. As I have said, disobedience is only a problem if we assume that we do in fact have an established political obligation, which some theorists have denied. I will show however, in what follows, that although there is a fervent debate about what grounds our political obligations, if we have any at all, it is undoubtedly the case that most people have a sense of political obligation. Once I have established this as a reasonable assumption to make, I can move on to the problem of disobedience and consequently make an argument for the *place* of disobedience in a democracy. This chapter will lay the groundwork for my discussion in Chapter Two, in which I will delve into the particular kind of disobedience that this thesis is concerned with, namely civil disobedience. Let us now turn to an examination of five influential theories of political obligation, which we will see vary greatly in their approach. This disparity between each of the theories should give us insight into the reasons for the widespread disagreement in political philosophy about what, if anything, grounds our political obligation.

2. Contemporary theories of political obligation

To have a political obligation means that one is bound by a moral duty to obey the laws of one's country or state. However, this apparently straightforward definition of political obligation generates a number of questions on which there is little agreement among political philosophers. For instance, how does one acquire such an obligation? Who are the bearers of such an obligation? Is it a question of doing something particular, or rather of simply belonging to a particular society?

I address these questions by examining five influential theories of political obligation: consent, gratitude, membership/ association, fair play and natural duty. There is some overlap between the different justifications of political obligation, and as such, some philosophers choose to advance a combination of two or more of these approaches, and some others suggest that a pluralistic approach may be the only way to justify political obligation. Nevertheless, I will deal with each of these separately in order to lay the groundwork for what I will take to be the most convincing argument for having a general obligation to obey the law.

2.1 Consent

Locke's fervent defence of the natural freedom of men born into "non-natural states" has dominated both ordinary and philosophical thinking on the subject of our political bonds (Simmons, 1976: 274). At the heart of this theory lies the claim that no person is obligated to either support or comply with any political authority, unless they have personally consented to its authority over them (Simmons, 1976: 274; Locke, 1690). The appeal to consent as a justification for political obligation, together with its corresponding claim, that a government is only legitimate if it governs with the consent of the governed, is very attractive. Part of its attractiveness is that consent is such an intuitively appealing basis for political obligation, perhaps more so than any other modern theory of political obligation (Simmons, 1976: 274). The notion of consent is particularly appealing from the standpoint of democracy, the underpinnings of which emphasize the equal protection of human rights, civil liberties and political freedoms for all citizens. In a democratic society government can only be considered legitimate if it has been elected, that is to say, if the majority has elected it and consented to its authority over them. This idea simply equates the act of giving consent with the act of voting, of which the latter is a means of giving consent which the democratic regime makes available to its members. So, by consenting to participate in the democratic procedure, citizens are giving their consent to adhere to the outcomes of that procedure, that is, to regard the elected government as legitimate and follow its directives. This idea seems simple enough and certainly has intuitive appeal: the government cannot have legitimate authority if its authority has not been consented to by the governed. When citizens have given their consent, they are politically obligated to obey the directives of the government, on the basis that they 'said' they would undertake such an obligation.

However, political philosophers from Hume in “Of the Original Contract” (date?) to A.J. Simmons (1979) have been critical of the notion that obligation can be rooted in consent. The central claim of these criticisms is not that political obligations cannot be rooted in consent, but rather that it is too difficult to determine whether people have given their consent either expressly or tacitly, and as such the obligation to comply with a political authority cannot be claimed to follow directly from consent given. In fact, Simmons maintains that express consent is *not* a “suitably general ground” for political obligation precisely because the vast majority of people have never been in a situation where they have been able to give express consent to a government’s authority, or there has not been the appropriate opportunity to do so (Simmons, 1976: 278). So, while we could agree that express consent may be *a* legitimate reason for political obligation, the real question is whether tacit consent is a legitimate source of political obligation. In order for consent theory to succeed, it must be able to convince us that tacit consent can be *the* legitimate source of our political obligations. Critics cast doubt on whether there is such a thing as tacit consent at all, and if there is, how we can really know for certain that it has been given (*ibid.*).

Despite the hefty criticism lodged against a consent theory approach to political obligation, consent theory still has support among political philosophers. There have been two general responses to the claims made by critics of consent theory. One response is to accept that, for political obligation to be grounded in consent, the consent given must be given expressly, but then to argue that it is the responsibility of political societies to establish channels and procedures in which such consent can be given openly (Beran 1976, 1987). In other words, it is the role of the state to ensure that its citizens openly and publicly either undertake an obligation to obey its laws, or openly and publicly refuse to comply with its laws. The argument is then that those who refuse to comply with the legal demands of the state can leave their current state and form a new state with people who are similarly unwilling to meet their political obligations. Alternatively, they have the option of settling in a territory designated for those that are unwilling to comply with the demands of the state. However, this response relies on a practically implausible and thus an overall unsatisfactory solution to the problem of consent as the basis of political obligation. This is therefore not a convincing solution for the practical problem of express consent and the larger problem of tacit consent as unreliable grounds for political obligation.

A second, more promising response to the critics of consent theory is to claim that the interpretation of “consent” is too narrow. The suggestion is that the act of voting or generally

participating in elections should count as consent (Steinberger, 2004: 218). Steinberger even suggests that any “active participation in institutions of the state”, such as sending your children to public schools, making use of a public library, phoning the police or fire department, should be considered consent (*ibid.*). A similar argument is made by Mark Murphy in his claim that “surrender of judgement is a kind of consent” (in Edmundson, 1999: 320). According to Murphy, this kind of consent is expressed by voluntary agreement or acceptance, either of a person or a set of rules. Murphy holds that consent is given in a particular sphere, by accepting and allowing someone else’s “practical judgements” to take the place of one’s own judgements in that particular “sphere of conduct” (*ibid.* 330).

A variation of this wider conception of consent is posited by Margaret Gilbert, who claims that “joint commitment” is a fundamental basis for both political and general obligations (1993, 2006, 2013). Gilbert defines a “joint commitment” as a commitment that is made “conjointly”, that is to say, that all commit as one. So it is not that each person commits him- or herself and therefore all are committed, but rather that each commits as one and is then subject to a “normative constraint or “ought”, which falls on all of them as one” (Gilbert, 2018: 756). Gilbert specifies that the content of a joint commitment relates to actions, which includes utterances, of each of the parties jointly committed to one another (*ibid.*). This content could be, to use Gilbert’s example, that parties are jointly committed to “*phi* as a body, where substitutions for “*phi*” might be “pursue goal G” [or], “believe that p”, and so on” (Gilbert, 2018: 756). The fact of being jointly committed then requires of each party to talk and act as one representative of a body or person with that goal or belief, would. Each party must thus align their actions and utterances with one another, as stipulated by the requirements of their joint commitment. According to Gilbert, the concept of “joint commitments” lies at the core of our most fundamental everyday concepts of “*acting together, of social conventions and rules, and of an agreement,[...], of collective intention, belief, valuing, and emotion, and shared attention*” (Gilbert, 2015: 19). For Gilbert the concept of a joint commitment comprises a fundamental part of “the conceptual scheme” in terms of which human beings interact with one another, and according to which we construct our social world (*ibid.*).

Gilbert’s account is distinct from that of Murphy and others in that she does not argue that one has to give express consent in order to incur political obligations, but rather expressing the willingness to be jointly committed is sufficient grounds for political obligation (Gilbert, 2006: 290). According to Gilbert’s theory one does not need to deliberate or undergo a

lengthy decision-making procedure in order to fulfil these conditions (of having an understanding of joint commitment), but if one has deliberated, she doubts whether there would be any choice but to incur those commitments (2006: 290). Although Gilbert's account is distinct from others that have advocated a less stringent interpretation of "consent", it is still apparent that Gilbert argues that political obligations can be grounded in consent, and furthermore that this consent need not be given expressly, but that it arises rather out of a willingness to be jointly committed.

It seems that this second response attempts to provide a more convincing account of consent theory, by trying to circumvent the issues that arise from the requirement of express consent. We have seen that it is not likely that express consent can bind us to political obligations, since it does not seem plausible that people will be given real opportunities to consent expressly to a government's authority. The alternative route is then rather to turn to tacit consent as the basis of our political obligations, which is a route taken by some (Steinberger, Murphy, Gilbert). The argument for tacit consent solves the practical problem of express consent, however it raises a problem of a different kind, namely how to know if people have in fact given consent. Thus, if one tries to circumvent the problems that arise with express consent by arguing that one's political obligations can be rooted in tacit consent, it becomes a serious challenge to establish whether people have in fact given the kind of consent that can incur them with political obligations. Gilbert's attempt to solve this issue fails to provide us with sufficiently clear criteria for establishing whether people have consented or not. Her appeal to joint commitments as a criteria to indicate citizen's willingness to give consent and thus incur political obligations is far too vague and does provide us with any concrete reasons for why we ought to fulfil our political obligations³. While it is clear why consent theory has long been a popular theory and an intuitively appealing basis for political obligation, it does not withstand its critique. Let us now turn to an alternative theory of political obligation and assess whether it provides more satisfactory grounds for our political obligations.

³ Gilbert's account of "joint commitments" shares some similarity with the argument that tales membership to a particular society to be sufficient grounds for political obligations. As such, Gilbert's argument succumbs to similar critique, which will be spelled out in the section on membership and associative theories of political obligation.

2.2 Gratitude

Virtually all governments confer substantial benefits on their citizens. While the number and nature of these benefits may differ between states, it remains the case that, without the state, citizens would otherwise not have such benefits. It is not uncommon to claim that when someone accepts benefits from someone else, they thereby incur a debt of gratitude towards their benefactor (Smith, 1973: 953). Thus, if one holds that obedience to the law is the best way of expressing one's gratitude towards the state for the provision of benefits, it could be reasonably concluded that each person who has received some benefits from the state, has a *prima facie* obligation to comply with the law (*ibid.* 953). This is the essence of the theory of gratitude as the source of political obligation. The main tenets of this theory can be set out in the following way:

1. The person who benefits from *X* has an obligation of gratitude not to act contrary to *X*'s interests.
2. Every citizen has received benefits from the state.
3. Every citizen has an obligation of gratitude not to act in ways that are contrary to the state's interests.
4. Noncompliance with the law is contrary to the state's interests.
5. Every citizen has an obligation of gratitude to comply with the law (Walker 1988: 205).

This argument is largely unconvincing, for the following reasons: First, it is doubtful whether most citizens would have an obligation towards their state if the benefits that they have received were unwanted. In ordinary situations, if someone confers benefits on another without considering whether they do in fact want them, and furthermore if they are conferred for reasons other than a concern for the particular welfare of the recipient, then the recipient would have no obligation of gratitude toward the provider of the so-called benefits (Smith, 1973: 953). According to Smith, the most important benefits that the government provides, such as infrastructure, utilities, security, etc. are not explicitly requested by its citizens, but are rather imposed on them regardless of whether or not they are wanted (1973: 953). It is also often true that in such cases a government may not confer these benefits in order to advance the particular interest of its citizens, but rather as a consequence of furthering its own interests. Simmons is similarly suspicious of the notion that citizens owe a debt of gratitude

toward their state, because we owe gratitude to those who intentionally provide us with benefits that are at a significant cost to themselves, and according to Simmons, this is not something that institutions can do (1979: 187-188; 2005:119-120). Smith puts forth the same argument in his claim that “[w]henever government forces benefits on me for reasons other than my particular welfare, I clearly am under no obligation to be grateful to it” (1973: 953).

Moreover, even if we were to assume that each citizen has an obligation to be grateful to their government, and that willing obligation is the best way to show one’s gratitude towards the state, the argument still fails to be convincing (Smith, 1973: 953). When one owes a debt of gratitude to another person, it does not necessarily follow that one now has a *prima facie* obligation to express this debt of gratitude in the “most convincing manner”. For example, if one had very demanding and domineering parents, one could express one’s gratitude best by complying with their every demand; however, one would not have a *prima facie* obligation to do so (*ibid.*).

In light of the above, it is fair to conclude that there is no *prima facie* obligation on citizens to express gratitude towards the state. Being grateful in the first place, and the extent to which one ought to express that gratitude, depend on numerous variables, some of which include, the nature of the benefits received, the manner in which they are conferred, the motives of the benefactor (Smith, 1973: 956). It should be clear that even if a person, or the state, has provided one with a wide range of benefits, and made them available to the fullest extent, it still does not establish the right to have one’s behaviour dictated on the basis of some debt of gratitude owed. As such, it seems too far a stretch to argue that citizens’ obligation of gratitude towards the state establishes a *prima facie* obligation to obey the laws of the state.

Other than the general problems with this theory of political obligation, the approach from gratitude fails entirely for the purpose of this thesis. While I do think that citizens in a democratic society are bound by political obligations, I do not regard gratitude to be the source of such obligations. For the kind of democratic citizen that I have in mind in this thesis, obeying the directives of government on the basis of gratitude is far too passive. I maintain rather that one’s political obligation can stretch beyond the mere obedience of law and can in some cases be fulfilled by disobedience. This is incompatible with the theory of gratitude, since deliberately disobeying the demands of government would certainly be considered ‘ungrateful’ behaviour. I thus find gratitude to be a wholly unconvincing source of

our political obligations, and as such, will turn to a third possibility for an answer to question of what grounds our political obligations.

2.3 Membership / association

Associative theories of political obligation, in some ways, solve the problems encountered with the first two theories that we examined. While consent theory attempts to establish our political obligations in terms of our voluntary consent and acceptance of such obligation, and the argument based on gratitude suggests that we have some kind of unconditional duty of gratitude towards the state, the theory of associative obligation maintains that political obligation is grounded in membership. In other words, based on the condition of belonging to a group, one is then obligated to comply with the norms and rules that govern that group. Given that one's membership of a particular group, such as a member of a family or being a citizen of a country, is often involuntary, one's obligation is not rooted in consent and does not depend on consent. Rather, the theory of associative obligation maintains that if one acknowledges one's membership to a particular political society, it follows that one must acknowledge a general obligation to comply with its laws: "Political association, like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation" (Dworkin, 1986: 206). This is so because, as some theorists maintain, having obligations simply *is* part of what it means to be a member (Gilbert, 2006: 3; Horton, 2007: 159- 160). Herein lies one of the most important claims that proponents of associative theory make, namely that membership can "in and of itself involve obligations" (Gilbert, 2006: 18). The implication of this claim is that one's relations to others, such as a "shared group membership", can be the source of obligations (van der Vossen, 2011: 479). The argument from association emphasises the similarities between non-voluntary obligations toward one's political society and familial obligations. Horton formulates the analogy between the two in the following way: "a polity is, like the family, a relationship into which we are mostly born: and that the obligations which are constitutive of the relationship do not stand in need of moral justification" (1992: 150-151). If we take this argument seriously, we must accept that both as members of a family and of a political community, we are subject to "non-contractual role obligations" – that is, we are subject to be bound to particular obligations, merely because of the "roles into which we were born" (Hardiman, 1994: 347).

The associative theory has elements that make it an attractive approach to political obligation. The first point in its favour is the deliberate absence of a sharp distinction between “voluntary” and “involuntary” obligations. This allows its proponents to hold that, while we do not voluntarily choose to be a member of a political society, our involuntary membership does not necessarily imply forced or imposed membership. A second compelling element of this theory is that it aligns with the general intuitions that we do, by and large, have certain obligations to comply with the norms and laws that govern our society merely by virtue of being members of this society. If members of a society identify with it as *their* society, they are more likely to be willing to share its concerns with fellow members, and furthermore if the government is thought of as *their* government, it seems that it would be easier to feel an obligation to obey its laws. In the formulation of Yael Tamir (1993: 137): “the true essence of associative obligations is that they are not grounded on consent, reciprocity, or gratitude, but rather on a feeling of belonging or connectedness”.

A defence of associate theory that seems particularly appealing is perhaps its original defence and is referred to as the “conceptual argument” (van der Vossen, 2011: 480). This argument claims that membership to a political society *conceptually* entails political obligation (*ibid.*). One can thus reasonably ask whether one should obey or oppose particular laws or support the government, but it is not reasonable to deny that we have political obligations. If we do that, we are demonstrating a failure to understand the meaning of the concept “political society” (Mac Donald, 1940: 109- 101; McPherson, 1967: 64- 65). However, while this argument certainly appears to be a convenient solution to the problem of political obligation, it is not sufficient to assume that the description answers the question of justification. This argument relies on an assumption about the meaning of societal membership, namely that part of what it means to be a citizen, is that one has political obligations. It is not clear however what the reasons are for having such obligations. The fact that having political obligations is part of what it means to belong to a society does not seem to be a convincing reason for (a) having political obligations in the first place and (b) for being committed to fulfilling those obligations. So, while the conceptual argument appears to be a quick fix to the problem of political obligation, it ultimately fails to provide us with a satisfactory account of precisely how our political obligations are incurred and furthermore, why we ought to fulfil them.

A further objection to associative theories of political obligation has to do with the analogy between the family and a political society. Critics (Simmons 1996; Wellman 1997; Dagger

2000) maintain that this analogy is not persuasive, because the modern political society does not consist of the same kind of intimate relationships that family members typically share, and it creates the possibility that the paternalism present and appropriate within the family context, could be extended to the political society.

I think the criticisms against associative theory ought to be taken seriously and that it ultimately fails to provide a convincing account for why we are morally obligated to obey the laws of government. However, I do think some elements are worth due consideration. The theory that we are bound by the norms and laws of our society in virtue of our membership has some intuitive appeal. The emphasis on belonging and ownership is a further attractive feature, namely, that we are more likely to feel an obligation if we consider the society to be our own. The fact that people do have some intuitive sense of political obligation in virtue of membership is one of the reasons why civil disobedience poses such a problem for political theorists. I will pick up this point further in the next section, but for now we have yet to settle on convincing grounds for political obligation. Let us now turn to the theory of fair play as the basis of political obligation.

2.4 Fair play

H.L.A. Hart provides the formulation of the principle of fair play:

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission (Hart, 1955: 185).

The idea here is that the mere existence of a cooperative enterprise gives rise to a certain *prima facie* obligation (Smith, 1973: 954).⁴ John Rawls offers a similar argument on the principle of fairness in what he formulates as “the duty of fair play”, in his essay, “Legal Obligation and the Duty of Fair Play” (1964). The principle of fair play essentially maintains that everyone who participates in a reasonably just, mutually beneficial cooperative venture – Hart’s “any joint enterprise according to the rules” – is obligated to bear a fair share of the burdens of the venture. This obligation is owed to the other people that cooperate in the

⁴ I should note that Hart does not use the term “*prima facie* obligation”, and maintains rather that his argument establishes an obligation *sans phrase* to comply with the law. However, since his use of the term “obligation” seems to me closer to my understanding of “*prima facie* obligation”, I will refer to it as such and ignore the terminological scruples.

enterprise, because their cooperation is what makes it possible for any individual to benefit from the venture.

Rawls's account of an obligation of fair play is more complex than Hart's, in that he does not take the mere existence of a cooperative venture to be enough to establish obligations on the part of citizens. Rawls sets out specific requirements for the kinds of cooperative ventures that can be considered to give rise to obligation. First, the success of the enterprise must be dependent on the participants obeying its rules universally, or at least very nearly universally. Second, obedience to the rule of the enterprise must demand some sacrifices – in this case, a restriction of one's liberties – and third, the enterprise must conform to the principles of justice (Rawls, 1964: 9- 10).⁵ According to Rawls, the nature of the obligation based on fair play is such that if a person benefits from participating in such a cooperative enterprise, and would like to continue benefitting from it, that person is acting unfairly when s/he refuse to obey its rules (Rawls, 1964: 9- 10). For both Rawls and Hart, this obligation is not owed to the scheme itself, or to its officials, but rather to the fellow participants whose willingness to comply with the rules makes it possible for everyone to benefit. This is because the success of the scheme and any benefits received are entirely dependent on the cooperation, which involves some sacrifice, or at the least a certain restriction of liberty, of fellow participants (Klosko, 1994: 263). That is to say, that without the willing cooperation of everyone participating in the scheme, there would be no scheme to benefit from at all. It is therefore that the obligation of fair play is owed to each participant that willingly cooperates so that the scheme will be mutually beneficial, for everyone. As a last point of agreement, both Rawls and Hart understand democratic legal systems to be complex practices that give rise to the obligation of fair play, and thus the people who benefit from these practices have a *prima facie* obligation to comply with its laws (Smith, 1973: 955).

However the jump from the principle of fairness as the basis of our moral obligations, to the basis of an obligation to obey the law, may be too much of a stretch. This objection to the principle of fair play is presented by M.B.E. Smith, who argues that the obligation of fair play only arises in small, voluntary cooperative enterprises, when we can reasonably expect any

⁵ According to Rawls, the first principle of justice is that everyone must have an equal right to the most extensive set of liberties, compatible with the same set of liberties for all. The second principle holds that economic and social inequalities must be arranged in such a way that it is to the advantage of the least advantaged persons, and it should be attached to offices and positions that are open to all under the conditions of equality of opportunity.

participant's failure to comply with the rules to affect the entire scheme (Smith 1973: 955-956). Political societies are of course not small enterprises, and one does not need to embark on an in-depth sociological analysis to imagine scenarios in which one person's disobedience neither disadvantages the polity in a general way, nor deprives any individual of benefits. For Smith, the complexity of one's obligation towards the legal system plays an important role, and even if the success of the system depends on a "habit of obedience" on the part of its citizens, all legal systems are set up to deal with a substantial amount of disobedience (*ibid.* 958). It is unlikely, therefore, that an individual act of disobedience would have any significant impact on the legal system as a whole. Furthermore, because these systems are designed to deal with vast amounts of cases, obedience often does not benefit anyone in particular (*ibid.*). Consider our obedience to traffic laws, for example: it is often true that by diligently stopping at a red light and complying with the speed limit, one actually benefits no one. Smith also points out that many legal systems have laws that are either pointless in terms of providing benefits, or they have laws that cause harm to people. Examples of such laws would be laws that prohibit homosexuality or the distribution of birth control information. If one were to hold that legal systems are in fact the kind of cooperative schemes that give rise to an obligation of fair play, it would be the case that in several circumstances that obligation would not require one to obey specific laws. Thus, Smith maintains that if there is a general *prima facie* obligation to comply with the legal system, it cannot be grounded in the principle of fair play. As such, one cannot extrapolate an obligation to obey the laws of the state, from our obligation to adhere to the principle of fair play in small, voluntary cooperative schemes (*ibid.*).

A second objection worth noting is presented by Robert Nozick. According to Nozick, the implication of the principle of fair play is that it would allow people to place us under an obligation, merely by bestowing benefits on us, regardless of whether we wanted them or not (Nozick, 1974: 90-95). Nozick illustrates this point by sketching a scenario in which a group of neighbours set up a public entertainment system and then assign every adult in the neighbourhood a day on which they are responsible for planning and broadcasting the program. As a member of the neighbourhood you may occasionally hear and enjoy these programs. Nozick maintains that the fair play principle dictates that you would then be obligated to take responsibility for the system on your assigned day, even if you did not consent to being part of this scheme. Nozick does not think that one's occasional enjoyment

of the system establishes an obligation to share in the responsibility of its maintenance, and thus argues that the fair play principle fails fundamentally.

A third objection, which expands on Nozick's critique, draws a sharp distinction between *receiving* and *accepting* benefits in order to argue that one does not have a fair play obligation to share in the burdens of some enterprise if one merely receives the benefits without having explicitly asked for them (Simmons, 1979: 129). This is often the case in political societies: citizens receive benefits, such as national defence and public order, simply by virtue of being members of a political society, and as such one cannot "meaningfully refuse" to accept them (*ibid.*). Simmons does acknowledge that there are people that do enjoy benefits that they willingly accept, and that they deem "worth the price [they] pay for them" if they are aware that "the benefits *are* provided by a cooperative scheme" (1979: 132). However, he thinks it unlikely that many people actually satisfy both of these conditions. The second is particularly contentious, since even in democratic political societies, such benefits are often rather thought to be "purchased" (with taxes) than accepted from the cooperative ventures of one's fellow citizens (*ibid.* 139).

However, the question still remains whether we can reasonably expect a polity to last if its citizens do not regard one another as members of a cooperative venture and merely as purchasers of state services, who comply with the law not out of an obligation in fairness, but under the threat of coercion. While there have certainly been fervent critics of fair play theory – in fact, Rawls himself abandons fair play in favour of a natural duty approach in *A Theory of Justice* – it remains one of the most influential and, to my mind, convincing theories of political obligation. It is far more reasonable to ground one's political obligation in the duty to fairness that one owes to fellow participants in a cooperative scheme, from which one does oneself benefit, than to derive it from some debt of gratitude owed to the state, or simply because one happens to belong to one society rather than another, or on the basis of consent that one may or may not have given. If we think of a democratic society as a cooperative venture, in which citizens show their willingness to cooperate and participate in the democratic process, it could certainly count as the kind of cooperative venture that Hart and Rawls are concerned with. Let us consider the most basic element of democratic life: the democratic election. The election process in a democracy requires that (ideally all) citizens participate and that they be willing to adhere to the outcome of the election, that is that they accept the results and comply with the directives of the elected executive order. Even if the outcome does not align with their own choices, the democratic procedure requires that

citizens continue to adhere to the outcome of that procedure. So, the democratic system requires that all citizens participate and work towards mutual cooperation, so that everyone may share in the benefits of political equality and freedom. The outcome of democratic procedure can thus only be deemed fair if all the participants are willing to comply with the principles that make this process fair. This is because it is due to the willingness of citizens to take part in the democratic procedure and then adhere to outcome of that procedure, which makes it a fair scheme. For these reasons it seems more reasonable that citizens are incurred with obligations owed to one another, on the basis that they benefit from other's cooperation. Citizens thus have a stake in the outcome, on which their cooperation with others is dependent.

Let us now turn to the final theory of political obligation, which Rawls eventually opts for as an alternative approach to fair play theory.

2.5 Natural duty

As mentioned above, Rawls abandons his commitment to fair play theory as an approach to political obligation and adopts the argument of natural duty as the source of political obligation. Rawls's natural duty argument for political obligation is embedded in and dependent on his larger theory of justice, and should be understood as such. Thus, "from the standpoint of the theory of justice, the most important natural duty is that to support and to further just institutions" (Rawls, 1999: 334). Rawls further specifies that this duty consists of two parts, firstly the duty to comply with and do our share in maintaining and upholding just institutions, "when they exist and apply to us". Secondly, we must assist in the establishment of just institutions when they do not exist, in so far as this can be achieved with little cost to ourselves (*ibid.*).

This is Rawls's classic formulation of the natural duty approach to political obligation. More recent proponents of the natural duty theory have refined and expanded on Rawls's initial account. They all understand natural duties as duties that people have in virtue of their status as moral agents. In other words, one does not need to do anything to acquire such duties, and having such duties are not dependent on one's membership of a particular societal group. Furthermore, natural duties are owed universally to all other moral agents and one's natural duty can be fulfilled by complying with a shared legal order. However, contemporary natural

duty theorists disagree about the kind of natural duty that establishes the basis for a general obligation to obey the law. So, for instance, Christiano (2008) argues that political obligation is grounded in the natural duty of justice that requires the equal advancement of people's interests. Wellman (2005) defends Samaritan obligations to perform "easy rescues", and argues that we each have a moral duty to obey the law as our fair share of the communal Samaritan chore of rescuing our compatriots from the perils of the state of nature. Stilz (2009) grounds her account of political obligation in a Kantian duty of respect for other people's "freedom-as-independence", which she holds to be a "secure sphere" of self-determination defined by a person's right to freedom (Stilz, 2009: 48, 68, 93, 99).

There are several reasons for this disagreement among natural duty proponents. For one thing, there is reasonable disagreement among people regarding the demands of justice. Furthermore, the achievement of justice often requires coordination issues to be resolved, and the demands of justice are often underspecified and not properly determined. According to Christiano (2008: 60), the disagreement over the demands of justice can be ascribed to the fact that people are so vastly diverse in their physical abilities, general capabilities, natural talents, cultural backgrounds, moral judgements and personal interests, that it is nearly impossible for people to agree on what the demands of justice ought to be (*ibid.* 56-57). Christiano thinks that, in light of these indisputable facts about people's diversity, even those who make a genuine attempt to determine what it would require of them to achieve justice will ultimately fail to reach a meaningful consensus. As a result of this inevitable disagreement among people, those who then wish to advance justice and choose to act on their own (private) conception of justice would be judged to be acting unjustly.

Let us now turn to Stilz, who is also in favour of the natural duty and who similarly takes issue with the inevitable conflict that arises when people, in their multiplicity, attempt to agree to the terms of justice. For Stilz (2009: 46- 48) it can never be justified for one person, or one group, to impose their conception of justice on others, because those others will then not be able to enjoy their "freedom-as-independence" to the fullest extent. Natural duty theorists agree that an inevitable problem of conflict and domination arises as a result of disagreement about people's conception of what is good, what is important and what justice entails and demands of them. Therefore, the only workable solution to the problem of political obligation is willing compliance with a common legal order. According to Wellman, "there is no other way than general compliance with a single authoritative set of rules to secure peace and protect basic moral rights" (2005: 45). Christiano makes a similar argument

when he claims that a state, when it is reasonably just, “settle[s] for practical purposes what justice consists in by promulgating public rules for the guidance of individual behaviour” (2008: 53). According to Stilz’s Kantian approach, the laws of the state are the solution to the problem of some unilaterally imposing some citizens’ conception of justice on others and thereby depriving them of their freedom (2009: 46- 48, 51- 54).

It should not be a surprise that proponents of a natural duty approach to political obligation would not consider just *any* kind of legal order to be sufficient in securing justice. Natural duty theorists maintain that in order for people to have an obligation to comply with the law, that law must either be established according to democratic procedures and/or in accordance with particular individual rights. Given the fact of human diversity, as well as the fact that people that have cognitive biases and are morally fallible, the only means of ensuring that everyone’s interests are equally protected and not unjustifiably disregarded is if political power is held and exercised by institutions that make the implementation and realization of equality as open and public as possible; in other words, liberal democracies (Christiano 2008: 46- 74). For Stilz, the expression of a general will of the people is a necessary condition for any law to “omnilaterally” impose obligations on said people. It is only possible for the law to do so if the “general will” meets three conditions: “first, it defines rights (protected interests) that apply equally to all; second, it defines these rights via a procedure that considers everyone’s interests equally; and third, everyone who is coerced to obey the law has a voice in the procedure” (Stilz 2009: 78). These conditions can only be met by a democratic procedure, and as such she maintains that our obligation toward justice requires of us “only” to comply with the legal directives of democratic states (*ibid.* 95). Simmons makes a similar claim in favour of a democratic system as sufficient for political obligation in the following passage:

It has sometimes been claimed that one of the things that is (morally) special about democracy is that (at least among political societies) in, and only in, democracies are citizens morally obligated to obey the law, support their political institutions, and so on. In short, democracy solves- where other forms of government cannot- the problem of political obligation. (Simmons, 2008: 112)

Given the fact that this thesis is concerned with examining the problem of political obligation in a democratic society, it is apparent why the natural duty approach offers a promising solution. If we take the conditions that Stilz sets out for law to be binding on us, namely that it must define equal rights, and that this must be done according to a procedure that equally

considers everyone's interests, and that everyone who is bound by such law should be able to take part in the procedure, we can see how this would align with democracy. In a (constitutional) democratic society the constitution defines rights that apply equally to all, the democratic procedures are set up in such a way that they take everyone's interests into account, as far as possible, and lastly, procedures such as voting in a democratic election create opportunities for everyone to have a say in the laws to which they are bound. It is for these reasons that Stilz, Christiano and Simmons unanimously concludes that people have a moral duty to obey the laws of a democracy, and as such, that democracy solves the problem of political obligation. While I am largely convinced by the natural duty approach to political obligation, I want to suggest that it is natural duty in conjunction with the principle of fair play that grounds our political obligation. The emphasis on the fairness of cooperative ventures and the outcome of such ventures, namely sharing in the benefits, are key underpinnings of the democratic process. The main features of democracy is that it requires citizens to cooperate, but also encourages them to participate in the process and ensures that everyone shares equally in the benefits that arise from democratic governance.

So far, I have deemed the arguments from consent, gratitude and membership to be unsatisfactory grounds for our political obligations. I have shown, furthermore, that the arguments from fair play and natural duty, while not without their own difficulties, provide the most promising basis for political obligation in a democratic society. I will thus adopt a combination of these two approaches in the following chapters of this thesis. Even though there is not a particular theory of political obligation that withstands all possible criticisms and establishes our moral duty to obey the law without qualification, considerations of natural duty and fair play are significant and, I think, sufficient grounds for us to assume that we do, by and large, have some political obligation. With this assumption in mind, I now turn to the real problem that this thesis is concerned with, namely the problem of disobedience. Now that we have established that people are bound, in some sense, by political obligation, we must examine the problems that arise when people deliberately refuse to comply with the legal directives of a democratic government.

3. The problem of disobedience in a democracy

From the position adopted in this thesis, the legitimacy of a democratic decision can be ascribed to the decision-making procedure that has at its core the aim to arrive at a resolution

of “a whole variety of disagreements in order to get people to treat each other reasonably well” (Christiano, 2008: 239). The commitment to equality and individual freedom that grounds the legitimacy of democratic decisions is also the source of citizens’ political obligation to comply with the laws of a “reasonably just” democratic state. Given this starting assumption, it would seem that any act of disobedience that overtly violates the law of a democratic state would pose a serious justificatory problem. If one holds the government to be legitimate, then an act of disobedience would create a conflict of rights and duties, in so far as the state has the right to coerce its citizens into compliance and the citizens then have a corresponding duty to act in such a way that they comply with the demands of their state. Simmons (1979: 14-15) refers to this relationship as the “correlativity thesis”, which entails that “[a] State’s (or government’s) legitimacy is its moral right to impose binding duties on its subjects and to use coercion to impose those duties”. It seems, then, that the expectation that democratic citizens ought to be committed to equality and respect for the individual freedom of others may be negated by their decision to disobey the laws of their democratic government (who in their decision-making procedures are presumably committed to ensuring equality and individual freedom for everyone).

Not only does disobedience pose a *prima facie* problem for democracy, but it is further complicated by the fact that citizens in a democracy have available to them legal means of expressing their discontent with a particular outcome of the democratic procedure. Dissatisfied citizens can express their discontent by requesting further deliberation on particular issues, which can be done through the media, by writing letters to Parliament, organising meetings and debates, etc. If these legal appeals have all been exhausted to no avail, as a last resort citizens can use the next election as a means to express their discontent with current leadership and as such have their say over who should be making the decisions. If a sufficient number of “democratic channels” of contestation remain open and available to citizens, and given the commitment to equality and respect for individual freedom that is the foundation of democratic life, the decision to act illegally appears to stand in direct conflict with the obligation that citizens have to comply with democratic laws (Raz, 1979). This claim encapsulates the problem of disobedience in a democracy and points to the seeming incompatibility of disobedience and democracy. In what follows, I will first consider two unconvincing justifications of illegal dissent within a democratic system, after which I will opt for a third line of reasoning in order to show that disobedience in a democracy is neither unjustifiable, nor does it undermine the main tenets of democratic practice.

A first and simple solution to the problem of justified dissent would be to question the viability of the presumed legal means of contestation. In other words one could question whether these means are actually or readily available to citizens in their everyday life. Without needing extensive evidence, we can all agree that there is no such thing as a perfect democracy. Even in the most advanced and comparatively the most just societies, issues of accountability, corruption, the violation of civil liberties, etc. are ignored and disregarded. If the history of social movements has taught us anything, it is that it is often the case that in order to bring about real change, people have to engage in forms of illegal confrontation. The suggestion here is that one way to solve the democratic problem would simply be to dismiss it. One could point out that the hook on which the objection to illegal dissent hinges is the ideal of democracy, which is just that: *an ideal*. As such, the ideal of democracy is too utopian and it can never be fully realised, because it seems that even a comparatively good democracy can always become “more democratic” and “more just” (Cohen & Arato, 1992: 567). It would seem to follow, then, that it is precisely *because* democracies are imperfect that citizens are justified in employing unlawful means of action in order to address the most “serious imperfections”. At the very least, this claim opens up the possibility that some forms of illegal action against democratic laws and policies might be morally justified.

However, is it really plausible to claim that the absence of a fully realised, ideal democracy is reason enough to justify disobedience to its laws? It seems more plausible to argue that one owes some kind of obedience to a state that at least comes close to the ideal. Granted, we may never achieve the ‘perfect democracy’. Nevertheless, the closer a state gets to the ideal of democracy, the stronger the reasons become for obedience and the weaker the reasons for disobedience. So, rather than dismissing the objection to disobedience because it turns on an unachievable ideal of democracy, we could start from the assumption that disobedience in a reasonably just democracy is generally wrong and as such requires extensive justification. By then considering the various imperfections of the particular democratic system, we could ascertain how far from the ideal of democracy the society in question is, and then conclude whether the disobedience was justified or not. This argument then assumes an inversely proportional relationship between the level of justice of the state and the admissibility of non-compliance with its laws. In other words, the further the state is from the ideal of democracy (the lower the level of justice), the easier it is to justify disobedience, and vice versa. Another way of putting it is to say: the more democratic a society is, the less likely the chances that its citizens will engage in disobedience.

Again: the above view has initial plausibility. However, one of the central aims of this thesis is to challenge the assumption that disobedience is a feature of a “bad” democracy, or one that functions poorly. I will show that we ought to reject the notion that disobedience in a democracy is a *prima facie* wrong and that it can at most be justified by the particular context in which it occurs. This assumption has problematic implications for the full meaning of citizenship, and as such it leads to a far too narrow interpretation of the role of political disobedience in the life of the democratic citizen.⁶ Therefore my argument will not be that disobedience can only sometimes be justified in a democracy, but rather that there is nothing wrong with disobedience *per se*, and subsequently that there is nothing good in obedience *per se*. My point is to frame disobedience not as an act that undermines the commitments of the democratic citizen, but rather as an act that is intrinsically tied up with what it means to be a fully realized democratic citizen. As such, I do not hold that disobedience is an indication of a democracy that has failed to meet, or come close to the ideal of democracy. Rather, I will offer an account of disobedience that is both compatible with the underpinnings of democracy and with its citizens’ commitment to equality and individual freedom. Thus, disobedience has a positive role to play, even in societies that are comparatively close to the ideal of democracy. I will go even further to suggest that the presence of political disobedience in a society can show us that it is a democratic society.

4. The place of disobedience in a democracy

My argument for the positive place of disobedience in a democracy starts from the assumption that citizens in a democracy have a moral obligation towards the laws of their state. I specifically say that it is an obligation “towards” the laws of the state, and not that it is an obligation “to obey” the laws of the state, because I will show that this obligation can sometimes be fulfilled by *disobedience*. This assumption is based on a further assumption, namely that an individual can only enjoy real equality and the fullest extent of individual freedom as a *citizen* in a particular sense of the word, namely as a member of a democratic society governed by law. The absence of state regulation does not, as the anarchist view holds, increase our freedom to choose how we would like to live our lives. The absence of

⁶ In this thesis, I am concerned with those obligations that arise within the bounds of a particular political community, i.e. obligations that arise from citizenship. As such, I will not consider the obligations that one might have toward the laws and authority of another country, for example.

state regulation would have the adverse effect, in that our ability to make choices about the kind of life we want to live would be seriously limited. We would be capable of enjoying a much lesser degree of freedom if the state does not impose any rules or regulations according to which we ought to govern our behaviour and actions with other citizens. I take this assumption as a point of departure, because of the particular conception of freedom that I consider valuable to citizens, namely “positive liberty”.⁷ In general terms, positive liberty is distinct from negative liberty in the sense that the latter is construed as “freedom *from*”, which includes freedom from interference, coercion, or restraint (Heyman, 1992: 81). Positive liberty is understood as “freedom *to*”, or self-determination, that is the freedom to act as one will and be what one wills (*ibid.*). The position that I adopt is not a new one, namely that the absence of state laws and regulations can seriously impinge the ability of the individual to realize their positive freedoms. The idea here is that without some regulation, or rules of conduct, if you will, people are less likely to be capable of doing and being whatever they will. The rules and regulation of the state thus enhances people’s freedom in the sense that it ensures positive liberty and not merely freedom from restraint and coercion. I take up the position that we do have an obligation towards the state, but that this obligation is constituted in having and showing *respect* for the law. I make this distinction between *respect* and *obedience*, because it serves as the anchor to my central claim, that an act of disobedience can be regarded as an act that expresses the agent’s respect for the law.

The crux of my argument in favour of civil disobedience has to do with the disposition of the citizen. My aim is to show that an act of disobedience may not only be fulfilling one’s moral obligation as a *human being*, but may in fact be fulfilling one’s political obligation as a *citizen*. As a first point of departure, I take up the position that there are at least some political obligations acquired by citizens in a non-voluntary way. Both the consent theory of political obligation and the anarchist critique of a moral obligation to obey the law are grounded in voluntarily incurred obligations (See Simmons, 1979, Wolf, 1970, Pateman, 1979). As such, I do not subscribe to the notion that explicit consent is a necessary condition for a political obligation to be validly and justifiably incurred by citizens. As we saw, the argument from fairness provides a far more convincing account of the obligations that citizens owe one another, without having ‘accepted’ them in the way that the traditional contractual approach

⁷ See the following with regard to positive liberty: Crocker, 1980; Gray, 1980; Christman, 1991; Heyman, 1992; Möller, 2009; Michelman, 2017.

would stipulate (Horton, 1992: 137- 171; Gilbert, 2006; Scheffler, 2001). As we saw in the discussion on consent, it is difficult, if not impossible, to establish whether citizens have given their voluntary consent explicitly. It is therefore more reasonable to think of the democratic society as a cooperative venture in which citizens can share in the benefits of democratic procedures, insofar as they are willing to cooperate with one another and with the state directives, on the basis of fairness. Obligations from fairness are thus not incurred voluntarily; rather citizens owe these obligations to one another, because of the shared benefits that arise from other people's willingness to partake in the cooperative venture. It is therefore more reasonable to expect of citizens to fulfil their political obligations, given that everyone receives benefits because everyone is willing to do their part in the cooperative venture. One can then examine the particular nature and reach of these obligations which all citizens incur with, rather than trying to posit that obligations must always be acquired voluntarily.

The emphasis on the disposition of the citizen departs in some sense from Rawls's political liberalism in his theory of justice, according to which the central focus is "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation" (Rawls, 1999: 6). I do not mean to criticise this position. However, I do think it important to emphasise the *motivations* and *dispositions* of the citizens to whom the "basic structure of society" is supposed to apply⁸. We should be cautious of the notion that one could solve the problem of good government, "even for a race of devils" (Kymlicka & Norman, 1994, in Galston, 1991: 215). The principles of justice alone may not be successful in ensuring the continuation and persistence of the overall structure and functioning of the society. Even when institutions function reasonably well, a lack of civic engagement could lead to a serious decline in the ability of citizens to feel connected to one another, thus diminishing their ability and willingness to interact with one another in their aims to further justice. Robert Putnam refers to this element in political communities as "social capital", "[w]hereas physical capital refers to physical objects and human capital to properties of individuals, social capital refers to connections among individuals –social networks and the norms of reciprocity and trustworthiness that arise from them" (Putnam 2000: 19). The point here is that focusing exclusively on the structure according to which society is organised fails to account for the loss of "social capital", which includes valuable

⁸ For a communitarian critique on this point, see McIntyre (1981) and Sandel (1998).

elements of organization, such as mutual trust, norms of interaction and social networks that ultimately strengthen a society's structure and improves coordinated and collective action (Coleman, 1990: 300- 321). In order for this "collective action" to work and ensure a willingness among citizens to advance societal justice, it requires of citizens to participate in their political communities (*ibid.*). In other words, their status as citizens imparts on them duties that involve much more than merely casting a vote, for instance. Societal stability requires that citizens show their willingness to participate in their political community and a willingness to cooperate with their fellow citizens in their aims to promote public interest. This thesis will not focus on specific principles that a stable and well-functioning democracy would require, but rather on the disposition of its citizens. My aim is to show that citizenship implies the occupation of a particular role, and that this role is constituted in action.

An argument for political obligation should thus not take as its point of departure the notion that citizenship is something *done to* people, but rather that it is something *done by* people in a particular community (Barber, 2003: 133). Following from the notion that citizenship is akin to fulfilling a particular role, individuals thus incur both rights and duties. There is no disputing the fact that we value citizenship – at least in large part – for the protection of equal rights, freedom and security. However, I want to emphasize the corresponding duties conferred on individuals, in virtue of their status as citizens. The central aim is to argue that acts of disobedience can demonstrate one of the ways in which citizens *do* things. By viewing citizenship in this way, and taking into account the significance of playing an active role in one's political community, non-compliance with a law can in some cases be the demonstration of a commitment to participation and active engagement in a democratic society. As such, we might be justified in viewing a citizen who engages in an act of disobedience as a morally praiseworthy citizen.

We have already seen that democracy is a form of government that both confers rights on its citizens, but also requires them to contribute to its maintenance by engaging actively with their respective political communities. In the same way that citizens in a democracy have a right to equality and individual freedom, they have a corresponding duty to respect that all their fellow citizens have a similar right to equality and individual freedom. As such, citizens are required to demonstrate their respect for the law in so far as it serves to promote and protect the equality and individual freedom of every citizen in the political community. One's duty of 'respect' towards the law is thus not a duty owed directly to the law, but rather a duty that is owed to one's fellow citizens. This attitude of respect can be expressed engaging in

both acts of obedience in *many* cases, as well as acts of disobedience in *some* cases. By pointing to the root of one's political obligation and the duty of respect towards the law as being a duty of respect towards one's fellow citizens, it becomes clear that this obligation is not necessarily only met by one's compliance with the law. In order to fulfil this obligation, a citizen might decide to deliberately depart from what the law requires *out of respect* for the law (Raz, 1979: 261). By focussing on respect rather than obedience, the intention is to suggest that at the root of citizens' political obligations, is the proviso to engage actively with the law, which in turn is based on an acknowledgement of the role and function that the law plays in the democratic system.

My argument is essentially that disobedience is one of the ways in which citizens can engage actively, in order to make it possible for a society to be truly democratic, and then to maintain and uphold the democratic system. Political obligations thus extend far beyond the moral duty to obey the law, and they are furthermore *not* exhausted by *obedience*. The fulfilment of political obligations requires in some cases, *disobedience* to the law. It is therefore the case that being a member of a political community confers duties on citizens that extend far beyond following a particular code of conduct, that is, obedience to the rule of law, and as such I hold that disobeying the law (even in a reasonably just society), could be what characterizes morally praiseworthy citizenship (Parekh, 1993).

Of course, the above claim that disobedience to the law can, in some cases, be a form of respect towards one's fellow citizens in service of the democratic process must still be proven by argument. This requires, in turn, that we have a clearer conception of the form of disobedience at stake here. This is the topic of the next chapter.

5. Conclusion

In this chapter I have shown that limiting the focus on obedience in the analysis of what constitutes political obligation is a first and important point of departure for understanding what it means to have an obligation *towards* the law. The connotation of the concept "obedience" is of a subject who in a duty-bound way, follows the letter of the law without pausing to consider their own judgement of the particular law. This implies an approach to the law as one of stringent obedience, with no room or consideration for opposition to particular laws, and as such no sufficient grounds for justified *disobedience*. It further

suggests a passively obedient citizenry, as opposed to one that is engaged with the legal system and actively partakes in their democratic society.

In contrast to the above, I have argued for an approach to political obligation that is rooted in a duty of respect for the equality and individual freedom of one's fellow citizens. The aim here has been to show that rigid obedience is not the only way in which one can fulfil one's political obligation, but because one's obligation is a duty of respect towards one's fellow citizens, that obligation can sometimes be fulfilled by disobeying the law. In breaking the law under those circumstances, a citizen will thus not have failed to satisfy her political obligation. On the contrary, such a citizen could be viewed as demonstrating the highest respect for the law, and as such his actions should not only be considered justified, but perhaps morally praiseworthy.

In the next chapter, I will analyse in more detail the particular kind of disobedience that I am concerned with in this thesis, namely *civil disobedience*. I will discuss the concept of civil disobedience and the features of this kind of disobedience that are generally agreed upon among political philosophers. I will then briefly introduce the controversial features of civil disobedience, about which there has been much debate. The controversial features will be discussed in more detail in Chapters Three and Four, since the main aim of Chapter Two is to introduce the concept and analyse the particular features according to which one can identify a form of resistance as *civil disobedience*, and not any other. This next chapter should be seen as a second step in attempting to show how this particular kind of disobedience can not only be justified, but could also be seen as a form of behaviour that demonstrates the character of a 'good' citizen, committed to active engagement and democratic participation.

CHAPTER 2: THE CONCEPT OF CIVIL DISOBEDIENCE

1. Introduction

Started in 1955 over a cup of tea by six middle-class white women outraged by the then-government's attempts at removing "coloured" citizens from the voter's roll, the Black Sash developed into a powerful force for protest and change and served as a visible prod to the consciences of those who implemented and benefited from an unjust system (Thamm, 2015: 1).

If the Black Sash had had access to Twitter back then, #blacksashing #vigil and #sitin would have trended regularly as the women relentlessly campaigned and mobilised, first against the legal amendment – a battle they lost – and then later against almost every other violation of human rights by the Apartheid state including racial segregation, migrant labour, influx control, detention without trial, state censorship and the various states of emergency the government imposed on the country (Thamm, 2015: 8).

The quotes above are excerpts from an article commemorating the 60th Anniversary of the Women's Defence of the Constitution League, founded by Jean Sinclair, Ruth Folley, Elizabeth McLaren, Tertia Pybus, Jean Bosazza and Helen Newton-Thompson. These women launched this organisation in order to protest and publicise the "undemocratic" practices of the Apartheid government. The movement employed a variety of non-violent tactics in their protests, which included marches, campaigns, mobilisation, and the distribution of information and staring ministers down from the public gallery in Parliament. The women's protests attracted international attention, and in September 1955 Time Magazine ran a feature on their resistance movement, of which an excerpt reads as follows,

Everywhere South Africa's Prime Minister Johannes Strydom looked, there seemed to be women – white women in black sashes, silent and contemptuous, heads bowed in symbolic 'mourning for the constitution'. Whenever he passed, they lifted their heads and stared. (TIME Magazine, 1955: 1).

The Women's Defence of the Constitution was launched in response to a Parliamentary Bill that was deliberately designed in order to increase the number of National Party representatives in the Senate, so that they could pass the Separate Representation of Voters Bill, which would result in the further disenfranchisement of 'coloured' citizens (Thamm, 2015: 1). The leaders of the movement soon changed its name to the Black Sash, which

reflected their trademark black sashes, worn or draped over a symbolic replica of the then-1910 Constitution (ibid.).

After Nelson Mandela was released from prison, he described the women of the Black Sash as “the conscience of white South Africa during the Apartheid era”. The Black Sash continued its work after 1994, assisting in the development of the Constitution, participating in large-scale voter education campaigns and at a later stage, helping with the plans for the Truth and Reconciliation Commission (ibid.).

The Black Sash movement represents one of the many instances of civil disobedience against the unjust laws of the Apartheid regime. The purpose of this thesis is to show that despite their deliberate non-compliance with governmental directives, actions like the Black Sash movement can, in their aims to change particular laws, reflect the behaviour of citizens committed to practices of democratic contestation and civic engagement. In this chapter, I will discuss the concept of civil disobedience, by highlighting its main features and how it can be distinguished from other law-breaking behaviour. It will become apparent that arriving at a clear definition of civil disobedience is a complicated task. In fact, defining civil disobedience has proven to be such a challenge that it has been suggested that it would be better to abandon efforts to arrive at a clear-cut definition altogether, and opt instead for a paradigmatic approach to identifying illegal acts as cases of civil disobedience (Brownlee, 2004). This would mean that one opts for a descriptive rather than a normative approach. In other words, a paradigm case approach does not aim to identify the ideal or model case of civil disobedience, but rather to identify a class of actions that are clear instances of civil disobedience (ibid.). I take a similar approach in this chapter, arguing that an analysis and moral judgment of civil disobedience should not only focus on the external features of the action, but should also focus on the disposition of the agent, namely whether or not the agent demonstrates *conscientiousness*. I will however argue in Chapter Four that there is at least one further necessary requirement of an illegal act of protest to qualify as an act of civil disobedience, namely the willingness to accept the legal consequences for one’s law-breaking behaviour. This feature will be briefly introduced in this chapter as a controversial and widely contested element of civil disobedience, but it will be fully fleshed out in Chapter Four.

I begin this chapter by distinguishing civil disobedience from other forms of illegal protest. Following this, I turn to Rawls’s influential account of civil disobedience in *A Theory of Justice* (1971, 1999). Rawls’s definition of civil disobedience has also been the source of a

great deal of debate, and thus, in discussing his account, I am able to situate my argument within the current literature.⁹ I will discuss the features that emerge from Rawls's definition, with the aim of demonstrating (a) that his definition is a good starting point for defining civil disobedience and (b) that it is ultimately too narrow in its requirements, particularly with its emphasis on "non-violence" as a necessary condition for an act to qualify as one of civil disobedience.

The problem of violence and whether an act of civil disobedience can be violent and still be considered an act of civil disobedience, and more importantly, a *justified* act of civil disobedience, will be discussed in more detail in Chapter Three. However, I briefly introduce this controversial feature in this chapter, in so far as it forms part of the conceptual understanding of civil disobedience. However, I want to make a distinction between the *descriptive* and *justificatory* features of civil disobedience. I maintain that theorists who include the requirement of non-violence in their definitions of civil disobedience fail to make the necessary distinctions between description and justification. I will show that the presence of violence does not necessarily mean that an act of resistance can no longer be considered *civil disobedience*. Violence should rather be approached from a justificatory position, so that a violent act of civil disobedience can still be called civil disobedience, but may then be unjustified civil disobedience. That is to say, that the presence and kind of violence used may either result in civil disobedience that is justified, or not, but it does not render an act no longer unidentifiable as civil disobedience. I will address this issue and expand the discussion significantly in Chapter Three. In this chapter, I am focussed on the description of the concept of civil disobedience.

The aim of this chapter will be to show that civil disobedience is best understood as a form of *communicative action*. It is precisely the communicative aims of civil disobedience that allows me to argue that, despite its law-breaking nature, civil disobedience is the action of a conscientious citizen, committed to democratic participation and active engagement with the law. My argument will therefore pay particular attention to the elements of conscientiousness and communication as crucial features of this particular kind of disobedience. I will also show, in the later chapters, that the conscientious disposition of the agent and the

⁹ It is almost impossible to say anything meaningful about civil disobedience without either starting with Rawls's account or, in some way, responding to his argument. Among the many philosophers who have Rawls as their point of departure are Singer (1975), Habermas (1985), Brownlee (2004), Celikates (2016), Farrell (1974), Smith (2004), Cooke (2016), Sagi & Shapira (2002).

communicative aims of their law-breaking action are what ground the *justification* of civil disobedience as an action that exemplifies democratic engagement and respect towards the law.

2. Distinctions between civil disobedience and other forms of dissent

The task of defining civil disobedience is, as previously mentioned, not without significant challenge, especially since it often overlaps, if only broadly, with other forms of dissent. The two kinds of dissent most closely related to civil disobedience are *conscientious objection* and *revolutionary action*. In determining what distinguishes civil disobedience from the latter types of dissent, we will be one step closer to determining the essential features of civil disobedience. In other words, by working out what civil disobedience *is not*, we may gain a clearer understanding of what civil disobedience *is*.

2.1 Conscientious objection

A possible reason for the overlap and confusion between conscientious objection and civil disobedience may be attributed to the action of the man who first coined the term ‘civil disobedience’. Thoreau’s refusal to pay taxes to a government that supported slavery was described by him, after the fact, as an act of ‘civil disobedience’, and has since been referenced as a paradigm case of civil disobedience (Thoreau, 1849). However, this so-called first and most famous instance of civil disobedience is better understood as a case of conscientious objection.

The conscientious objector’s disobedience is motivated by the belief that the particular law or policy in question is morally wrong or bad, either in part or as a whole. If one takes conscience to refer to the moral knowledge and beliefs of an individual, then one could say that, “conscientious objection is an act which aims to safeguard the conscience of a person” (Sagi & Shapira, 2002: 183).¹⁰ As such, conscientious objection is the result of an individual’s loyalty and commitment to their personal moral beliefs, which hold such significance for them that they are compelled to disobey certain laws or policies that

¹⁰ My framing of ‘conscience’ as the deepest moral beliefs of an individual is not an attempt to defend this assertion. Rather, it is a common sense interpretation of ‘conscience’ that I employ for the purpose of this thesis, without trying to defend this understanding of the concept.

contradict their beliefs. Michael Walzer goes further, in that he relates individual conscience to what he calls “shared moral knowledge”. Thus Walzer maintains that

the very word ‘conscience’ implies a shared moral knowledge, and it is probably fair to argue not only that the individual’s understanding of god or the higher law is always acquired within a group but also that his obligation to either is at the same time an obligation to the group and to its members...this conscience can also be described as a form of moral knowledge that we share not with god, but with other men-our fellow citizens (Walzer, 1970: 5)

Walzer’s emphasis on shared moral knowledge implies that the conscientious objector relies on universal moral commitments that have more weight than the state’s laws. According to Walzer, the conscientious objector does not merely wish to ensure that she is blameless, and she does not act only out of concern for herself. Rather, Walzer’s conscientious objector acts from a sincere belief that her cause is justified on the basis of universal obligation. The implication of Walzer’s argument for universal obligation and a ‘shared moral knowledge’ is that the conscientious objector thus relies on principles that can be generalised and as such applied to all people that find themselves in a similar situation (Raz, 1979).

Critics of this ‘universal’ approach to conscientious objection argue that, in general, an act of conscientious objection cannot be justified on universal grounds, but that it is rather motivated by personal factors (Heyd, 1990; Enoch, 2002). As Heyd argues:

An objector refuses to comply with orders which are incompatible with his religious, moral or personal values. The purpose of his objection is not to change the order or the law but to preserve his own innocence and moral integrity. Accordingly, the objection is not an act initiated by the individual, but a passive response to the circumstances (Heyd, 1990: 87- 89).

One the one hand, the conscientious objector might believe that the law in question is morally wrong overall, as a pacifist would regard conscription to be generally wrong. On the other hand, a conscientious objector might think the law extends to certain cases to which it should not apply, such as an orthodox Christian who believes that euthanasia is a case of murder (Raz, 1979: 263). Raz notes that conscientious objection often refers to, and as such is commonly understood as, pacifist objections to military service. However, people can conscientiously object to any law that they believe they have moral reasons to disobey.

A further, somewhat narrower, conception of conscientious objection is characterised by non-compliance with a direct legal or administrative order, rather than overt disobedience.¹¹ This is described as conscientious refusal, of which an example would be a Jehovah's Witness who refuses to salute the flag, or the famous historical example of Thoreau's refusal to pay taxes to a government that supported slavery. It may be true that those engaging in conscientious refusal or objection are acting on the assumption that the authorities are aware of their non-compliance, even if they did not intend to communicate their breach of law to the state. Secret or covert conscientious objection is sometimes referred to as conscientious evasion (Brownlee, 2007). The motivation for acting in this way would be deeply rooted moral obligations of a very personal nature, which the person does not feel needs to be made public, or does not want to be made public. The religious devotee who continues to practice her religion in secret even after it has been banned, does so covertly for personal moral reasons and does not want to protest openly against the law. Those who engage in conscientious refusal do so covertly in order to avoid being drawn into a situation that will place the preservation of their conscience in conflict with the order of law.

This extreme evasion of publicity is not necessarily the case for all instances of conscientious objection, but it is usually the case that the conscientious objector does not act in order to bring about a change in the laws or policies, but rather out of loyalty to their conscience and their moral beliefs – be they idiosyncratic or shared with others. Given that this is the primary aim of the conscientious objector, their actions are not usually performed in the public sphere. This is in contrast with an act of civil disobedience that is carried out in the public sphere in order to communicate to authorities that a significant change in law or policy is needed. I will refer again to this fundamental distinction between civil disobedience and conscientious objection when I discuss *the communicative aspect of civil disobedience*, in a later section of this chapter.

¹¹ An obvious distinction between civil disobedience and conscientious objection is that the latter is in some cases within the bounds of the law and the former is *necessarily* illegal. A conscientious objector can sometimes refuse to comply with an administrative order, and this would still be considered an act of conscientious objection, but it would not be illegal.

2.2 Revolutionary action

In contrast to the conscientious objector, radical protestors or revolutionaries do aim to express themselves in the public sphere and to effect overt change. However, unlike the case of civil disobedients, in this case the aim is to change the entire political system rather than to change laws *within* an existing democratic system. While the civil disobedient does not necessarily take issue with the regime in general and only seeks to communicate her condemnation of particular laws or policies, the revolutionary is deeply opposed to the regime as a whole. The revolutionary's aims are thus much more extensive, and in order to successfully achieve these aims, they may employ more radical forms of dissent such as coercive violence, organised forcible resistance, militant action and intimidation.¹² Unlike the modes of communication that the civil disobedient chooses to use, the revolutionary's tactics are less likely to succeed in persuading others that their cause has merit. This is due to the fact that the revolutionary's extreme tactics are intended to disrupt and ultimately overthrow the entire system. Carl Cohen expresses the severity of a revolutionary project as follows:

He who revolts against the constituted authority, whatever his reasons, necessarily unsettles the life of the entire community, shakes the security and peace of mind of all its members, brings on great loss of property, and renders probable the injury and death of many human beings. Revolution tears up the fabric of a nation's life; justified or not it is an awful thing (Cohen, 1971: 44).

The revolutionary does not seek to persuade the state or the wider public by means of a moral dialogue, but seeks rather to change the entire regime, by means of force or violence if necessary (Cohen, 1971: 47). While revolutionaries are not interested in persuading the state to change established policies, one could say that they are making a moral appeal on society – and often also on the broader international community. However, the object of the appeal is

¹² Even though these are very radical forms of dissent and they are more often than not judged as intolerable and very difficult to justify, they should not be equated with, or labelled as acts of terrorism. There are good reasons to avoid labelling such acts of disobedience as ‘terrorism’, one of which is that it is a provocative term. The term carries with it negative connotations, implicit in its definition. Acts of terrorism bring to mind fear-inducing, intentional and systematic violence, with aims that are sometimes political, but can also be motivated by personal, religious or ideological motives. Furthermore, it is often used by governments to refer to a very broad range of actions, and as such attaching very negative connotations to those actions. Given the extremely negative connotations of this term, one ought to call into question whether it holds any valuable philosophical use. It seems to me that if one uses less loaded terms to refer to intimidation, coercion, violence etc., one is then able to create more space to question the justification of such modes of protest.

that the established government should cease to govern and that it should be replaced by an entirely new system. Gandhi's revolutionary project in India is a successful example of this kind of strategy. Gandhi was certainly a revolutionary; he was not interested in maintaining the established government and certainly felt no loyalty towards the British government. However, he did employ non-violent persuasive tactics, and once it became nearly impossible for the British to resist his movement, they left India with relatively little violent resistance (Bilgrami, 2002). It should also be noted that Gandhi's actions are often regarded as acts of civil disobedience, and I refer to them as such. However, it is possible that acts of civil disobedience, such as Gandhi's, which are characterised by their communicative aims and conscientious commitments, can also be motivated by revolutionary aims. Another prominent example of a resistance movement that employed both revolutionary and civil disobedience tactics was the anti-Apartheid movement. Organisations such as the PAC, the ANC its military wing, Umkonto we Sizwe, employed strategies characterised both as acts of civil disobedience and revolution. These examples are evidence that although revolution and civil disobedience are conceptually distinct and should be understood as such, it is still in some cases difficult to draw a sharp distinction between the two. The revolutionary who seeks the destruction of one system of government and its replacement with a fundamentally new system, may in the slow process of building that revolution, "practice and encourage civil disobedience directed against specific acts of oppression" (Cohen, 1971: 47).

In contrast to revolutionary action, acts of civil disobedience are usually more issue-focused and more limited in the scope, whereas, large-scale violence and coercion that are often associated with revolutionary action tend to obscure any specific demands or aims. Revolutionary action is characterised by the far-reaching objective to bring about a complete change in regime, while the civil disobedient acknowledges and accepts the general legitimacy of the established authorities.¹³ Civil disobedients may strongly condemn a particular law or policy that the government implements and may therefore deliberately disobey it. However, that does not mean that they object to the legal system as a whole. It is essential to note that in accepting the system as a whole, the disobedient accepts to a large extent the "technical legitimacy" of the law that they have violated. In other words, they

¹³ To be clear: My aim here is not to condemn all revolutionary action and to promote civil disobedience as the only justified form of resistance. The purpose of this chapter is merely to delineate the conceptual boundaries of civil disobedience in contradistinction with other forms of dissent.

recognise and acknowledge that in some cases the law is legitimate and that they are incurred with some political obligation towards it.

3. Civil disobedience in outline

An analysis of civil disobedience faces a series of challenges, of which the first is the attempt to identify the particular characteristics of this form of resistance. Nevertheless, if one is to single out civil disobedience as one particular kind of protest and as a distinct form of illegal behaviour, it is necessary to give an account of its essential features, i.e. those features that distinguish it from other forms of dissent. I start with a discussion of John Rawls's influential account of civil disobedience as a distinct form of resistance. I will show that in some respects Rawls's definition proves to be too narrow in some of its demands, particularly with its proviso of non-violence and with Rawls's particular understanding of an action performed "publicly" (Rawls, 1999).

According to Rawls, an act of civil disobedience is, "a public, non-violent, conscientious yet political act, contrary to law, usually done with the aim of bringing about a change in the law or policies of the government" (Rawls, 1999: 320). The first point to take note of in Rawls's account is that an act of civil disobedience is "contrary to the law" (Rawls, 1999: 320). This is a wholly uncontroversial feature of civil disobedience. For any action to be referred to as an act of civil disobedience it necessarily must be an illegal action, that is, it must entail the deliberate violation of a legal directive. This is the most basic requirement for an act of civil disobedience: even if a particular action conforms to every other requirement for identifying it as an act of civil disobedience, if it is within the bounds of the law, it cannot qualify as civil disobedience.

Furthermore, the unlawful aspect of civil disobedience can be performed in more than one way, namely *directly* or *indirectly* (Rawls, 1999: 365). There can be cases of civil disobedience in which the law that is being protested is the same law that is being violated. An example of this kind of direct illegal action would be the ban of religious or cultural garments being worn in public that could then be protested by deliberately wearing those garments in public. It is however not always possible or the best course of action to pursue a direct violation of the law in protest against it. Rawls notes that there are sometimes "strong reasons" for agents of civil disobedience not to violate the laws being protested (1999: 365). Typical examples of instances in which a direct violation of the law could not be carried out

include protests against military or environmental policies and protests against the violation of rights of minority groups to which one does not belong. One can quite easily imagine why in cases such as these, it would not be possible for protestors to ‘directly’ defy the law which they hold to be problematic. As such, dissenters may need to resort to protesting the problematic laws in an ‘indirect’ way. An indirect breach of law in this case would consist in protestors breaking a law, with which they agree *in principle*, in order to protest the law or policy that they deem to be unjust. This indirect illegal action is often what constitutes civil disobedience, a typical example of which would be trespassing illegally, violating a traffic law or occupying a state building as a means to protest an environmental or military policy for instance (Rawls, 1999: 365, Brownlee, 2007: 184). I will touch on this distinction between direct and indirect breaches of law again in the final section of Chapter Four, where I will suggest that it can influence the behaviour of the civil disobedient that appears at the criminal trial.

The second requirement that Rawls sets out is that civil disobedience must be “a public” act (Rawls, 1999: 320). While it is typically the case that ordinary lawbreakers would act covertly, hoping to conceal their identity and their illegal action, the civil disobedient rather makes their identity and their action clear to their society (Smith, 2011: 145). For the civil disobedient, the more people know who they are and what their cause is, the better their chances would be of receiving a positive, productive response to their protest. Making one’s identity known, whether it is before, during or after the act, depending on the particular circumstances, is thus a further defining feature of civil disobedience. In light of this definitive feature, Carl Cohen writes that one should be skeptical of the claim that the Boston Tea Party of 1773, was “the most famous single instance of civil disobedience in the American History”, since the act was carried out in the darkness of the night and the agents deliberately kept their identity concealed (Cohen, 1971: 37). According to Cohen the Boston Tea Party failed to fulfill the requirement of publicity and thus does not qualify for what counts as an act of civil disobedience (Cohen, 1971: 37).

Rawls’s third specification is one that I will take particular issue within the next chapter. Nevertheless I will mention it briefly here as it pertains to the conceptual analysis of civil disobedience. According to Rawls, an act of civil disobedience must necessarily be “non-violent” (Rawls, 1999: 320). This simply implies that when engaging in lawbreaking behaviour, the civil disobedient actively avoids violent means of protest. We will see in the following chapter that this requirement is not as simple as Rawls would have us think. I will

point out that the first issue with including non-violence as a conceptual requirement is that there is such disagreement in the literature on *what violence is*, in the first place. In the second place, I maintain that the feature of violence / non-violence should be considered as a justificatory feature of civil disobedience, rather than a descriptive one, and that including or excluding violence in the definition of civil disobedience does not enhance our understanding of what this particular kind of resistance involves. I will return to this discussion in the next chapter. Let us now resume the conceptual analysis of civil disobedience.

The fourth element of Rawls's definition is that an act of civil disobedience is aimed at persuading the government to change a particular law or policy. There can be several incentives for people to disobey the law, whether it is criminal disobedience, the refusal to obey a legal demand that is perceived by the agent to be immoral, or it may be that the agent is seeking exemption only for themselves from the demands of a particular law (as we saw with the conscientious objector). However, when it is an act of civil disobedience, the incentive for illegal action is to persuade the legislator to change a particular law or policy in its entirety, either to get rid of it completely or to replace it with an alternative (Bedau, 1991: 51). This feature is both a defining feature of civil disobedience and a feature that distinguishes it from a similarly principled kind of disobedience, namely conscientious objection. As previously noted, conscientious objection and civil disobedience bear many similarities, both in individual motivation and in method. As a result, these two types of disobedience are often used by protestors in conjunction with one another, and consequently these concepts are frequently used interchangeably. However, it is in their respective action-guiding aims that we find the fundamental difference between these forms of protest and, by implication, one of the defining features of civil disobedience.

The aim of the conscientious objector is to demand exemption from a legal obligation that they feel they cannot comply with, because its demands stand in direct contrast with the demands of their conscience. Such protestors are not saying that the law should be changed, but if they are making their action public at all, they are saying that they do not support the law and refuse to obey its demands.¹⁴ The conscientious objector operates first and foremost

¹⁴ As mentioned in the previous section, this kind of disobedience is often done covertly and as such there is no message relayed to the public. However, even if conscientious objectors make their non-compliance public, their aims are still to achieve individual exemption from the legal demands to which they are opposed. Although it is reasonable to assume that they may imply in their actions that

on an individual level and does not seek to invoke the convictions of her fellow citizens as the civil disobedient does. In his attempt to distinguish civil disobedients from conscientious objectors, David Enoch writes of the latter that they, “...are egocentric in character” in that they “are attempting to save themselves from a disintegration of their selves, from the danger of having to act in ways that are in deep conflict with everything they believe in – indeed with who they take themselves to be – that in a sense they cannot survive such behavior” (Enoch, 2002: 228).

Given this inward-focused concern, the conscientious objector does not act in order to contribute to the deliberative democratic process. This is a key difference with civil disobedience, which, as I will argue, does have as its aim a positive contribution to the process of deliberative democracy. I will discuss this aspect in more detail in the fourth chapter, where I deal with the requirement that the agent be willing to accept the legal consequences of their lawbreaking action. For now it is important to note that what sets civil disobedience apart from other kinds of disobedience, such as conscientious objection, is that it *makes an appeal to reasons that their fellow citizens can agree with*. The intention to “address the community” for a change in the legal system lies at the core of the aims of civil disobedience, but it is also a defining feature of this kind of resistance.¹⁵

Some proponents of civil disobedience have been critical of conscientious objection, pointing out that while agents of civil disobedience aim to educate their societies about injustice and boldly propose a change in their legal directives, conscientious objectors (conveniently) limit themselves to a “washing of the hands” in their individual exemption (Tella, 2004: 77). One can presume that this criticism is levelled against conscientious objection, because it does not aim at actively addressing unjust laws and demanding that they be changed, and as such it cannot be seen as a genuinely political practice, but rather as an expression of a personal attitude¹⁶. This criticism may be too harsh a judgment of the conscientious objector’s failure to participate in the political life of their community. One could certainly concede that their demands to be exempted from a law that goes against the dictates of their conscience is also

this law or policy ought to be changed, it is not the main aim or reason for their action. Contrary to the civil disobedient, the conscientious objector is much more modest in her aims.

¹⁵ This hints at Rawls’s claim that, “civil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is by the principles of justice which regulate the constitution and social institutions generally” (1999: 365).

¹⁶ I borrow the term, “genuine political practice”, from Celikates (2016a, 2016b).

intended to bear witness to the injustice of that law and subsequently points to a need for the law to be changed. Furthermore, I have already noted several times that conscientious objection is often employed in conjunction with civil disobedience in an act of protest. A paradigmatic example of this is when anti-war activists use conscientious objection as a means to avoid military conscription, as well as civil disobedience in order to condemn the unjust war policies, or the injustice of the war as a whole (Harel, 2002). I do acknowledge the general validity of these arguments, but what I am pointing out is simply that it is not a *requirement* of conscientious objection to address the public and demand that a law or policy be changed, while this requirement is what *constitutes* civil disobedience. Throughout my argument, I will reiterate the emphasis on civil disobedience as an act carried out in public, with the aim of communicating a message that is intended to appeal to the ‘shared’ reason of the community.¹⁷ This ‘communicative’ aspect is a definitive feature of civil disobedience, as well as a point from which one can make a meaningful distinction between civil disobedience and conscientious objection.

4. Communicative aims of civil disobedience

I have stated above that interpreting civil disobedience as a communicative act through which the agents aim to send a message to the authorities and their fellow citizens.¹⁸ In this section, I then develop this claim further by arguing that, insofar as civil disobedience is a communicative enterprise, it is an act that aims at *persuasion* and necessarily avoids *coercion*. An act of persuasion intends to “lead a person to the performance of an act by argument”, whereas an act of coercion aims to, “forcibly constrain or impel [others] into doing something” (Simpson, 2007: 2171). The most important element of persuasive action is

¹⁷ This “shared reason of the community” hints to Rawls’s proviso that acts of civil disobedience are intended to appeal to the, “shared sense of justice of the community”. However, I will maintain that it is not so much a shared sense of justice, since it is often precisely because people do *not* share the same sense of justice that agents are compelled to engage in acts of civil disobedience, but rather that they appeal is to the community’s sense of reason. In other words, the agents of civil disobedience aim to give their fellow citizens reasons for their law breaking action. This forms part of the communicative aims of civil disobedience, as well as the justification of acts of civil disobedience as being rooted in a duty of respects for the autonomy of one’s fellow citizens. The links between these aspects of civil disobedience and the disposition of the agents will become increasingly clear as the argument progresses.

¹⁸ Smith (2004: 363) identifies this communicative aspect of civil disobedience as twofold. In the first place, the intended audience or recipient of the message is the state, which Smith refers to as “vertical communication”. The second kind of communication is “horizontal communication”, which is directed at one’s fellow citizens.

the aim to convince or bring people to understand and *share* one's own reasons for acting in a certain way. In contrast, coercion does not require that people be convinced to share in one's reasons for behaving in a certain way, nor does it aim to foster an understanding for the reasons motivating one's action. This is because coercion, as a course of action attempts to impose one's own will onto other people (*ibid.*).

In order to understand the communicative aspect of civil disobedience and its relation to conscientiousness, which will follow hereafter, we must first make clear what 'communication' means in this context, together with the requirements and conditions for successful communication. The first, rather obvious requirement is that communication necessarily involves at least two people. Communication cannot be equated with mere expression, since one can express one's feelings alone in a remote location, whereas communication is an "other-directed" activity (Brownlee, 2004: 343). For communication to be successful there must be both an utterer and an audience involved.¹⁹ It is then the responsibility of the utterer to consider whether the content of her message will be understood by the audience. Moreover, the utterer must consider whether the means of her communication is likely to cultivate understanding or hinder it. A further point of concern for the speaker is to anticipate what kind of impact the mode of her communication will have on the hearer.²⁰ Modes of communication relevant for civil disobedience include violence, coercion, publicity, collective action and direct or indirect action (Brownlee, 2004: 343). Although the utterer's choice among these modes of communication can either foster or hinder understanding, the success of communication depends as much on how receptive the audience is to the content of the utterer's message. This is particularly relevant for civil disobedience, as it places certain constraints on the kinds of people or groups that can be considered appropriate audiences, or toward which acts of civil disobedience can be aimed.

Even the most fervent proponents of civil disobedience recognise that this kind of communication is not always the best, or even a possible option in the face of unjust laws or

¹⁹I use the terms "utterer" and "audience" to encompass both linguistic and non-linguistic communication. Brownlee (2004: 343) makes use of the terms, "speaker" and "hearer", however I find this terminology to be unfortunate in the context of civil disobedience, since this kind of communication in particular, but also communication in general, is not always verbal in its mode.

²⁰I take the distinction between the means and modes of communication from Kimberley Brownlee, in her account of the aspects of communication. In this case 'means' refers to the different kinds of action that people use to communicate their message, and mode refers to the way in which such actions are performed, in other words whether the action is performed violently or peacefully, collectively or individually, directly or indirectly, etc. (Brownlee, 2004: 343).

policies. By stressing the communicative aspect of civil disobedience, it becomes clear that not any kind of political context is appropriate for civil disobedience, and therefore one must consider the conditions under which one can reasonably expect acts of civil disobedience to have some success. In a totalitarian society for instance, with dictators who are unwilling to consider or even entertain opposing ideas, “civil disobedience amounts simply to suicide” (Sabl, 2001: 310). It is thus of central importance for the successful communication of the civil disobedient’s message, that the state and civil society (the audience), be receptive to the message that the utterers (agents of civil disobedience) are attempting to convey.

According to Rawls, the conditions that would be suitable for civil disobedience *are nearly just societies*, which are “for the most part well-ordered, but in which some serious violations of justice nevertheless do occur” (1999: 319). If one were to take this notion of “nearly just” literally, it seems to me that it would account for very few real cases of civil disobedience. As David Lyons (1998: 36) points out, neither Thoreau, nor Gandhi or King regarded the regimes that they opposed as just “for the most part”, or as nearly just. We could add other examples here, such as women’s suffragists, (Sabl 2001: 310), and of course the numerous anti-Apartheid movements and campaigns mentioned in the preceding chapters. None of these agents of civil disobedience considered their current regimes to be *nearly just*, in fact they likely considered the system to be absolutely and fundamentally unjust. In these paradigm cases of civil disobedience, it seems that the injustice they were fighting against detracts from any claim of general morality or legitimate authority that the “nearly just” regime may have (Lyons, 1998: 36). However, Rawls’s account could be less problematic if we had a better understanding of what he means by the term “near justice”.

According to Sabl (2001: 311), Rawls does not generally use this term in the “everyday sense”, in that they are moderate in most of their practices, “just in all the details”, or committed to the fair treatment of *almost* everyone. It is true that Rawls does occasionally use “nearly just” in this way, for instance when he argues that society if near justice is “unlikely” to practice “vindictive repression of legitimate dissent” (1999: 376). However, elsewhere Rawls presents an account of societies in which civil disobedience is the correct response to injustice, but which still does not minimise the extent of the injustice. In such societies people are deprived of voting rights or persecuted on the basis of their religion, of which the latter is a paradigm case of deep injustice for Rawls (Sabl, 2001: 311, Rawls, 1999: 372). Injustices such as these do not arise blindly or merely as a result of apathy, but are “more or less deliberate over an extended period of time in the face of normal political opposition” (Rawls,

1999: 375). Furthermore, the people responsible for such injustices are “immovable and apathetic”, even in the face of repeated appeals and resistance (Rawls, 1999: 373). Such injustices are “serious” and the enforcement of them amounts simply to the use of “illegitimate force” (Rawls, 1999: 382, 391). It is clear that a society of this sort cannot be characterised as “nearly just” in the everyday sense.

We may thus consider Rawls’s use of the term “nearly just” as somewhat unfortunate and consider, instead, his alternative description of societies that are “regulated to some considerable degree by a sense of justice” (1999: 387). According to Sabl (2001: 311), the best interpretation of Rawls’s “to some considerable degree” is: “within circumscribed limits”, or “when we confine our attention to a certain non-trivial subset of citizens.” In light of this interpretation, a “nearly just” society could involve fair institutions, mutual cooperation and a sense of justice among the ruling group, while at the same time treating those outside its membership with “a cruel and near-absolute tyranny” (*ibid*). Robert Dahl refers to such regimes as “dual regimes”, of which an example would be the Apartheid South Africa is a prime example, given their vastly disparate treatment of white South Africans on the one hand, and Black, Indian and Coloured South Africans, on the other. A further example that bears strong similarity with the Apartheid regime is, the system of racial segregation in the United States of America during the 1950s, where they certainly treated African American people “near-absolute tyranny” (Dahl, 1971: 28). Sabl (2001: 311) opts for “a piecewise just society”, in which justice is present, and in limited cases practiced perfectly, such as among a “powerful ‘in’ group” (*ibid*). However, justice is practiced to a very small degree, or not at all, towards excluded or oppressed groups (Sabl, 2001: 312).

In light of this interpretation, one could say that one of the conditions for successful civil disobedience is that the society in which it is practised must at least be piecewise just. This is because members of the dominant group must have at least some sense that they ought to practice justice among themselves, even if they simultaneously feel entitled to exercise domination over others (*ibid*). It is essential to consider whether the targets or recipients of civil disobedience are likely to have an inkling, even if very slightly, that fair cooperation is the normal basis of social and political life and that arbitrary domination over others cannot normally be justified (*ibid*). Sabl suggests that, “Stalin’s evident lack of this sentiment was a necessary and sufficient condition for his being a poor target of civil disobedience” (*ibid*). We can thus see how the condition of “piecewise justice” ensures that the agents have some “leverage for moral appeals” (*ibid*).

To summarise: as part of the communicative aims of an act of civil disobedience, the agent must consider to whom the message is being aimed and whether or not it is reasonable to assume that the recipient will be receptive of this message.

The particular kind of communication that I have outlined above plays a central role in any paradigm case of civil disobedience. This communicative aspect of civil disobedience can be explained by looking at its correspondence with the communicative aspect of lawful punishment by the state (Brownlee, 2004: 345, 2007).²¹ The first parallel to be drawn between the act of civil disobedience and the act of lawful punishment is that both actions are expressing something *particular* about the actors that are involved. Lawful punishment indicates society's adherence to particular values, in that they are willing to punish and condemn those people that violate or disregard those values (Brownlee, 2004: 345). Analogously, when a civil disobedient breaks the law in order to communicate their condemnation of the government's actions to support an unjust law, it shows that person's "moral consistency" in their commitment to the values (that are being violated by the state) that they have reason to defend (Brownlee, 2004: 345).²² The notion that lawful punishment can be viewed in light of a communicative theory provides a useful starting point for understanding the aims of civil disobedience. The aims of punishing a wrongdoer are twofold: to demonstrate protest against their action and to bring about change, both in the action of the wrongdoer and the actions of society as a whole. As Feinberg argues, in punishing a wrongdoer, the state expresses its disavowal and condemnation of the crime that has been committed and conveys its need for the offenders to show remorse and reformation for their crimes (Feinberg, in Duff & Garland, 1994: 77- 79).

The objective of the civil disobedient is also to show her disavowal of law and of the government that implements and supports it. This disavowal is in the first place a stark rejection of the values that both motivate and are perpetuated by such laws. Additionally, the objective is to dissociate oneself from the law and the government that enacts it. It is this dissociation that manifests as some kind of public expression of the dissenter's condemnation

²¹ I take this point from Kimberley Brownlee in both her 2004 publication, "Features of a Paradigm Case of Civil Disobedience" and her article published in 2007, "The communicative aspects of civil disobedience and lawful punishment".

²² I borrow the phrase, "moral consistency" from Brownlee (2004). I will refer again to the moral consistency on the part of the agent when I discuss the conscientiousness of the civil disobedient. In short, I argue along the same lines as Brownlee when she claims that 'conscientiousness' requires of the civil disobedient to be morally consistent in their actions and in the motivations for their actions.

of the law and the government. The dissenter is so committed to dissociating herself from the unjust law that she is willing to break the law (that particular law, or any other law, i.e. directly or indirectly), and risk punishment in order to communicate clearly that they do not support the law or the government that endorses such injustice.

Who, then, is the target of the civil resister's condemnation and dissociation? Here we can again look to the state's lawful punishment of criminals to tease out its similarities with the communicative aims of the civil disobedient (Brownlee, 2004, 2006). In punishing criminals, the state of course addresses the offender, but it is also relaying a message to society as a whole. The state could also be communicating with the wider international community, as well as the particular victims of the crime (Feinberg, 1965: 404). The communicative aspect of punishment has a number of aims. By punishing the offender, the state tries to engage the wrongdoer in a dialogue about the morality and ethical implications of their offence. The punishment is supposed to convince the offender that their action was wrong. Moreover, the sentence is intended to cause the offender to repent for their actions, to bring them to reformation and to seek to recompense the victims of the crime. By openly and publicly addressing the other members of society, the state does a few things. Firstly, it aims to deter people from acting in the same unlawful way. Secondly, it aims to reassure people of their safety in the aftermath of some criminal act that could affect them in the future (if the criminal is not incarcerated). Furthermore, the state confirms and makes public their condemnation of such criminal acts, both to their immediate society, as well as to the international community as a whole (Feinberg, 1965: 404). Lastly, by communicating to the victims of the crime, the state is showing them that they are valued and that their grievances are being taken seriously (McEwan, 1991: 987).

In the same way, the resister who engages in civil disobedience wishes to communicate ultimately with the policymakers who implemented the law that she is protesting. The resister might also be communicating with the victims of that law, with the entire society, or with the international community, even if they are not affected by that law. The message that is conveyed to these groups could simply be to show their condemnation of the law and the underlying values that it perpetuates. However, as we have seen, it is a fundamental part of the civil resister's objective to aim for a lasting change in the law. In this sense both civil disobedience and lawful punishment have at their core, a forward-looking component (Feinberg, 1965 and Sabl, 2001: 307-330). By breaking the law, the civil resister is aiming to

bring about a change in the current law, as well wanting to prevent any new laws or policies that may be similarly unjust to the ones currently being protested²³.

This particular forward-looking component of civil disobedience will be discussed in much greater detail in the third and fourth chapters. For now, it is important to take note that interpreting civil disobedience as a communicative enterprise can better illuminate its larger aims as a forward-looking means to address injustice (Sabl, 2001: 307- 330). It should be clear at this point in the argument that the forward-looking aim of civil disobedience has two central components. First and foremost, civil resisters are interested in convincing governments and policymakers to change existing laws. Furthermore, the civil disobedient wants the policymakers to reflect on and internalise the reasons why these laws ought to be reformed, so that any future laws and policies will not perpetuate similarly problematic values.

Now that we have some clarity on the communicative aspect of civil disobedience, let us turn to an interrelated feature, namely conscientiousness. The conscientious aspect of civil disobedience is interrelated with its communicative nature, in the sense that the former can be demonstrated by the latter. In other words, the open and public communicative aims of civil disobedience is *one* way in which civil disobedients can show that they are acting conscientiously. In the both chapters three and four, I will discuss persuasive violence and the willingness to accept the legal consequences of one's law-breaking actions as further demonstrations of the conscientious aspect of civil disobedience. First, let us consider conscientiousness as a feature of civil disobedience.

²³ It should be noted that it is not a necessary requirement for the civil resister to have a clear conception of what the unjust law should be replaced with. The resister does not also have to take responsibility for the reformation of unjust laws in order to have a justified demand that such laws ought to be reformed. It is sufficient for the civil disobedient to believe, and communicate to her government, that a law is in serious need of replacement. As an alternative point, those engaged in civil disobedience may also believe that the law should not be replaced by anything at all, i.e. that law holds no place in people's lives whatsoever. The civil resister may even have no objection to the law in itself, but may believe that it requires reformation in light of current values. An example would be if the resister believed that a law requires some revision in so far as it has promulgated the necessary democratic participation. The point is that all of the above are examples in which the central aim of civil disobedience is to bring about a change in the current law (Brownlee, 2007: 179-192).

4. Civil disobedience as a conscientious act

Conscientiousness, in the most general interpretation of the concept, is an attitude marked by specific attributes that an individual may exemplify through her actions. Those actions which demonstrate a conscientious attitude are characterised by compliance with and loyalty to one's conscience. Here I follow Kimberley Brownlee in her argument that the varying qualities of conscientiousness can be captured by two features, namely "*sincerity* and *seriousness*" (2004: 340). Seriousness can, in turn, be understood in two ways. In the first sense, seriousness denotes earnestness and resoluteness, of which the opposite is flippancy and frivolity. The second understanding of seriousness is significance, importance, gravity. Along with Brownlee, I will use seriousness in the former sense.

Conscientiousness, then, involves, "a sincere and serious commitment to, or belief about, something" (Brownlee 2004: 340). Certain actions and intentions can be marked by sincerity and seriousness, and others not. Sincerity and seriousness cannot be expressed by self-deceiving actions or intentions, because the notion of self-deception is necessarily in tension with the sincerity of conscientiousness and its loyalty to conscience. This is not to say that a person cannot be conscientiously deceitful or flippant, but rather that one cannot act conscientiously without having a serious and sincere motivation for that action. This constraint has a very minimal effect on the kind of action that can be performed conscientiously, since most actions can in some way be supported by seriousness and sincerity. Brownlee notes the following attributes as marks of commitments and beliefs that can be said to be serious and sincere, "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." (Brownlee, 2004: 341). These expressions of commitment and belief, demonstrate a person's loyalty to their conscience and compliance with their deeply held beliefs and what they have reasons to act on.

In light of the above, we can say that the conscientious civil disobedient has a serious and sincere belief that a particular law or policy needs to be revised or changed completely and that the values that inform that belief are so important that a breach of law is required to defend them. A conscientious protestor who believes that a particular law or policy is seriously erroneous and unjust would refuse to comply with such laws and policies, and furthermore harshly judge the government that chooses to implement such misguided

policies. Conscientiousness can then be further demonstrated by openly communicating one's disapproval of unjust policies and the governments that support them²⁴. This shows the seriousness and sincerity of the person's commitment to her beliefs. Anthony Duff explains the connection between conscientiousness and communication thus: "[t]o remain silent, to let the action pass without criticism, necessarily casts doubt on the sincerity of [her] declaration that such conduct is seriously wrong." (Duff, 2001: 28). For the civil disobedient however, her judgement of the government's misguided support of unjust policies gives her reasons to express her protestations by a breach in the law. It is of course true that the civil dissenter may have other commitments, such as commitments to particular persons that may give her reasons not to act in certain ways, specifically if those actions will have severe consequences for herself or for those persons close to her. What is most significant for conscientiousness is that the person recognises and acknowledges the reasons for her action and that it is her deeply held beliefs that generate those reasons. It would be morally inconsistent if a person who believes that a policy should be changed and believes that the values underpinning her judgment are important and serious enough to justify breaking the law in its defense, would then deny that she has legitimate reasons to engage in civil disobedience. Brownlee (2004: 342) notes that this kind of denial would show a "lack of respect for her own values" and as such would not be demonstrating a serious and sincere commitment to those values and beliefs.

I have emphasised that conscientiousness demands sincerity in the belief that a person has good reasons to act as she chooses. This belief, or 'reason-giving' attribute of conscientiousness can be demonstrated by the appeal to common or shared reasons, such as the "sense of justice of the majority of the community" (Rawls, 1999:364). However, it does not follow that conscientiousness also demands that those judgments and beliefs be correct or justified. In other words, an action can still be conscientious even if the person's belief in the injustice of a law is untrue or unjustified. What matters most for conscientiousness is how the person's action is related to their beliefs and values. In other words, an agent's decision to engage in civil disobedience may still be conscientious, even if they are mistaken in viewing

²⁴ By openly and publicly communicating their disapproval of unjust law and policy, the civil disobedients can *demonstrate* their conscientiousness, however this should not be seen as a requirement of conscientiousness. The conscientious objector, for instance can still be conscientious in the sense that she seriously and sincerely regards a particular law to be unjust and demonstrates this conscientiousness by refusing to comply with the law. The public nature of civil disobedience should thus be seen as a further demonstration of conscientiousness and not as a necessary requirement.

a particular law as unjust (cf. Lefkowitz, 2007: 202- 233).²⁵ For instance, there is no logical reason why a person could not conscientiously oppose – and commit acts of civil disobedience against – say, the desegregation of schools or other measures designed to address racial inequality (cf. Bedau 1991: 10). A person’s reasons for this action may vary from more justifiable to much less justifiable. For example, a person may believe that children develop better without the pressures of multi-ethnic interaction, or that desegregation will cause children to lose touch with their cultural heritage. A less justifiable and much less appealing reason could be the belief that some ethnic groups are inferior to others and should thus be educated separately. Since the correctness or justifiability of a person’s judgment is not a determining factor for conscientiousness, an action is conscientious simply if it is in alignment with a person’s beliefs. Essentially, conscientiousness refers to the sincerity, seriousness and moral consistency of a person’s commitments, and subsequently the extent to which their actions are guided by those commitments. While the justifiability the motivating beliefs would not matter for the definition or the identification of a paradigm case of civil disobedience, it does matter for its justification. That is to say, that the content of a person’s beliefs does not negate its conscientiousness, but it may provide reasons to argue that a case of civil disobedience is *unjustified*. I will address this issue more fully in Chapter Three and Four, when I attend specifically to the justificatory elements of civil disobedience.

5. Conclusion

In this chapter I have provided an outline of the main features of the concept of civil disobedience. I have first explained the ways in which civil disobedience is distinct from conscientious objection and revolutionary action respectively, by which I was able to conclude that civil disobedience importantly aims for a *change in the legislation*, rather than mere *exemption from the law*, but also without aiming to overthrow the entire system of governance.

I then turned to Rawls’s influential account of the main features of civil disobedience. These are, first, that it is an illegal action, which can be performed either directly or indirectly, and second, that it is carried out in public, with the aim to communicate a particular message to that public. The third feature that Rawls highlights is its non-violent nature, which I have said

²⁵ David Lefkowitz (2007) presents an argument for the “right to do wrong” in his article, “On the Moral Right to Civil Disobedience”.

requires much more serious consideration and examination and which will, as such, will be the topic of the following chapter. A fourth and significant feature discussed in section two, is the aim of civil disobedients to change particular law and policy. This is important as it both distinguishes civil disobedience from other kinds of dissent, but also because it informs the tactics and strategies that are available to civil disobedients. Given the aims of successfully changing particular laws and policies, as opposed to overthrowing an entire system of government, it is only reasonable for the civil disobedients to follow a certain route of action, rather than another. I will discuss this in more detail in the next chapter.

I further showed that conscientiousness and communication are closely connected features of civil disobedience. Given that conscientiousness requires moral consistency, someone who sincerely believes that a particular law or policy is in need of reformation has serious reasons to communicate that belief. The conscientiousness and communicative aspects of civil disobedience are linked to achieving particular aims, one of which is the aim to demonstrate dissociation and protest against a law or policy, and the other to bring about a lasting change in that legislation (Brownlee, 2004: 350). The sincerity of these aims, particularly the aim to bring about a change in the law, “is reflected in the mode of civilly disobedient communication that a person adopts” (*ibid*).

I will show in the next chapter that the sincerity of one’s communicative aims can be illustrated by adopting non-coercive methods and aiming instead to persuade lawmakers and one’s fellow citizens that a law or policy is in need to reconsideration and reformation. I have mentioned briefly that the feature of violence, as a mode of communication, is a controversial aspect of civil disobedience. This is because it is argued that violence *obscures* the communicative aims and conscientiousness of civil disobedience. I will thus discuss persuasive modes of communication as the best way to demonstrate one’s conscientiousness and argue that modes of communication which aim to coerce fail in this regard. Let us now turn to the next chapter, in which I discuss the problem of violence as mode of communication and a controversial feature of civil disobedience.

CHAPTER 3: THE QUESTION OF VIOLENCE

1. Introduction

We have seen in the previous chapter that Rawls's definition of civil disobedience includes the condition of non-violence as one of the fundamental features of civil disobedience. I have said that this proviso is not an uncontroversial one and thus requires further examination. That is the purpose of the present chapter. My larger aim is to challenge the Rawlsian view that, "any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act" (Rawls, 1999: 327). However, before I argue that not all violence present in civil disobedience makes it *prima facie* unjustified, I will attend to a preliminary problem with the inclusion of non-violence in the definition of civil disobedience. In the preceding chapters I noted that part of debate surrounding non-violence as a criterion for civil disobedience is due to disagreement about the definition of violence. In other words, what do we mean when we say an action is violent? I will show that there is serious disagreement on what precisely should fall under the conceptual umbrella of the term "violence".

The larger problem here is that many theorists make non-violence part of the definition of civil disobedience, which carries the logical implication that any kind of violent act cannot be called "civil disobedience". This is a mistake. The place for the condition of violence or non-violence, should rather be in the justification of civil disobedience. As I will show, an act of resistance that uses violence could still be considered an act of civil disobedience. The question we must ask is whether or not such violence is *justified*. By making a distinction between features belonging to the description and the justification of an act of civil disobedience, we are in a better position to (a) identify paradigm cases of civil disobedience and (b) judge whether a particular instance of civil disobedience is justified or not.

I will argue that one can, in some cases, interfere with the civil liberties of others and that, by implication, some forms of violence may be used in acts of civil disobedience. While I will claim that civil disobedients may aim only at *persuading* their fellow citizens, this does not necessarily rule out a degree of violence. As long as the violence used by protestors does not contravene the communicative nature and aims of civil disobedience, I hold that in some cases, a degree of violence may be permissible. The overall aim of this chapter is to show that, even when it employs a degree of violence, acts of civil disobedience can still qualify (a) as an act of civil disobedience and (b) as a democratic form of address. The crux of the

argument here thus has to do with agents' political obligations in democratic societies. Following on from my argument in Chapter One that obedience to the law is not the only way for democratic citizens to fulfil their duties as citizens, in this chapter, I elaborate on the claim that "citizenship is a call for action" (Barber, 2003: 123). Citizenship thus requires that agents actively engage with their particular context and participate in the democratic process, and thus to identify the appropriate response. In some cases, such a response may entail a departure from 'conventional' forms of participation, "in favour of actions that, while being 'forceful', still remain loyal to democratic ideals" (Moraro, 2014: 73). We should thus be cautious of dismissing violent cases of civil disobedience as 'uncivil' and 'undemocratic'. Protestors may, even in some cases of violent action, just be doing their duty as citizens.

The main difficulty to be addressed in allowing a degree of violence in acts of civil disobedience is the risk of interference with individual autonomy (which I presented as the justification for democracy in Chapter One). After all, a threat can also constitute an act of communication. Pointing a gun at someone with the aim to elicit a particular response is a way of 'sending a message'. As we have seen, acts of civil disobedience are to be understood as a means of persuasion. A threat, however, does not aim to *persuade* the recipient of the message, but aims rather at forcing a particular outcome. The problem is then, how can we allow violence in acts of civil disobedience, without compromising its persuasive aims and its role in fostering democratic citizenship? (Moraro, 2007: 73). This chapter will focus specifically on this issue and attempt to determine in which cases a degree of violence might be compatible with the persuasive aims of civil disobedience. As I will show, the argument that violence might sometimes be allowed does not necessarily entail the justification of threats as part of the communicative aims of civil disobedience. This point will be crucial, for if we defend civil disobedience as a democratic form of address and as demonstrating active citizenship, we cannot at the same time hold that it employs threats in order to achieve social change.

We will see that there is a lack of clarity on the terms and conditions for an act to count as one of violence. In other words, making a sharp distinction between violence and non-violence presents us with a serious challenge. I will discuss three possible approaches to identifying something as an act of violence, namely whether it is directed at persons and/or property, whether it causes harm, and whether that harm entails physical and/or psychological suffering. This discussion is intended to demonstrate the extent to which writers have failed to reach a consensus over the definition of violence, which is partly why my argument will

not be an attempt to spell out the necessary and sufficient criteria for a particular act to be characterised as violent. While this is certainly an important task, it is not especially relevant or particularly important for the issue at hand. The issue that requires attention is not so much a question of definition as it is a question of justification. I will thus attempt to answer the question of whether violent civil disobedience can be justified, and if so what this kind of violence would look like.

Once I have ruled out the kind of violence that I hold to be incompatible with the conscientiousness and communicative nature of civil disobedience, namely violence that aims at seriously or fatally injuring people, I will move on to discussing the question of *how much* violence should be allowed in acts of civil disobedience. In this section, I will show how we can gauge the amount, and more specifically the *kind* of violence that would be justifiable in acts of civil disobedience.

I will then move on to the problem of the seeming incompatibility of coercive civil disobedience on the one hand, and the fundamental principles of democracy. I will focus here on the democratic commitment to individual autonomy and attempt to show that acts of civil disobedience, while they can use coercion as a means of communication, do not necessarily undermine this democratic ideal. I will thus discuss the concept of autonomy briefly, and clarify how it differs from freedom. This distinction will become a crucial part of the justification for employing a degree of violence in acts of civil disobedience. I will show that in some cases, civil disobedients may infringe on others' freedom, without necessarily infringing on their status as autonomous agents.

In the final section of this chapter, I will briefly discuss the acts of resistance carried out by the ANC's military wing, Umkhonto we Sizwe. My intention here is to show that while Umkhonto engaged in violent means of protest, their actions could nonetheless be regarded as civil disobedience, and furthermore, as justified civil disobedience. With this example, I will show that in practice, acts of civil disobedience may, in some cases, employ a degree of violence as a means of communication. We should thus be cautious of dismissing cases such as the acts of sabotage carried out by Umkhonto we Sizwe as being 'uncivil', given that such

cases may still be representing a legitimate form of democratic participation and civic engagement.²⁶

Let us now turn to the first section, namely, ‘The Question of Violence’, in order to understand why I have referred to the condition of ‘non-violence’ as a controversial feature in traditional definitions of civil disobedience. This will be the first step in assessing whether an illegal act of protest can be violent, and still count as an act of civil disobedience.

2. The question of violence²⁷

It is normally accepted that civil disobedience is a ‘peaceful’ form of resistance, in that it does not use violence as a means of communication. Some of the leading theories of civil disobedience consider non-violence a key feature of such actions. Consider:

Civil disobedience is a morally justified protest which may not be founded only on private convictions or individual self-interests; it is a public act which, as a rule, is announced in advance and which the police can control as it occurs; it includes the premeditated transgression of legal norms without calling into question obedience to the rule of law as a whole; it demands the readiness to accept the legal consequences of the transgression of those norms; the infraction by which civil disobedience is expressed has an exclusively symbolic character— hence is derived the restriction to nonviolent means of protest (Habermas, 1985: 100).

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

²⁶ I am not naïve about other components of the armed struggle, I do acknowledge that there were definitely acts of violence that do not fulfil the communicative aims of civil disobedience, as I have presented them here. However, for the purpose of this thesis, I focus my attention on the acts of resistance that do fulfil the communicative aims as spelled out in Chapter Two. I will thus devote my discussion exclusively to the acts of sabotage aimed at the destruction of property.

²⁷ I take the title of this section, and of the chapter as a whole, from an excerpt in the speech that Nelson Mandela delivers during the Rivonia trial. Mandela announced that he “must deal immediately and at some length with *the question of violence*”, in order to explain, to resolve and to clarify the misconceptions about violence used by the ANC and MK in their resistance against the Apartheid system (1964, SAHO). Indeed, the topic of violence raises many questions that require explanations, resolutions and serious clarification. Unpacking and attempting to answer these questions will be the aim of the present chapter.

disobedience is giving voice to conscientious and deeply held convictions; while it may warn and admonish, it is not itself a threat (Rawls, 1999: 327).

Anytime the dissenter resists government by deliberately destroying property, endangering life and limb, inciting to riot (for example, sabotage, assassination, street fighting), he has not committed *civil* disobedience. The pun on “civil” is essential; only *nonviolent* acts thus can qualify (Bedau, 1961: 656).

Bedau, Rawls and Habermas – all three influential theorists of civil disobedience – here emphasise its essentially non-violent character. The feature of non-violence is the feature most often associated with civil disobedience – so much so that one could say that that non-violent action has become *synonymous* with acts of civil disobedience. However, defining civil disobedience in this way threatens “to reduce civil disobedience to a purely moral appeal, which sets all hopes on a responsive political system or public sphere” (Celikates 2016: 41). Celikates further asks whether civil disobedience, to be effective, does not require a “real moment of confrontation”, and he argues that it does. I will develop this idea further, but for now let us turn to the specific question of violence.

As I have mentioned, defining “violence” and “non-violence” is less simple than one might imagine. We have to establish whether violence includes only serious violations of the physical integrity of other people, or if it also refers to the violence against property (Govier, 2008: 61). Does violence against oneself fall under this conceptual umbrella? What about violence in self-defence? Would we regard restricting the freedom of movement of uninvolved third-parties as acts of violence? Would exerting psychological pressure on other people count as acts violence? (ibid) These questions are crucial for our assessment of what constitutes ‘violence’, and some influential views, such as Bedau’s for instance, has deemed all of the above instances of ‘violence’, and as incompatible with the ‘civility’ of civil disobedience. In order to illustrate the prevalence of the assumption that all kinds of ‘violence’ are incompatible with the civil nature of civil disobedience, Celikates cites the public’s response to the London riots of 2011. These riots were met with widespread public outrage from people who regarded this protest as violent, often equating the “destruction of private property with the attack on human lives” (Celikates, 2016: 41). These riots were then represented as being apolitical criminal acts that needed a military response rather than a political one (ibid). Celikates takes issue with these stigmatizing reactions, because it neutralises “the normative and political logic also present in urban riots and should remind us that an all too easy juxtaposition of violence and non-violence makes it possible to combine

the celebration of protest that is ‘good’ in terms of who protests how and with what aim with the criminalization of more radical forms of protest” (*ibid.*). Celikates raises important points regarding the implication of our choice to label some acts of protest as ‘violent’ and others ‘non-violent’. The first step here, however, is to deal with the challenge of distinguishing violent from non-violent acts.

On the face of it, we might think that we all have a common-sense notion of what violence entails and thus what a non-violent action would entail. As Carl Cohen (1971: 23) puts it: “[t]he meaning of violence is itself unclear, but most plain men have a good idea of when it has and when it has not taken place”. He then cites the example of punching a policeman in the nose as one that accords with our intuitive idea of a violent action. I agree that this is an uncontroversial example. However, Cohen also cites examples such as spraying another person with paint, or tipping over an automobile, setting fire to or stoning a building as *prima facie* instances of violence. He considers these to be clear instances of violence, because “[v]iolence supposes the use of force in ways that are directly and wilfully injurious to persons or property” (*ibid.*). Presumably Cohen would then argue that those acts of protest that do not cause injury to persons or property are non-violent. As examples of what he takes to be *clearly* non-violent actions, Cohen writes that “I am not violent when I refuse to leave some place in which I am not entitled to remain, or when I peaceably but deliberately refuse to obey some other governmental order. If I refuse to report for induction or to pay my taxes while my government wages an unjust war I am not violent. These are clear cases” (*ibid.*).

It is obviously true that these examples are of non-violent actions. However, Cohen is writing about the relationship between civil disobedience and violence, and three out of four of his examples lie at the outer periphery for what counts as civil disobedience. Refusing to obey a governmental order, refusing to report for induction and deliberately failing to pay one’s taxes in order to protest one’s government’s involvement in an unjust war²⁸, would be far more accurately characterised as instances of conscientious refusal and/or objection. Nevertheless, we can agree with Cohen that these examples are non-violent in nature. Let us

²⁸ Presumably Cohen is referring here to Thoreau’s refusal to pay his poll tax in protest against the government’s slave trade and involvement in the war against Mexico. As mentioned in Chapter Two, this case has become known as the paradigmatic example of civil disobedience, owing partly to the fact that this protest resulted in Thoreau coining the term “civil disobedience”. However, as we saw, this case really lies at the periphery for what counts as civil disobedience and is in fact much closer to conscientious objection.

now turn briefly to the cases that Cohen does not think one can clearly deem as either violent or non-violent:

When I lie down across a railroad track to block the movement of a train I am not violent in an ordinary sense, but that use of my body may prove to be a directly injurious one; when a group of which I am a member blocks passage to an office or building by locking arms, effectively incarcerating those within, I help to inflict some personal injury, although it may be a minor and bloodless one (Cohen, 1971: 23).

In the above examples, the distinction between violence and non-violence is “infinitely graded”, which is why he asserts initially that “the meaning of violence is itself unclear” (Cohen, 1971: 24). However, he does provide us with a point of departure. In his view, we can recognise violent actions as those that are likely to result in “direct physical injury to persons or property” (*ibid.*). In other words, an action is violent when we can reasonably foresee that it will result in the injury of persons or property. For Cohen this is a common sense notion, one that we all share and one which can thus be reasonably agreed upon as a reliable metric for distinguishing violence from non-violence.

In response to Rawls’s restrictive use of non-violence as a requirement for civil disobedience, Brownlee points out that when we talk about violence there is first and foremost the “difficulty of specifying an appropriate *common sense* (my emphasis) notion of violence” (Brownlee, 2007: 21). If we take the likelihood to cause injury (as Cohen does) as the most significant criterion for a common sense notion of violence, then we would have to include “violence to self, violence to property, or minor violence against others” in our conception of the relevant kinds of violence (*ibid.*). However, we should be cautious of over-emphasising the injury or harm caused, as the criterion for assessing the degree of violence of a particular act. It is not necessarily the harm caused to, or suffered by others that makes an act violent. For example, Raz (1979: 267) argues that a strike by ambulance drivers could cause, despite constituting a legal protest, a lot more harm to people than the illegal destruction of private property could.

A similar point is presented by Gandhi’s claim that there is no violence as long as there is no “infraction of a duty” (Haksar, 1986:156). By way of illustration, Gandhi gives the example of milk drivers that decide to cut off the milk supply to the city of New York, because of a grievance with the municipality. In this case cutting off the milk supply would be putting people’s lives in danger and as such the disobedients would be “guilty of a crime against

humanity” (ibid). But suppose that the milk drivers were badly underpaid by their employers and as a result they were starving and unable to support their families. In this case, Gandhi says the drivers would be justified in their action if they had tried “every other and proper method of securing better wages” (ibid). Even if their refusal to deliver milk to the city resulted in the death of babies, Gandhi argues that it was not the duty of the drivers to supply milk to the city under *all circumstances*. As such, cutting off the milk supply under these particular, extraordinary circumstances does not count as an infraction of duty. Thus, even though their actions led directly to the death of babies, it would not count as violent civil disobedience.

Gandhi then applies this same idea to the Indian non-cooperation movement, which involved the boycotting of foreign goods: “If the people in Lancashire... suffer thereby, non-cooperation cannot by any law of morals be held to be an act of violence. India never bound herself to Lancashire” (N.V.R., 168, in Haksar, 1986: 156). Given that the people of India had not “bound” themselves to the people of Lancashire, they were under no obligation to fulfil a duty to ensure that Lancashire does not starve. Therefore, the latter’s suffering is not the result of a violent action, because violence presupposes a violation of duty and is not only contingent on harm caused or experienced (Haksar in Bedau, 1991: 157).

We have seen that Gandhi does not take the relationship between violence and harm caused to be particularly relevant. Rather, he focuses on the relationship between violence and the infraction of duty. Morreall also departs from the traditional understanding of violence, in that he does not think the essence of violence lies in the use of great physical force, as we saw in Bedau for instance. Contrary to the notion that violence is any action aiming to destroy “property, endangering life and limb, inciting to riot”, Morreall argues that physical force is often used against people without it being violent and many violent actions involve no physical force at all. Physical force is thus not the essential feature that makes something violent (Moreall in Bedau, 1991: 137). Thus, violence should rather be understood as any action that violates the value, integrity or ‘sacredness’ of the human being. This ‘value’ is then defined as *the prima facie rights* of individuals, namely the right to one’s own body, which is violated by physical violence; the right to make free decisions and carry them out, which is violated by psychological violence; and the right to own and control one’s private property (Moreall 1976: 35- 47).

According to Moreall, it is a failure on Rawls's part to overlook the second form of violence, namely psychological violence and to focus exclusively on physical violence and violence against property. Moreall holds that psychological violence can often cause significantly more harm than physical violence, and thus it should be given due consideration. In fact, he argues that because psychological violence can cause so much harm, it should be protected more seriously than the right to property, and he criticises Rawls for failing to take violations of the right to psychological freedom and security seriously. However, I disagree with Moreall on this point, since Rawls clearly writes that, “*any interference with the civil liberties of others*” obscures the quality and nature of civil disobedience (Rawls, 1971: 366). I would imagine that the right to make free decisions and carry them out falls under the umbrella of Rawls's civil liberties. Moreall (in Bedau, 1991: 137- 138) further criticises Rawls in his inconsistent treatment of the right to private property. On the one hand, Rawls forbids acts that are likely to damage one's personal possessions, since this violates one's right to property. On the other hand, Rawls grants as justifiable other kinds of violations of this right, such as limiting the control over one's private property in cases of civil disobedience as illegal trespassing.

According to Moreall (in Bedau, 1991: 137) it would only be justifiable to violate these rights if a higher moral claim “supersedes” them.²⁹ Under any ordinary conditions it would not be justifiable to violate a person's right to bodily integrity – that is, to physically harm another person and thus violate their right to determine what may be done to their body. Yet, in situations of self-defence we all seem to think that people are justified in acting violently: “if I am coming at you with a knife, obviously intent on harming you, and you have a loaded gun in your pocket, it is obvious that I no longer have a claim to bodily security” (*ibid.*). Here my right not to be shot by you has been ‘superseded’ by my intent to harm you. Thus, if you are attacked by someone, that person cannot appeal to the right to have his or her bodily integrity respected, since they are violating your right to have the integrity of your body respected and preserved. It is not a controversial claim that violence aimed at self-defence is justified, even if only in part. Moreall's point with these examples is that we can apply these principles to cases of civil disobedience. That is, if it is obvious that the requirements of a particular law is immoral, then one's moral obligation to obey the law, in general, has been superseded by a higher moral claim to disobey the law in question. One can thus violate a law

²⁹ See Waldron as well on supersession (1992).

that establishes people's right to property, or freedom of movement, if the law in question violates an even higher moral right, such as the protection of some people's equality and political freedom, for instance. While we can concede this, it is still not absolutely clear how we can draw a line between employing a degree of violence, and restricting the use of all violence altogether.

We have seen that civil disobedience is commonly understood as being non-violent in character. This is in large part due to the overly restrictive definitions that list 'non-violence' as a definitive feature and a necessary requirement for actions to count as being civilly disobedient (Rawls, Habermas, Bedau). We have also seen that in order to assess whether or not an act of civil disobedience can be violent and still retain its 'civil' quality, we must first agree on the definition of 'violence'. However, there has been significant disagreement about such definition: from Rawls's argument that an act of violence is one that interferes with the civil liberties of other people, to Cohen's argument that violence is any action that results in the physical injury or harm of persons and private property, to Gandhi's account of violence as the result of an infraction of duty. Rawls's account is too narrow and ends up being overly restrictive. Cohen on the other hand, over-emphasises the relationship between violence and injury caused to people and property, which we have seen does not serve as a convincing criterion for distinguishing violence from non-violence. Given that the harm caused by an act of civil disobedience does not *necessarily* make it a violent one, and as such is not a good criterion for establishing the degree of violence of a particular action, we need an alternative criterion to distinguish violence from non-violence.

Furthermore, given this failure to reach a consensus about the definition of violence in the first place, I maintain that its counterpart, "non-violence", does not belong in the definition of civil disobedience. In fact, I will show however, that not all violence needs to be ruled out in order for us to consider civil disobedience a justified form democratic resistance. In order to do this, however, we still need to settle on a convincing means of distinguishing between acts that are violent and non-violent, respectively.

While none of the above criteria have provided satisfactory for drawing such a distinction, I now turn to an alternative approach that circumvents the violence-non-violence distinction in favour of a distinction between justified versus unjustified violence.

3. Persuasion versus coercion

It has been suggested that we can characterise civil disobedience as being either “persuasive” or “coercive”, with the difference to be found in the *means* used to achieve the respective aims (Rosenberg, 1981: 45- 62). Persuasive civil disobedience makes an appeal to the conscience of the public in order to communicate their message. An example of this kind of persuasion would be the temporary occupation or obstruction of a public space. The aim of such action would be to send a message to the public that an injustice has occurred and needs to be addressed. In other words, the aim is to persuade the majority in power that something needs to change (Moraro, 2007). In contrast, coercive civil disobedience is not aimed at *persuading* the public to change their minds, but rather *threatens* them. Coercive civil disobedience seeks to achieve its objective by “threatening the rest of society with the dire consequences the disobedients will bring about unless their goals are attained” (Tella, 2004: 61). Examples of such behaviour may include, acts of sabotage, vandalism, seriously obstructing public spaces or interfering with important communications and transport systems. These examples count as coercion, because the aim is to create such an inconvenience that the state is forced to deal with the issue and engage with the disobedients. However, as we will see in this chapter, the distinction between persuasion as justifiable and coercion as unjustifiable action is not as simple as some of the literature suggests.

If we turn again to Rawls’s requirement that civil disobedience is not a threatening activity, we must conclude that coercion, insofar as it constitutes a threat, is incompatible with civil disobedience. For an alternative, less restrictive approach to the distinction between coercion and persuasion, Smart proposes an account that does not rule out all forms of violence and, thus, *all* kinds of coercion. In his account, Smart turns to an argument presented by Ted Honderich (1976: 109- 115) for a distinction between “coercion of force” and “coercion of persuasion” (in Bedau, 1991: 189- 211). An example of forceful coercion would be if someone were to point a gun at you, threatening to shoot unless you give up your wallet. In such a situation you are technically presented with a choice, however, the threat that you are faced with offers no possibility for an actual choice. Coercion of force thus leaves one with virtually no options to choose from and essentially forces one to act in accordance with the demands of the coercer. The latter kind of coercion proposes a choice for which there *is* a rational and actual alternative available. An example of this could be a director of a company threatening to resign if the board does not vote for a takeover (Moraro, 2007). In such a situation the director would be exercising “coercion of persuasion”, because the board

members would still be able to make a rational choice between the options available to them, i.e. accept the director's demands, or refuse to do so, accept his resignation and appoint a new director.

Honderich (1976: 109-115) argues that a form of "coercion of persuasion" would be permissible in an act of civil disobedience, however the same concession cannot be made for "coercion of force". The latter would not be appropriate for an act of civil disobedience and would be better suited to acts of revolution (ibid). Smart, on the other hand, argues that both forms of coercion can be compatible with civil disobedience. In his view, Rawls's and Honderich's exclusion of coercion of force in civil disobedience, can be ascribed to their fear that the aims associated with revolutionary action, such as seizure of power, overthrow of all authority, might then be included in some acts of civil disobedience (Smart, in Bedau, 1991: 189- 211). However, coercion of force is not used exclusively to achieve the objectives of revolutionaries. Civil disobedients could similarly use forceful coercion to destroy an entire missile base in order to protest a government's involvement in missile warfare, for instance. This serves as an example where coercion of force is used in order to communicate the protestor's denunciation of a *particular* policy and not the system as a whole. In this case, the use of coercion of force would count as an act of civil disobedience, because the protestors are coercing the State in order to achieve partial, *not total*, change (Moraro, 2007).

Thus far, we have seen that Rawls rejects coercion as an option available to civil disobedients and argues that persuasion is the only strategy that civil disobedients may use. In response, Smart rejects Rawls's argument and instead proposes an account of civil disobedience in which coercion does not undermine an action as an instance of civil disobedience. However, a more extensive analysis of the distinction between 'persuasion' and 'coercion' throws up further challenges.

For one thing, some have argued that most of the time, "persuasion involves coercion" (Morreall, 1976: 35- 47; see also Bedau, 1991; Greenawalt, 1987). Consider for instance the case of civil disobedience in which people occupy a building or obstruct a public space, in order to persuade the government to change a policy. This is the kind of civil disobedience that Rawls would permit. However, this is less a case of "pure persuasion" than one of "mild coercion" (Moraro, 2007). In order to illustrate this point, let us consider two of the most well-known leaders of civil disobedience movements, namely Gandhi and Martin Luther King. Both of them were strong advocates of non-violent strategies that were aimed at

persuading their oppressors of the need to change unjust policies. However, both Gandhi and King recognised that the “inconvenience” they caused to their oppressors, was a necessary means in order to focus the attention on the injustice that they protested against (Greenawalt, 1987: 226-243). King’s own words support this view:

The purpose of our direct-action program is to create a situation so crisis-packed that it will inevitably open the door to negotiation (King, 1986 (1963): 54).

Non-violent direct action seeks to create such a crisis and establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue (King in Bedau, 1991: 71).

From this we can conclude that *pure appeals* to persuasion in civil disobedience are not as common as one might think. It seems that even those who are strong advocates for non-violence and strategies of persuasion still employ some coercive methods. The line between persuading the majority that a particular policy is unjust and employing coercive methods to force the majority into seeing that the policy is unjust is not all that clear. According to Moraro, if we were to argue that civil disobedience and coercive modes of action are always mutually exclusive, “there would not be much left” (2007). Moraro is thus taking issue with the exclusion of coercion from acts of civil disobedience, since it would leave very little room for the kind and range of action available to the disobedients. He asks whether it would even be necessary for civil disobedients to break the law at all, if what it is they are aiming for is simply the *persuasion* of the majority.

Moraro is not alone in his concern about failing to acknowledge the role that coercive action can play in civil disobedience. Celikates argues against the reduction of civil disobedience to “symbolic politics” (2016: 43). Civil disobedience does have an intrinsic and fundamental symbolic nature and Celikates does acknowledge this. However, he warns against reducing civil disobedience to pure symbolism.³⁰ He writes that, “[w]ithout moments of real confrontation (that will in many instances be seen and categorised as violent) it would also lose its symbolic power and actually turns into a mere appeal to the conscience of the powers that be and their respective majorities, probably losing any prospect of having practical effects” (Celikates, 2016: 43- 44). The point here is that the necessity to go beyond the purely symbolic and engage in “moments of real confrontation”, is grounded in the symbolic

³⁰ I will say more about this in the next chapter when I discuss the willingness to accept the legal consequences of one’s law-breaking behaviour as a kind of symbolic dramatization.

function of civil disobedience (*ibid*). The requirement of ‘real confrontation’ is thus a condition of the effectiveness of its symbolic aims and function. I will elaborate on this further in the next chapter, but it is important to note here that although the persuasive aims, or ‘symbolic function’, of civil disobedience is central, it is often, if not inevitably, tied up with coercive intentions.

While I agree, by and large, with the preceding arguments, I think the relationship between coercion and persuasion needs to be clarified further, particularly as it pertains to the aims of civil disobedience. I agree, for the most part, with Honderich’s distinction between coercion of force and coercion of persuasion. However, for the purpose of this thesis, I suggest a narrower distinction between coercion that aims to persuade and coercion that aims to seriously or fatally injure. There is an important difference between using coercion to persuade people to listen, or pay attention to you, and using coercion to force people into doing something that they otherwise would not want to do.³¹ For civil disobedients it is sometimes necessary to use coercive methods in order to get the state and civil society to listen to their message and pay attention to their grievances. However, this is not the same as using coercion to force the state to meet your demands, without giving them any choice in the matter. Using coercion to persuade others to engage in a dialogue about the civil disobedients’ concerns for justice, while it may employ violent acts, such as vandalising or destroying property, still allows the state and civil society the choice to respond in whichever way they want. By using threats aimed at people’s personal safety, or even their lives, the civil disobedients would be *forcing* the state to meet their demands, since the choice between changing a law or policy and one’s life, is not a choice that can be meaningfully made by anyone. I thus conclude that civil disobedients have available to them *some* degree of coercion, but only insofar as its larger aims are to communicate and to persuade.

³¹ For example, a civil disobedient may vandalise or completely destroy a government building (as Umkhonto we Sizwe did during the anti-Apartheid struggle) in order to get people to pay attention and to create a situation of such crisis that the state and the wider public are forced to engage. This is not to be equated with threatening someone’s physical safety as a way of getting them to comply with your demands. While vandalising a building could be seen as coercion, in that it forces people to pay attention, where they may not have if it were a peaceful protest or petition, it is not the same as threatening someone’s life in order to get them to change a particular law or policy. While the former aims to persuade people to change their minds or to act according to the civil disobedients’ demands, the latter constitutes violent coercion that deliberately fails to engage in dialogue or makes any attempts at persuasion.

By specifying the kind of coercion that is allowed in acts of civil disobedience, we are also in a better position to specify what kind, and how much violence is allowed. Violence that aims to persuade people to enter into a dialogue is compatible with the communicative aims of civil disobedience. On the other hand, violence that aims to injure and threaten life in order to coerce people into doing something, is in the first place morally unjustifiable and in the second place, fundamentally incompatible with the aims of civil disobedience. We thus have two separate issues to deal with, namely violence and coercion. While violence always entails coercion, coercion is not always violent. Recall for instance the company director who employs coercive means in order to persuade his board members to vote in favour of a takeover. This is a case of coercion that in the first place does not employ violence and secondly, is aimed at persuasion (the director wants to persuade the board members to agree that a takeover is the best way forward). So, we can have coercion in civil disobedience that is nonetheless used in a way that is morally justified, i.e. in order to persuade. Violence can then also be used as a means of persuasion, in a way that is morally justified. Violence that aims to persuade cannot at the same time use threats aimed at the physical safety of people, but it can be justified for civil disobedients to use violence that is aimed at persuading others to enter into a dialogue so that they may be persuaded and convinced accordingly.

I have argued that coercive measures can be employed by civil disobedients, but only insofar as they aim at persuasion. This is the only kind of coercion that is compatible with the communicative aims of civil disobedience, that is, with the overall aims to communicate a concern for justice and to persuade the state to change a particular unjust law or policy.³² Moreover coercion that aims to force others to meet your demands is also fundamentally incompatible with the ideals and underpinnings of democracy. Given that this thesis is situated within the context of the democratic polity, it is only fitting that we address the particular relationship between democracy and justifiable coercion here. This next section will focus on the protection and promotion of individual autonomy as one of the most significant and fundamental features of democratic life. It will further be framed as the

³² It is crucial for the civil disobedient to aim for persuasion, not only because they want a law or policy to change, but because they want the state and society to sympathise with their cause. That is to say, the civil disobedient appeals to the principles of justice and points out to the state that justice is not being upheld. The point is that civil disobedients want the state to *want* to advance justice and to change laws and policies that do not further the advancement of a society that is considered just by all its citizens.

grounds on which we can distinguish justifiable from unjustifiable coercion in acts of civil disobedience.

4. Civil disobedience and autonomy

As we have seen, acts of civil disobedience, despite their illegal nature, are compatible with democratic ideals. That is, under democratic regimes, civil disobedience can be justified as a ‘form of address’, as a means to communicate a concern about a particular law or policy to the state and the wider society. We have also considered the prevalent view that civil disobedience “may warn or admonish”, but “it is not itself a threat” (Rawls, 1999:321). It became clear that it is precisely this assumption on the part of Rawls and followers that is behind the widespread view that non-violence is a necessary condition of civil disobedience. The usual justification for this view is that the use of coercion against others threatens the right of each agent to express their views freely and without coercion (Moraro, 2014: 63). By coercing others, one is disrespecting their autonomy and treating them as a means to an end (*ibid*). Democratic citizens therefore ought only to employ persuasive forms of address, so that they treat one another with the respect “due to autonomous self-legislators” (*ibid*), which is why the use of some kinds of coercion is one of the benchmarks for distinguishing civil from uncivil disobedience.³³

In what follows, I will argue that acts of civil disobedience that comprise some degree of coercion may still treat others as autonomous agents and thus remains compatible with the democratic commitment to individual autonomy. Essentially, I will attempt to counter the Rawlsian claim that “any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one’s act” (Rawls, 1999: 321). I will thus show that an act of civil disobedience *can* be civil even when it uses coercion to interfere with people’s liberties. My argument is twofold. In this first place, I show that using particular kinds of coercive measures as a form of address in the democratic sphere does not necessarily infringe on the individual’s status as an autonomous agent and secondly, it may in fact fulfil a positive duty to *promote* the autonomy of the people upon whom the coercion is applied, in the sense that it encourages democratic participation and civic engagement³⁴. In order to see how coercive

³³ For a detailed discussion of ‘civility’, see Cheshire Calhoun, “The virtue of civility” (2000).

³⁴ This argument is derived from Piero Moraro, “Respecting Autonomy Through the Use of Force: the Case of Civil Disobedience” (2014).

interference with some civil liberties may form part of the requirement to respect persons in their capacity as autonomous agents, we first have to make sense of the concept ‘autonomy’.

Much of the justification for a democracy relies on the assumption that people are, for the most part, capable and qualified to govern themselves, for “it seems self-evident that people ought not to govern themselves if they are not qualified to do so”. (Dahl, 1989: 95) This is why we exclude children from the democratic franchise, for instance, because we do not think that they are capable or qualified to govern themselves (Moraro, 2014: 64).³⁵ Central to a democracy is thus the value of individual autonomy. As we have seen in Chapter One, part of the reason why we value a democratic regime is that it is what best allows equality of self-government or ‘self-legislation’ on the part of its citizens (*ibid*). Although the individual citizen has an obligation to comply with the results of a democratic election even if the results do not coincide with her preferred choices, her choice is still considered to have an influence on the final outcome. The nature of a democratic election is such that it cannot satisfy everyone’s choices, but the final outcome is the result of a confrontation between varying choices (Manin, in Przeworski, 2010: 359). If we start from this assumption, we could say that the value of democracy should not necessarily be attached to the fact that each individual “obeys her own will”, but rather that each individual is able to *take part* in a process of “collective self-legislation” (Rostboll, 2008: 104-5, 210). In light of this contention, it seems that the use of coercion might very well be incompatible with the most rudimentary principles of democratic systems, in so far as the latter aims to promote the individual’s ability to participate in ‘collective self-legislation’, whereas the former interferes with it by “seek[ing] to impose choices she may not endorse if un-coerced” (Moraro, 2014: 65) By exercising coercion over other people, one is effectively dismissing their status as an autonomous agent who deserves to be treated in a manner that is free from coercion. In fact, it has been claimed that while an agreement may be reached by using coercion, that which is the result of coercive violence, does not subjectively count as an agreement (Cooke, 1998: 120).

By focusing on individual autonomy, we are considering the extent to which a person has the ‘effective’ ability to be in control of their own life by choosing and then pursuing their own conception of the good (Wall, 1998: 128).³⁶ According to Moraro (2014: 65) it is this ability

³⁵ For an argument challenging this assumption, see Joanne Lau, “Two arguments for child enfranchisement” (2012).

³⁶ Herein lies the implication that some people can be more autonomous than other people. I agree with this and will attend to this point further on in this section.

to define the course of one's own life that makes an autonomous agent worthy of respect. That is, a person ought to be respected for the ability to give direction to their life. Autonomy thus does two important things: first, it describes something that is specifically and importantly human, namely the capacity to make choices. Secondly, it sets a normative criterion about how we ought to treat one another as autonomous agents (Moraro, 2014: 65). This is relevant, because it follows from this point that people have a right to be respected as autonomous agents, in other words, they have the “right of autonomy” (Hill, 1991: 48; Dagger, 1997: 30- 32; *ibid*).

There are of course several ways of showing one's respect for someone or something³⁷. The kind of respect that I am interested in here is not an attitude based on personal inclination. That is to say, it cannot be derived from a subjective evaluation of the person in order to establish whether they are worthy of respect or not. I am concerned instead with an attitude of respect that relies on that person's “*objective* worth and dignity” (Herman, 2000: 153). In doing this, one respects other individuals because of their intrinsic characteristics, such that their worth is not contingent on one's own interests and motivations.³⁸ Insofar as the respect due to an autonomous agent does not rely on a subjective evaluation of the individual, it is also not grounded in the agent's merit. In fact, this attitude of respect is precisely intended to treat the individual in such a way that is not conditional on merits or demerits (Darwall, 2006: 123). According to Darwall, we ought to show respect for someone's dignity because of who they are and not because of what they have achieved (*ibid*). We may be confronted with scenarios in which we do not feel that a particular person is worthy of respect, but even a person whose actions are morally objectionable ought to be treated in a way that respects their status as an autonomous agent. Even when someone acts wrongly, one still owes it to their status as an autonomous agent to treat them with respect, which may mean holding them accountable for their actions. Thus, “a sane offender may claim a right to be punished rather than be subjected to some other [...] preventative treatment: to punish her is to treat her still as a rational agent” (Duff, 1986:186).

³⁷ See Feinberg, 1975: 1-30; Hudson, 1980: 69-90; Cranor, 1997: 30-32 and Dillon, 2010: 153.

³⁸ This approach is in line with Kant's Formula of Humanity, which would require that individuals be respected for their intrinsic value as an end in themselves, and never treated “merely as a means” (Wood, 1999: 18). I will discuss the idea of respecting persons in their status as autonomous agents, and as such treating them as ends in themselves in the following section. The underlying idea in this section is to use the categorical imperative as a gauge for how much violence and more specifically, what kind of violence the democratic citizen can use in acts of civil disobedience.

A further noteworthy point that arises from the objective approach to respecting individual autonomy is the shift in focus from *outcome* to *disposition* (Moraro, 2014: 65). Treating people in accordance with their right of autonomy cannot be equated with making provision for their well-being (*ibid*). There are instances in which our showing respect to people's dignity may cause great inconvenience to them (Strawson, 2008 in Moraro, 2014: 65). This is of central importance for my discussion, because I will not argue along the paternalistic lines that interfering with people's choices is permissible insofar as it is in their best interest. I am not concerned with respect that aims at providing for people's welfare, but rather respect that is due to people in their status as autonomous agents.³⁹

Although individuals may share with one another the *capacity* to make autonomous choices, individuals do differ with regards to whether they are in the *condition* to make such choices (Feinberg, 1986: 31). Raz suggests, for instance, that a person who is being kept prisoner would not be able to exercise her capacities as an autonomous agent because of her restrictive situation (1986: 373- 374).⁴⁰ This shows that merely refraining from interfering with the choices of others is not 'tantamount' to showing respect for their status as autonomous agents (Moraro, 2014: 66). In fact, someone who is free insofar as they are free from interference, "will have attained a perfectly useless state if she lacks intelligence, skills, knowledge, and emotional health" (Berofsky, 1995: 15). It is therefore that I hold the absence of interference to be the bare minimum requirement and as such, insufficient for demonstrating one's respect for an individual's right of autonomy.

Similarly, we can see that a person without a basic education, even if free from interference, would not be able to fully exercise their capacities as an autonomous agent. The right of autonomy can thus be framed as being both a positive and a negative right, in that it bestows both positive and negative duties on others.⁴¹ If we are obligated to respect the right of

³⁹ See Darwall (2006: 122-130) for an important distinction between respect and 'care'.

⁴⁰ This point is similarly made by Nelson Mandela when he refused release from prison on the condition that the ANC renounces its violent tactics. Mandela made the following declaration, "Only free men can negotiate. Prisoners cannot enter into contracts [...] I cannot and will not give any undertaking at a time when I and you, the people, are not free. Your freedom and mine cannot be separated. I will return". [Available at

http://www.mandela.gov.za/mandela_speeches/before/850210_udf.htm]

⁴¹ This view is defended by, among others, Young, *Autonomy: Beyond Negative and Positive Liberty* (1986); Oshana, "Personal autonomy and society" (1998); Pogge, "Realizing Rawls", (1990) and Habermas, *Between Facts and Norms*, (1996).

individuals to direct the course of their lives, then it stands to reason that we ought to attempt to promote their exercising of that right.

The right of autonomy therefore has a social dimension (Moraro, 2014: 66). In order to be autonomous, we need other people. As Dagger (1997:39) writes: “the awareness of ourselves as capable of choice is something that others teach us, wittingly or not”. The point here is that our capacity to make autonomous choices is partly due to the backdrop of our shared values. Thus, while autonomy requires a degree of independence of choice, this can still only be realised from within a shared context (Mendus, 1989: 96-97). The effective ability to make autonomous choices therefore means that one is in the condition to revise or reject one’s own ventures according to criteria that are partly determined by the context in which we find ourselves (Moraro, 2014: 66).

In the next section I will show that, in some cases, acts of civil disobedience can employ both violent and coercive means of communication, while still respecting persons in their status as autonomous agents. However, before I move on to this discussion, I must first make an important distinction between ‘autonomy’ and ‘freedom’. The notion of freedom pertains to a sphere of human agency that is much narrower than autonomy. By this, I mean that a person can be ‘free’ at a particular moment in time, whereas one can only say that a person is ‘autonomous’ once a substantial part of their life has been evaluated (Dworkin, 1988: 15-16). For a person to be considered autonomous, one needs to assess whether they are actually ‘in control’ of their life, in other words whether they are able to make the choices that are important to the pursuit of their conception of the good (Moraro, 2014: 66). Autonomy plays an important role in the individual’s life, in that it connects her identity to her values and desires (*ibid*). There is a distinctive difference, for example, between making the choice to have either coffee or tea, and the choice between supporting one political party rather than another. The latter reflects, to a certain extent, the choice to be a particular kind of person, who endorses a particular conception of the good. The choice, for example to “cast a Klan ballot is to identify oneself in a morally significant way with the racist policies that the organization espouses” (Brennan & Lomasky, 1993: 186), whereas the choice to drink coffee rather than tea, says very little about the kind of person that has this preference. Thus, while autonomy requires a degree of freedom, freedom on its own is not sufficient for making autonomous choices (Young, 1986: 8). One can thus infringe on someone’s freedom, without depriving them, at the same time, of their status as an autonomous agent.

If we accept that civil disobedience can incorporate some coercion, we must still reject what Moreall refers to as “naked coercion” (1976). In Moreall’s terms, ‘naked coercion’ refers to coercive means used to make unreasonable demands, in the sense that the demands are not conscientious. In this case, the disobedients would not be acting in a way that demonstrates their serious and sincere beliefs that a particular law is unjust and in need of reformation. Instead of acting from sincere and serious beliefs, the disobedients would be acting on the basis of more particular, personal beliefs, such as religion, ideology or self-interested motives (Moraro, 2007). In the absence of conscientiousness, such acts would not count as instances of civil disobedience, but rather as an attempt to impose one’s own views and agenda onto others.

Nevertheless, the possibility of *coercive* civil disobedience is not yet justification for *violent* civil disobedience. Moreover, even if we were to argue that under particular conditions, some form of violence might be required in order to communicate one’s grievances in the public sphere, it still remains a challenge to draw a sharp distinction between acts of violence that are justified and violence that is not. We are therefore in need of an argument that indicates to what extent civil disobedience may be violent. I do think that civil disobedience can involve some degree of violence, when the law in question is seriously unjust. However, I will show in the next section that civil disobedience can never allow for direct physical harm, such as the aims to seriously injure opponents or third party bystanders. I will argue that this kind of violence contravenes the communicative and conscientious nature of civil disobedience.⁴²

5. How much violence should we allow in acts of civil disobedience?

As I have argued above, violence is not a defining feature of civil disobedience as it is in other forms of resistance, such as revolution or guerrilla warfare, but it may still be employed as a means of action in civil disobedience. However, if we take this stance, we are in danger of falling into a slippery-slope argument: how do we distinguish between allowing *some* violence and allowing *a lot* of violence in acts of civil disobedience? It appears that we are in need of criteria for distinguishing between the kind of violence that would be justified in

⁴² See Chapter Two for a discussion of conscientiousness and communication as fundamental and necessary features of civil disobedience.

terms of the overall aims of civil disobedience and the kind of violence that would not be justifiable.

Given the account of civil disobedience that I have presented thus far, I think it apt to argue that any violence that aims at the serious injury or death of people would contravene the communicative nature of civil disobedience. I ground my argument on Kant's Formula of Humanity: "So act that you use humanity, whether in your own person or that of another, always at the same time as an end, never merely as a means" (Kant, 1965 [1785]: 52; Abbot, 2008: 46). This is the second formulation of the categorical imperative and according to Myskja (2008: 215) it essentially amounts to the prohibition of coercion. Treating others as an end in themselves and never merely as a means, can thus be interpreted as our basic moral duty "to act in accordance with the trust others place in us" (*ibid.*). In a democracy citizens trust one another to respect their individual autonomy and to treat them in such a way that they demonstrate this respect. The central underpinnings of the democratic ideal, namely, political autonomy, equality of interests and reciprocity, would be seriously undermined if people were merely treated as a means to someone else's political end. The commitment to the ideal of democracy is thus compatible with Kant's Formula of Humanity and serves as a helpful point of departure for establishing the relation that democratic citizens ought to have with one another. In terms of this particular discussion, I will show that one can apply this formula to the fundamental communicative nature of civil disobedience and consequently, make a sharp distinction between violence that is permissible and violence that is not.

Following from what I have discussed in Chapter Two, civil disobedients aim to engage representatives of the government and the rest of society in a dialogue about the injustice of a particular law or policy. In this communicative enterprise, the disobedient assumes that the audience at whom they are aiming their message is capable of rational thought, and that their fellow citizens and government representatives are therefore able to understand the message that they want to communicate. It is obvious that any communication with someone that is unable to understand the message, as a result of an impairment of their rational faculties, is likely to be unsuccessful.⁴³ Agents of civil disobedience thus choose to engage in civil disobedience, precisely because they take the state and the rest of society to be rational

⁴³ It is important to note that there is a difference between someone that is *incapable* of understanding a message because of some impairment that leaves them unable to communicate successfully, and someone that *refuses* to understand the message, because they are unwilling to engage in a dialogue.

agents, capable of receiving and understanding the message. The recipient of the message would thus be expected to both receive the message and to issue a response to it. Following from this perspective, the recipient would be, in Kantian terms, *the end* of the communicative enterprise. Taking this to be the case, we can then start by assessing the extent to which civil disobedience involves violence, according to its treatment of others. To clarify this, let us consider the following two (hypothetical) cases of anti-war protests.

In the first case, think of anti-war protestors that aim to cause direct physical harm to a third party, such as killing or kidnapping a soldier in order to protest against that very policy. In the second case, the protestors act violently by damaging and destroying property, such as damaging military weapons or airplanes, in order to protest unjust warfare. In both cases the protestors are aiming to communicate to the representatives of their government and to their fellow citizens, their concern about the country's war policies.

In the second example, the protestors were clearly using violence in order to cause a great inconvenience and have their message received by the state and their fellow citizens. They are violating someone's property rights, with the aim of persuading the recipients to pay attention to their message that the military policies are due for serious re-examination. It may be said that in this case, the protestors are using the people whose property rights they are violating, as a *means* to achieve their ends, given that the destruction of their property is what gives their protest the weight and seriousness necessary to incite effective change. However, the people on whom the violence is inflicted are, in this case, also treated as the *end* of the action, because the disobeidents are appealing to their rationality (Moraro, 2007). The disobeidents thus assume that the state and their fellow citizens will understand the reasons behind their actions, that is, their serious and sincere concern about the injustice of the war policies. The protestors thus still view their society and the state as their interlocutor, in other words, their aim is one of persuasion directed towards the society as an end of their illegal action.

The same cannot be said for the first example mentioned. In that case, the use of violence completely disregards the individual as a rational being. In killing the soldier, the protestors treat the individual merely as a means to force the state and their community to listen to their message and accept their demands. There is no way in which they could be appealing to the rationality of the soldier whom they have killed. This kind of violence would be treating the person merely as a means to a further end, and not also as an end in itself (Moraro, 2007).

By referring to Kant's Formula of Humanity and applying it to cases of violent civil disobedience, we are closer to understanding why seriously injuring or possibly killing other people contradicts the fundamental nature of civil disobedience as a communicative act. We can thus look to Kant's formula as a gauge for *how much* violence and more specifically, *what kind* of violence is permissible. As mentioned, those who engage in civil disobedience do think that communication with the state and their wider community is possible (Sabl, 2001, Brownlee, 2007: 8). They think this because they assume the state and their fellow citizens to be in possession of their rational faculties, so that they are able to receive and understand the communicated message. If we then completely disregard the rationality of other human beings by seriously or fatally injuring them, that is treating them as a mere means for our ends, we are then also disregarding the fundamental communicative nature of civil disobedience.

Raz (1976) also makes an argument in favour of justifiable violence in acts of civil disobedience. As I have already mentioned earlier in this chapter, Raz's example about ambulance drivers going on strike illustrates that non-violent action can be equally, or more harmful than violent action. His point, which is echoed by Morreall, is that non-violence is not necessarily a guarantee of civil liberties and violent action does not necessarily violate people's civil liberties. This goes against Rawls's argument that violent action interferes with the civil liberties of people. Brownlee lodges a similar critique against Rawls's account of exclusively non-violent civil disobedience. She argues that the use of violence as a coercive measure can *support* rather than undermine the communicative aspect of civil disobedience (Brownlee, 2007: 8). There is no general reason why civil disobedients should not be permitted to use violent means of communication. In fact such violence may be necessary in order to preserve or re-establish the civil liberties and rights that unjust laws and policies have failed to uphold (Moraro, 2007)⁴⁴. The distance between the oppressed and the oppressors may be so extensive that, "employing some form of violence may be necessary in order to try to bridge this gap" (*ibid.*).

What conclusion can we draw from the discussion so far? First, we have seen that employing a degree of violence does not necessarily deprive civil disobedience of its 'civil' character. I

⁴⁴ Think again of Morreall's argument about superseding moral claims. That is to say, when the state is failing to protect one's civil liberties, one's moral claim to have those liberties protected may be superseding the right of the state to be obeyed, or other's rights to property or freedom of movement, for example.

have tried to show that *some* violations of civil liberties are justifiable and not *none whatsoever*, as Rawls claims. However, these violations of civil liberties are only justifiable in cases where the agents of civil disobedience are motivated by a serious and sincere⁴⁵ conviction of injustice present in their society. It may be the case that the use of coercion is the only way to have one's voice heard and one's message successfully communicated (*ibid*).

Nevertheless, violence aimed at seriously or fatally injuring can never be justified in civil disobedience, as this would contravene the fundamental communicative nature of civil disobedience. Therefore, it is crucial that the kind of coercion or violence employed is used to engage in a dialogue, with the aim to persuade, to change people's minds or to win a change of heart. Whatever the case may be, coercion and violence cannot be used to threaten someone's physical safety or to force them into doing something they would otherwise not choose to do. I am certainly not endorsing violent civil disobedience under all, or most circumstances. Here I am in agreement with Raz's (1976) view that violence should always only be considered with caution and generally discouraged, for three reasons. First, we should discourage violence, because we should always avoid any kind of harm towards others. Second, the justified use of violence in certain situations may encourage the use of violence in situations where it would not be similarly justified. Third, the nature of violence is such that the use of it would result in an emotionally charged response and as such one could upset potential sympathisers and further confirm opponents' opposition⁴⁶. I therefore do not hold that violence is a necessary requirement for justifiable civil disobedience. However, as we have seen, this does not compel me to argue that acts of civil disobedience must necessarily be non-violent.

6. Civil disobedience in practice

In this section I will further develop the claim that the use of coercion and violence as a means of communication may, nonetheless, be compatible with the democratic duty not to infringe on others' autonomy, as well as the communicative aims of civil disobedience. In order to illustrate this argument, I will draw on the violent and coercive tactics employed by

⁴⁵ See Chapter Two for a detailed discussion of seriousness and sincerity.

⁴⁶ For a practical example of this kind of irrational and unreasonable response, we need only look to the South African National government's response to the violent tactics employed by the ANC's military wing, Umkhonto we Sizwe. The government labelled the actions of the MK as acts of terrorism, and subsequently treated the leaders and members as terrorists.

the ANC's military wing, Umkhonto we Sizwe in their struggle against Apartheid laws and policies.

In the speech that Nelson Mandela delivers from the dock during the Rivonia trial, he speaks at length about the formation of Umkhonto we Sizwe, why they started the organisation and what their particular aims and tactics were. In his account, tensions had become so high as a result of the continuing oppressive government policies that violence by African people had become inevitable (Broun, 2012: 71). Therefore Mandela and his fellow founding members felt the urgency to start an organization with responsible leadership, in order to direct and channel the rising anger of the oppressed. Part of the motivation for starting Umkhonto was to ensure that outbreaks of violent terrorism did not start spreading across the country, and that the struggle against oppression would not culminate in what seemed to be heading towards an inevitable civil war between races. A second reason for founding Umkhonto was as a result of the failure that non-violent protest had brought African people in the fight against racial oppression. This failure to achieve any change by means of peaceful protest was a frustration shared among many black South Africans and particularly the struggle leaders, as expressed in the words of former ANC President, Chief Luthuli:

who will deny that thirty years of my life have been spent knocking in vain, patiently, moderately, and modestly at a closed and barred door? What have been the fruits of moderation? The past thirty years have seen the greatest number of laws restricting our rights and progress, until today we have reached a stage where we have almost no rights at all? (Steinberg, 2006: 267).

In his speech, Mandela explains that Umkhonto we Sizwe felt that without violence there was no alternative means for African people succeed in their struggle against white supremacy. As a result of the Nationalist government's continuing suppression of anti-apartheid resistance, any and all lawful modes of demonstrating and expressing opposition had been closed off to African people. This meant that African people had to choose either to "accept a permanent state of inferiority, or to defy the Government" (Mandela, 1964). They chose the latter.

Umkhonto we Sizwe initially demonstrated defiance of the government by deliberately breaking the law in such a way that avoided any use of violence. However the government's response to these initial acts of civil disobedience was to establish new legislation and impose harsher punishments on any government opposition, so that the any attempts at resistance

were essentially crushed by government policy and forceful response (*ibid.*). It was then that the leaders of Umkhonto we Sizwe resorted to violent tactics. However, for the sake of general moral justification and commitment to the overall aims of the organization, Mandela went to great lengths to explain precisely what this violence entailed in order to emphasise that it was not terrorism (Broun, 2012: 71- 72). Umkhonto we Sizwe was founded as a deviation from the ANC, but its members were all members of the African National Congress, and were committed to strategies of non-violence and negotiation, as we saw with regards to the Defiance Campaign in the introduction to this thesis. There was thus much deliberation before the MK leaders concluded that violent forms of protest would be the only way to continue their political struggle. In the Manifesto of Umkhonto we Sizwe, the leaders proclaimed the following,

The time comes in the life of any nation when there remain only two choices- submit or fight. That time has come now to South Africa. We shall not submit and we have no choice but to hit back by all means in our power in defence of our people, our future, and our freedom (MK Manifesto, 16 December 1961).

While the leaders of MK were ultimately in favour of non-violence and aimed above all for racial peace and equality, they became alarmingly aware that South Africa was headed towards a racial civil war. According to Nelson Mandela, one of the overriding motivations for employing “properly controlled violence” was precisely to avoid the radical outbreak of violence that might result in a civil war (Joffe, 2007: 158- 159). Umkhonto we Sizwe thus considered the tactics available to them. Mandela claims that there were four forms of violence available to them as legitimate strategies of resistance. The strategies were as follows: sabotage, guerrilla warfare, terrorism, and full scale open revolution. The MK chose to adopt strategies of sabotage and exhaust before turning to any other strategies. The MK leaders specifically chose to start with acts of sabotage, because it would not involve the loss of life, and thus offered the “best hope for future race relations” (Broun, 2012: 73). The belief was that by avoiding threats to life, bitterness and resentment between races would be minimised and democratic government would eventually become a reality. These aims are clearly expressed in another excerpt from the MK Manifesto, which reads as follows,

We of Umkhonto we Sizwe have always sought to achieve liberation without bloodshed and civil clash. We hope, even at this late hour, that our first actions will awaken everyone to a realization of the disastrous situation which the Nationalist policy is leading. We hope that we will bring the Government and its supporters to their sense before it is too late, so that both

the Government and its policies can be changed before matters reach a much more desperate state of civil war (MK Manifesto, 16 December 1961).

The initial plans for sabotage were based on careful and meticulous analysis of the particular economic and political situation in South Africa. The leaders of Umkhonto we Sizwe believed South Africa's dependence on foreign trade and capital to be particularly significant and a strategic target for their sabotage plans (Broun, 2012: 71- 72). The sabotage was thus involved the destruction of power plants and interference with rail and telephone communications, which was aimed at steering outside capital away from South Africa (*ibid.*). The reasoning behind these actions was that it would put strain on the economy of the country and it would eventually compel voters to reconsider their position and loyalty towards Apartheid policies. The attacks aimed at the economy of South Africa were paired with the sabotage of government buildings and similar symbols of the Apartheid system. These acts of sabotage were intended to serve as a means of inspiration for African people, i.e. as a way for the leaders of the struggle movement to show their followers that they have not given up the fight for liberation (*ibid.* 73). As mentioned, the motivation for using controlled forms of violence was also a solution for the rising tensions and the desperation of oppressed black South Africans. By planning attacks on government buildings and other concrete symbols of Apartheid, Umkhonto we Sizwe were able to provide an outlet for those people who were applying pressure for the adoption of violence (Joffe, 2007: 158). By taking these calculated steps, Nelson Mandela and his fellow MK leaders could show the people of South Africa that they were taking the struggle very seriously and were committed to using any means necessary in order to ensure the political freedom and racial equality of all South Africans. A further motivation for turning to more extreme measures in the anti-Apartheid movement was to raise both national and international awareness, and to rouse sympathy in other countries for the cause (Motlanthe, 2013: 13). According to Mandela, the hope was that the international world would put more pressure on the South African government to abolish the Apartheid laws and policies and start working towards establishing a democratic South Africa.

What does this brief overview of Umkhonto we Sizwe demonstrate? I maintain that the conscientiously motivated plans for sabotage launched by MK show that acts of civil disobedience can use violence as a means of protest and still adhere to the democratic requirement for respecting individual autonomy. While Umkhonto we Sizwe certainly employed violence in their sabotage strategies, they made a very clear distinction between

violence aimed at buildings and infrastructure on the one hand and violence aimed at persons on the other. The latter would not have been compatible with their aims, which were to ensure the controlled use of violence that would not result in the injury or loss of life. Their long term aims were to establish racial peace and equality, which they believed would not be possible if they used violence against persons, but would rather result in a civil war between races and a further escalation of violence. So, while there is no doubt that acts of sabotage constitute violence, it can nevertheless be compatible with the aim to persuade. It is possible for civil disobedients to employ acts of sabotage as a way to persuade the state, their society and the international world to pay attention to their cause and engage in a dialogue about the demands for justice. We should therefore not be too hasty in characterizing an action as ‘undemocratic’ on the basis that it employs violence as a means of communication. As we have seen, there are some acts that do infringe on one’s freedom temporarily, but which does not affect one’s position as an autonomous agent, capable and able to participate in the democratic process. It is important to note the difference between using a degree of force to open up a dialogue, and forcing people to choose to accept one’s demands. Thus, we can conclude that the use of a degree of violence is not incompatible with acts of civil disobedience and does not render such acts ‘undemocratic’.

7. Conclusion

In this chapter I have addressed the seeming incompatibility between civil disobedience as a *democratic* practice of contestation and civil disobedience as an act that employs violence. As we have seen, it is generally accepted that an illegal act of protest is characterised as civil disobedience if it aims for persuasive communication, rather than coercion. The reason given for this is that by employing coercion and posing threats to one’s fellow citizens, one fails to respect their status as autonomous agents. For an act of civil disobedience to be justified by democratic principles, it must adhere to the duty to respect individual autonomy, by aiming to persuade rather than to coerce. The civil disobedient must therefore acknowledge that each individual retains the final say as to whether or not they decide to support their protest. The civil disobedient is thus obligated to respect the individual autonomy of the targeted recipients of their message, and act in such a way that treats others at the same time always as an end in themselves and never merely as a means to achieving their ends.

My intention with this chapter was to challenge the view that acts of civil disobedience may never use violence as a means of communication. The point was to show that non-violence is not a necessary feature of civil disobedience and that, conversely, the ‘civil’ character of civil disobedience is not necessarily compromised when a degree of violence is applied. I should reiterate that I do not mean to endorse violent civil disobedience and as I have said, violence should generally be discouraged (recall Raz’s admonitions in Section Five above). My point, however, is that non-violence is not a *necessary* condition for civil disobedience. Rather, a degree of violence, insofar as it respects the autonomy of individuals and does not deprive civil disobedience of its communicative nature and aims, may be employed in civil disobedience and still be regarded as a genuinely democratic practice of contestation.

While, I have shown non-violence *not* be a necessary condition for civil disobedience, I do hold *the willingness to accept the legal consequences of one’s illegal behaviour*, to be a necessary requirement for civil disobedience. This is the topic of Chapter Four. Here I will show that the willingness to accept the legal consequences of one’s law-breaking behaviour can both demonstrate the seriousness and sincerity of one’s convictions and express “disobedience to the law within the limits of fidelity to the law” (Rawls, 1999: 322).

CHAPTER 4: THE WILLING ACCEPTANCE OF PUNISHMENT

1. Introduction

This chapter will largely be devoted to exploring the relation between civil disobedience and the rule of law. This is a particularly important relation to establish, given that civil disobedience is by definition, an illegal act and the aim of this thesis is to show that it is nevertheless, a legitimate democratic practice. The discussion will thus centre on the question of whether or not an agent should be willing to accept legal punishment for their illegal actions. John Rawls is one of the most prominent advocates of a logical and necessary connection between civil disobedience and punishment (Buttle, 1985, 650). According to Rawls it is “the willingness to accept the legal consequences of (their) conduct” that distinguishes civil disobedients from militant resisters, as well as ordinary criminals (Rawls, 1971: 366- 367). Rawls writes that while “the militant may try to evade the penalty since he is not prepared to accept the legal consequences of his violation of the law”, civil disobedience is characterised as “disobedience to law within fidelity to law” (*ibid.*). If civil disobedients demonstrate an ‘unwillingness’ to accept punishment for their law-breaking behaviour, this may lead others to question the sincerity of their motives, “(w)hen we observe the heroics of defiance being followed by the dialectics of legal evasion, we question the sincerity of the action” (Hook, in Murphy (ed.), 1971: 56). Thus, the *meaning* of an act of civil disobedience can change according to whether the protestors choose to escape and conceal their identity, or adhere to the police’s instructions and accept arrest and possible prosecution. This chapter intends to show why the latter kind of response is a ‘*pro tanto*’ requirement of civil disobedience.

In this chapter, I will argue that the civil disobedient is required to accept accountability for their illegal action. That is, by breaking the law, the civil disobedient must be willing to face the risk of punishment. By engaging in acts of civil disobedience, agents must then not try to escape arrest, they must be willing to cooperate with the police and accept the call to appear in court if they are summoned (Moraro, 135). However, I will also that civil disobedients are not required to accept any criminal liability for their actions – in other words, they are not required to plead guilty at the criminal trial. Rather, pleading “not guilty” is a further means of persuading their community that they do not deserve to be punished. My discussion of the

willingness to ‘accept’ punishment should therefore be understood as the broader willingness to accept the ‘risk’ of punishment.

Given that I have referred throughout to the anti-Apartheid struggle as *the* seminal movement of civil disobedience in South Africa, it seems only fitting that I end this chapter with an analysis of the “trial that changed South Africa”, namely, the Rivonia trial (Joffe, 2007) – and in particular the speech that Nelson Mandela delivers from the dock. The discussion of this trial is intended to serve as a culmination of the argument that I have been building up in the preceding chapters. I hope to show how this trial was used as an extension of civil disobedience as a communicative enterprise, whereby the trialists could express their concerns for justice and attempt to persuade the state, civil society and the international community of their cause.

In the previous chapter, I explained that civil disobedience relies on the duty to respect individual autonomy and on the aim to participate in and contribute to the deliberative democratic process. This was based on the communicative nature of civil disobedience, the commitment to persuasion rather than coercion and the avoidance of violence that aims to seriously or fatally injure. However, it is still not clear on what grounds we can base the willing acceptance of punishment as a necessary requirement of civil disobedience. I will start by considering some of the traditional arguments made in favour of the willing acceptance of punishment as a necessary condition for civil disobedience. There are two arguments made in favour of this requirement. The first of these emphasises the efficacy of the act. In other words, to what extent does the willing acceptance of punishment gives support to the protestors’ case and aids in the achievement of societal change? The second argument is more concerned with how the willing acceptance of punishment demonstrates a respect for the law as such. Here the focus shifts the success of the act of disobedience to what the act ‘says’ about the disobedient:, does it show the disobedient to be law-abiding and willing to cooperate?

I will discuss each of these arguments in turn and show that both make convincing cases for including the willing acceptance of punishment as a requirement for civil disobedience. I will then turn to an alternative argument for the willing acceptance of punishment, which is based on the principle of fairness, as discussed in Chapter One. The underlying idea is to argue in favour of the willingness to accept punishment from a position that is not contingent on circumstance. In other words, regardless of whether accepting punishment affords the

disobedients more publicity or raises more support for their cause, they are obligated to accept the legal consequences of their law-breaking action based on the duty of fairness owed to the citizens, with whom they share membership in the democratic enterprise.

My main consideration in analysing the three arguments is what the willing acceptance of punishment after the act communicates to the public. More specifically, I will look at the communicative aspects of the criminal trial and argue that there are significant parallels between the communicative nature of civil disobedience ‘on the streets’ and in the courtroom. I will thus show that appearing at trial can form part of the communicative aims of civil disobedience and can demonstrate the conscientiousness of the civil disobedient’s convictions. As mentioned, I will analyse the Rivonia trial as a way to illustrate my argument, but also to situate this thesis within the South African context. With this illustration I hope to show how the willing acceptance of punishment and the utilisation of the trial space, allows the civil disobedient to emerge as a conscientious citizen, with the aim communicate a concern for justice and persuade others to be similarly concerned.

Let us first consider the arguments for the willing acceptance of punishment as a necessary requirement for justified civil disobedience.

2. Instrumental arguments

If we turn to the paradigm cases of Gandhi and Martin Luther King, we will find in both a strong endorsement of the willing acceptance of punishment as a necessary requirement for acts of civil disobedience. In his Letter from Birmingham Jail, Martin Luther King writes about his willingness to go to jail as a means to “arouse the conscience of the community over its injustice” (King, in Bedau, 1991: 91). In a similar vein, Gandhi writes about going to jail as representing, in some cases, the only way to persuade society of the injustice against which acts of civil disobedience takes its aim. In Gandhi’s words,

Experience has shown that mere appeal to reason has no effect upon those who have settled convictions. The eyes of their understanding are opened not by argument, but by the suffering of the *Satyagrahi*. The *Satyagrahi* strives to reach the reason through the heart (Gandhi, 1961: 191).

From this perspective, we can view both King’s and Gandhi’s choice to accept punishment as having instrumental value and motivation (Greenawalt, 1987; Sabl, 2001). Both advocated

for the willing acceptance of punishment in order to increase public awareness and exposure to their cases. Both King and Gandhi were willing to be martyrs for the cause in order to draw attention to the issues and give more resonance to their cases. The condition of the willing acceptance of punishment after an act of civil disobedience can thus be seen as an instrumental reason, in that civil disobedients can show their willingness to attain social change by undergoing punishment. The fact that many civil disobedients are prepared to appear in court and use that as a platform from which they can address the authorities about the injustice against which they take aim, provides support for this account:

Many a civil disobedient would actually welcome an appearance in court: indeed to become the subject of prosecution might even have been his primary objective, for he may perceive her trial as a suitable platform for the expression of his moral or political views. The judge and jury will be required to listen to him, and he may also hope that the media will attend his trial and report her views to the public at large (Turenne, 2004: 379).

A further instrumental reason for civil disobedients to accept punishment for their law-breaking behaviour would be to rally the support of the law-abiding members of society. Given that many instances of civil disobedience tends to infringe on the liberties of others, such as damaging private property and disrupting public transport (recall Chapter Three), by submitting to legal punishment, civil disobedients may reduce the likelihood of alienating the law-abiding public. The idea here is that people may be less likely to feel resentment towards protestors that jeopardise their interests, if the protestors show a willingness to accept the legal consequences of their actions. In doing so, civil disobedients can demonstrate to the public, the seriousness and sincerity of their conviction, and as such circumvent charges of hypocrisy of superficial self-interest (Greenawalt, 1987: 249). .

In a similar vein, Andrew Sabl (2001: 323) draws an analogy between an act of civil disobedience and a gaming tournament. Both are open for all to participate. There is thus a need to deter “frivolous competitors with little chance of competing well” (*ibid*). One way of doing this is by “giving entry a cost”, which in the case of the gaming tournament would amount to a high entry fee and for civil disobedience, the requirement to accept punishment would deter those who are not seriously and sincerely motivated (*ibid*). This high entry fee thus serves to deter against *unconscious* civil disobedience.⁴⁷ Sabl further suggests that undergoing legal punishment would serve to put extra pressure on the state, by shifting the

⁴⁷ See Chapter Two for a detailed account of conscientious civil disobedience.

“moral burden” of showing a similar commitment to justice onto “the majority in power” (*ibid*). By accepting the legal consequences of their law-breaking behaviour, the civil disobedients demonstrate their conscientiousness and in doing so, they shift onto the state, the moral burden to show the same concern for justice, by listening to their message and taking action in accordance with their demands (Sabl, 2001: 326).

An implication of these views is that the willing acceptance of punishment for an act of civil disobedience is valuable insofar as it contributes to the success of the protest. By accepting punishment, the disobedients may win public support for their cause, put pressure on the state to pay attention to them and promote the ideals of justice that they are advocating. However, we should be wary of assuming that these kinds of arguments establish the willing acceptance of punishment as a necessary condition for civil disobedience, or that the absence of this feature deprives both the act and the agents of moral value. One can think of some circumstances under which refusing punishment may hold the same usefulness for the disobedient, as submitting to punishment may under other circumstances. For instance, there may be cases in which the state is attempting to deter any further acts of disobedience and as such punishing the offenders much too harshly. An example of this would be the court’s decision to ban any future participation in marches or social protests, since this could not reasonably be accepted by the disobedient⁴⁸ (Brownlee, 2017). One could also imagine cases in which the success of the act would depend on carrying out *further* acts of civil disobedience. In such cases, escaping arrest would be necessary in order to successfully organise further protests as part of the civil disobedience project. Under these circumstances, willingly accepting arrest and prosecution would contradict the aims of the civilly disobedient act.

It therefore seems that there can be reasons to both accept and avoid punishment after an act of civil disobedience, depending on the circumstances and the particular aims of the acts. This calls into question whether we can say that the willing acceptance of punishment is a necessary requirement for civil disobedience based on its ‘instrumental’ value. Let us turn to non-instrumental arguments in order to see whether these provide us with a better justification for the acceptance of punishment.

3. Non-instrumental arguments

⁴⁸ We need only look to the National government’s response to anti-Apartheid protests, which was to establish and implement new legislation that made it illegal to engage in such acts of resistance, the defiance of which was met with severe punishment.

In this section I will focus on three non-instrumental arguments for the acceptance of punishment for lawbreaking: (a) showing respect for the law, (b) demonstrating willingness on the part of the disobedient to cooperate with the authorities and (c) fulfilling an obligation towards one's fellow citizens. I will discuss each of these arguments in turn.

The idea that accepting punishment for civil disobedience demonstrates the agent's attitude of respect for the rule of law is famously captured by Martin Luther King Jr in his "Letter from Birmingham Jail",

I submit that an individual who breaks the law that his conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, *is in reality expressing the very highest respect for law* (emphasis added) (King, in Bedau, 1991: 91).

The argument is essentially this: when citizens choose to resort to civil disobedience, they choose to violate a law and as such; they have deliberately committed an illegal action. Given that a general abidance to the law is essential for the "subsistence of the political organization", by willingly accepting punishment for their illegal behaviour, the "the civil disobedients demonstrate their respect for the Law in itself, and the exceptional character of their law-breaking behaviour" (Moraro, 2007). This then gives "moral support" to the act of civil disobedience, and also to the agents themselves. Although the act is one contrary to the law, the agents' willingness to submit to punishment shows that it is in fact "an endorsement of law-abidingness" (*ibid*). By accepting punishment, the protestors are in the first place, acknowledging that they have deliberately disobeyed a legal directive, and in the second place, they are demonstrating to the authorities and their fellow citizens, their "fidelity to the law" in general (Rawls, 1999: 320; Feinberg, 1994). Thus, by accepting punishment, they show that they do not encourage lawlessness, but quite the contrary. Furthermore, it is precisely the feature of willingly accepting punishment that sets civil disobedience apart from both ordinary crimes and more radical forms of protest. As King puts it: "In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks the law must do so openly, lovingly and with a willingness to accept the penalty" (King, 1986 [1963]: 55).

However, a critic might argue that the argument that deliberate disobedience to the law shows respect for the authority of law is self-defeating. Thus, with reference to the case of Socrates

in Crito, we might ask: “Why is it all right to disobey the law in the first instance, but then, when you are sentenced to prison, start obeying it?” (Zinn, 1991: 914). Herbert Storing argues along similar lines that that deliberately disobeying the law while willingly accepting punishment after the fact shows respect for the law “in the same way that an open insult to a degraded woman, with a willingness to be slapped for the insult, shows the highest respect for womanhood” (Storing, in Bedau, 1991: 93). Zinn also calls Martin Luther King’s sincere commitment to the idea of expressing “the highest respect for the law” into question. King writes that he willingly goes to jail in order to “arouse the conscience of the community over its injustice”. According to Zinn, this choice does not appeal to the ‘rightness’ of the law, but rather, King accepts arrest in order to increase publicity and give his case more resonance (Zinn in Bedau, 1991: 914). Therefore, Zinn holds that King does not accept punishment for moral or moral reasons, but rather for practical purposes (Moraro, 2007).

Zinn (1991) takes a very negative stance against the idea that civil disobedients need to be willing to accept punishment for their law-breaking action. In his view, civil disobedients do not need to be willing to accept punishment for their illegal behaviour and nor do they need to be concerned with showing respect for the law at all. While the willing acceptance of arrest might have some practical value in that it gives publicity to a particular case, it does not serve as a moral justification for the act of civil disobedience. For Zinn, the refusal to obey a law that is deemed unjust is already reason enough for the act to be considered morally justifiable (Moraro, 2007). Given that it appears to be a stark contradiction to both break a law and then express respect for the law by accepting punishment, and since the disobedient act is aimed towards the state that supports the unjust law, the civil disobedients ought to continue in their disobedience by refusing to accept the state’s punishment: “Refusing to go to jail makes a different kind of statement: ‘The system that sentenced me is the same that is carrying on this war. I will defy it to the end. It does not deserve my allegiance’” (Zinn, 1991: 917).

It is clear that, as Zinn understands it, civil disobedience as a means of disassociating oneself from a state that supports unjust laws and policies. The disobedients choose to violate a law that they regard as unjust in order to communicate their concerns over its injustice, and therefore they do not deserve to be punished for violating that law. The law that prescribes punishment for violating that unjust law, is then unjust as well.

This view presents a serious challenge for supporters of the Rawlsian view that civil disobedience requires of agents to willingly accept punishment. However, I think Zinn’s

objections are based on a misunderstanding of two important elements of civil disobedience. As I have argued throughout, civil disobedience is essentially and primarily a communicative enterprise. That is to say that citizens who decide to take part in this form of disobedience still consider the state as legitimate, in that they are capable and likely to receive and respond to the message.⁴⁹ It is crucial for the nature and aims of civil disobedience that those in power are still considered as ‘deserving’ of taking part in a dialogue, which is something that Zinn seems to miss. Civil disobedients do not aim at overthrowing the entire system of governance, thus they do not seek to “defy it to the end”, as Zinn maintains (1991: 917). The primary aim of the civil disobedient is to persuade the government to change a particular law or policy, while making it expressly clear that they accept the underlying principles of the state and are ultimately aiming for mutual cooperation in the future (Sabl, 2001; Moraro, 2007).

By arguing for absolute disobedience, Zinn overlooks this significant aspect of civil disobedience. The fact that civil disobedience protests against a particular law or policy, but at the same time, accepts and recognises the legitimacy of the system as a whole, informs the means and modes of action that characterises civil disobedience as a distinct kind of resistance. Part of what characterises civil disobedience is thus that the disobedients are willing to accept the legal consequences of their action as a way to demonstrate their willingness to cooperate with the state in the future (Sabl, 2001). This is also why Rawls argues that militants would not accept punishment for their action, since they believe that it would “play into the hands of the majority that [they] believe cannot be trusted” (Rawls, 1999: 320). Civil disobedients, by contrast, still hold the belief that the majority can be “trusted” to engage in a dialogue about the disobedients’ concerns for justice.

This element of ‘cooperativeness’ is a second important argument in favour of the willingness to accept punishment as a necessary requirement for acts of civil disobedience. As we have seen in Rawls and other traditional liberal definitions of civil disobedience, as well as my own account presented in Chapter Two, the distinctive nature of civil disobedience is that it represents a particular form of address. Civil disobedience entails the efforts of a group, usually in the minority, to communicate to the state and the rest of society their concern about the injustice of a particular law or policy. We have also seen that this

⁴⁹ See Chapter Two for an account of communication and the relevant criteria for successful communication.

communication is not intended only to express defiance of or disassociation with said laws. Civil disobedients do not merely seek to refuse to comply, but seek instead to establish and engage in a dialogue so that they may achieve mutual understanding for their particular concerns. Civil disobedients thus aim for *cooperation* with the state and the wider society, which is to say that they assume mutual cooperation with the state to still be possible. As Sabl (2001: 319) put it: “Disobedience represents a demand that persons in power renegotiate the existing terms of social existence: the disobedience takes aim not at laws (which do not have a sense of justice) but at the people who make and enforce laws”.

By accepting punishment, the disobedients express their acknowledgement of the state’s (legitimate) authority to sanction punishment for illegal actions. By accepting punishment for their law-breaking behaviour, civil disobedients communicate very clearly that they are not questioning the legitimacy of the state as such, but only calling into question the justness of a particular law or policy. Andrew Sabl calls this kind of action, “forward-looking”, in the sense that it seeks to initiate open channels of communication between the state, civil society and the disobedient minority, about the justifiability of a particular law or policy (2001: 307). There is thus an assumption on the part of the civil disobedient that, while the state may not currently be acting in a just way, they do have the capacity to do so in the future. Once we recognise that civil disobedients act from this assumption, it becomes clear why they should show a willingness to accept legal punishment for their actions. However, this deduction is not based on “a sense of current obligation, nor some sort of desire not to break the law ‘too much’, as defenders of civil disobedience, and its sceptical critics, sometimes assume” (*ibid.* 312- 313). Civil disobedients commit themselves to willingly accepting punishment, because they remain committed to social cooperation in future (*ibid.* Edmundson, 2007: 8).

I mentioned that in his critique of the requirement to accept punishment, Zinn overlooks two important aspects of civil disobedience, of which the first was its fundamental communicative nature and the second is the conscientiousness of the disobedient. As discussed in Chapter Two, the decision to engage in an act of civil disobedience is rooted in a sincere and serious belief that a law or policy is in need of reformation or total change (Brownlee, 2004: 341). Civil disobedients are thus motivated not by personal interest, but by political reasons, that is, a concern for justice (*ibid*; Moraro, 2007). The fact that civil disobedients are aware that there is a risk of punishment and furthermore, that they ought to willingly accept such punishment, expresses to the state, the rest of society and the international world, the seriousness and sincerity of their convictions. In other words, the

stakes of civil disobedience are too high to invite frivolity and fickle convictions. Moreover, this would prove to the majority that inasmuch as the civil disobedients still trust them, they can in turn trust that the disobedients are sincerely committed to the advancement of justice, and that mutual cooperation in the future is possible. Sabl (2001: 320) explains this point as follows:

When disobedients make appeal to the sense of justice, rather than relying on merely coercive means, this shows that the existing powers have, in their view, passed a minimal test of possible future fairness. When they show a willingness to suffer punishment, this shows that they are willing to apply a similar test to themselves.

What is perhaps an even more significant implication of demonstrating conscientiousness in this way is that the civil disobedient is able to “shift the moral burden onto the majority in power” (Sabl, 2001: 323; Moraro, 2007). That is to say, once the civil disobedients have clearly communicated to the state that their concern for justice is serious and sincere, it is now the state’s responsibility to show the same concern for justice. How should the state do this? The state should reconsider (and reform or change entirely) the particular unjust law or policy in question, and in so doing demonstrate that they take the advancement of social justice to be a priority.⁵⁰

It is important to note the difference between the account of civil disobedience that Zinn presents, and the kind of civil disobedience that I defend in this thesis. Both of these accounts start out from the question whether we owe compliance to a system that does not guarantee justice. According to Zinn, the answer is no. Civil disobedience is thus an act of defiance against a system that no longer warrants the allegiance of its citizens. However, the account that I have presented in this thesis expresses a positive answer to the question. Contrary to Zinn, I propose that civil disobedience, by willingly accepting punishment, shows us that the system still warrants its citizens’ allegiance. As previously mentioned, this is largely due to the assumption and expectation of the civil disobedient that the state will take its citizens’ concerns for justice seriously, and as such be willing to respond appropriately when a

⁵⁰ If the state did not respond by showing the same concern and commitment to justice, but turned instead to extreme repression for instance, it would consequently lose its status as a legitimate partner for cooperation in the future (Sabl, 2001: 323; Moraro, 2007). If the state constantly and consistently refuses to listen to or consider the requests of civil disobedients, it will be demonstrating a deliberate failure to adhere to the principles of justice, underlying the society, and as such civil disobedience may no longer be the appropriate response. Resorting to more extreme forms of protest may then be more easily justified in order to re-establish the underlying structure and principles of justice, to which society as a whole has agreed.

grievance about injustice is communicated. Once again, this shows that the willingness to accept punishment demonstrates a sense of trust that the state is still – at least to some extent – interested in the advancement of justice and that future cooperation might still be possible.

Thus far, I have investigated what the willingness to accept punishment *communicates* about the civil disobedient. I have shown that this particular feature demonstrates that she is a conscientiously motivated citizen, who regards the advancement of justice with seriousness and sincerity. By willingly accepting punishment, the civil disobedient shows an attitude of respect for the law in general, as well as a recognition and acceptance of the state as a legitimate authority. Finally, I have shown that willingly accepting punishment for breaking the law in protest shows us that the civil disobedient ultimately aims for cooperation in the future and thus considers the state to be a ‘worthy’ partner in such a venture.

As such, I have considered the extent to which the willingness to accept punishment functions as a *justification* for an act of protest that deliberately and openly violates the law and that, in some cases, employs violent strategies to do so. While I think it is of utmost importance to consider the willingness to accept punishment as a justificatory feature of civil disobedience, I should also address the reasons that can be given to civil disobedients for why they ought to adhere to this requirement. While there are pragmatic reasons for doing so, in what follows I will argue that this is a *necessary* requirement.

I now want to develop the preceding point further and claim that the argument for willingly accepting punishment in order to ensure future cooperation can be grounded, in part, in the obligation of fairness towards other citizens.⁵¹ The argument is essentially that it would be ‘unfair’ towards other citizens if agents of civil disobedience were to avoid the penalties of their illegal behaviour. This is so for a number of reasons. In the first place, it is because there is already an established sense of general compliance with law that the deliberate violation of law is able to gain such widespread public attention. In a society where violations of law are commonplace and the authority of law is not treated with strict compliance, the fact that a protest is deliberately illegal would not necessarily contribute anything to the communicative strength of the act. But when individuals take action that is deliberately and openly against the letter of the law, in societies where people are generally law-abiding citizens, their actions

⁵¹ See Chapter One for an explanation of the principle of fairness from which the fair play theory of political obligation is derived.

are far more likely to be noticed and to elicit a response. It is therefore that the communicative success of civil disobedience is, to a large extent, contingent on the fact that it takes place in a law-abiding society (Brownlee, 2007, 2014).

Following from this, one can make the argument that disobedients who do not accept the penalties of their illegal behaviour would be taking advantage of the fact that other citizens have undertaken self-restraint in order to comply with the law and advance social cooperation and mutual benefit. It is precisely because others have committed themselves to cooperate and comply with the demands of the law in general that civil disobedients are able to deliberately violate the law in service of their concerns for a particular law.

Avoiding punishment for civil disobedience is similarly unfair towards one particular group in society, namely those that resort exclusively to legal forms of protest. It would thus be unfair for civil disobedients to use illegal means of protest without dealing with the appropriate consequences, when there are people who commit themselves wholly to legal means protest, even if it does not gain the same kind of publicity as openly defying the law would. Civil disobedients would then have an unfair advantage over those that do wish to have their message communicated, but only within the limits of the law. In fact, part of the success of acts of civil disobedience may be attributed to the self-restraint shown by legal protestors, that is to say, that their commitment to legal channels affords civil disobedients a better opportunity to have an impact on the public opinion. Therefore, the willing acceptance of punishment can be seen as a kind of concession for the unfair advantage that increased publicity and public engagement affords the civil disobedients. The willingness to accept punishment thus becomes a *pro tanto* requirement for acts of civil disobedience, because it expresses the acknowledgement that, because others are committed to obeying the law, it is possible for civil disobedients to use illegal forms of protest as a (potentially) successful form of communication. In this regard, civil disobedients are able to avoid an accusation of failing to share in the burdens of social cooperation, while only enjoying the benefits (Greenawalt, 1987: 249).

We have now considered several arguments in favour of the willingness to accept punishment, as a criteria for acts of civil disobedience. In the first instance we considered an argument based on the efficacy of the act, that is to say, the extent to which willingly accepting punishment contributes to the success of the civil disobedient's aims. We then considered the argument that accepting punishment for one's illegal action shows in fact that

civil disobedients are committed to the value of law-abidingness. While they deliberately break the law in order to protest a particular law or policy, their willingness to accept the legal consequences linked to those actions, demonstrates a fundamental attitude of respect towards the law. After I addressed Zinn's critique of the argument based on respect for the law, we turned to an argument in favour of willingly accepting punishment which is grounded in social cooperation. The idea here was that civil disobedients have as their central aim the establishment and maintenance of social cooperation, which is why they ought to be willing to accept the legal consequences of their illegal protest. In doing so, they are able to demonstrate to the state and the wider society that they are ultimately committed to cooperation and social cohesion.

4. Civil disobedience and the criminal trial

In the final section of the thesis, I develop the communicative aspect of civil disobedience further, in order to defend it as a particular kind of persuasive behaviour that represents the characteristics of a good (democratic) citizen. In order to do this, I will challenge the idea that the willingness to accept punishment after an act of civil disobedience necessarily implies that the disobedients have to plead guilty when appearing at the criminal trial. I will argue that by pleading *not guilty*, the disobedient does three important things. First, the criminal trial represents an extension of the communicative aims and nature of civil disobedience. Second, by pleading not guilty and offering reasons to the court for why the action in question does not constitute a crime and subsequently does not warrant criminal punishment, the disobedient demonstrates an attitude of respect towards the law. Lastly, when the accused explains the reasons and motivating factors underlying their illegal action, she is able to demonstrate their conscientiousness and the serious and sincere reasons behind their actions. I will discuss each of these aspects in turn, and focus in general on what it means for the civil disobedient to accept the legal consequences of their actions.⁵² My aim is to frame the

⁵² It should be noted that my discussion will focus exclusively on the disposition of the civil disobedient towards the law. I will thus not make an argument or any kind of suggestion for what kind of verdict the judge should issue (however, given that my entire thesis aims at offering a justification for civil disobedience, it should be clear what my suggestion would be). The intention of my argument is to point out how the civil disobedient can show an attitude of respect towards the law during the criminal trial. It is therefore beyond the scope of this thesis to address the undoubtedly important question of how the state should deal with a civil disobedient who pleads not guilty. For an

criminal trial as a culmination of the features of civil disobedience discussed in the previous chapters, as well as an illustration of the particular characteristics that make civil disobedience a justifiable practice of democratic contestation. In what follows, I will first address the relationship between civil disobedience and the criminal trial in general, with particular focus on communication. I will then turn to the Rivonia trial and analyse the famous speech that Nelson Mandela delivers from the dock, as a representation of my argument in practice.

5.1 The civil disobedient on trial

The purpose of a criminal trial is not merely to condemn and elicit guilt, but it is also a process intended to address the defendant (Duff, 1986; 2001). The trial calls the defendant to account for their action and so doing, is afforded the opportunity to provide an explanation and to submit reasons (Duff *et al*, 2007: 96). The defendant has the right to be heard and to attempt to persuade the court during the trial, which shows that the process of communication runs “in both directions” (*ibid.*). It is thus not only the state that calls on the defendant to answer for their crimes, but the state is also called on by the defendant to account for the accusation. During the criminal trial there is thus the aim for achieving persuasion from both sides, i.e. either the state will persuade the defendant of their wrong-doing, or the state will be persuaded by the defendant that the charges are unwarranted. The emphasis on persuasion as a means of communication and as a practice according to which agents treat one another when faced with disagreement, demonstrates an attitude of respect for people as autonomous individuals (which is the central underpinning of democracy, as I have argued throughout).

So, how can the civil disobedient persuade at the criminal trial? In order for a guilty verdict to pass, the prosecution needs to prove that the civil disobedient (a) committed the act in question and (b) that this action constitutes a criminal wrong that is deserving of punishment. An implication of this notion is that the fact that someone has committed a particular action is not sufficient to lay a guilty charge. Thus, even when it is proven that the defendant is responsible for the act, whether or not they are guilty and as such deserving of punishment, requires a further establishment of “criminal liability” (Duff, 2005: 88). While responsibility is a necessary requirement, it is not a sufficient condition for issuing a guilty verdict (Duff *et*

attempt to answer this question and provide apt suggestions, see Hall (2007), McEwan (1991), Smith (2012), Buttle (1985), Farrell (1977).

al., 2007: 130- 131). A defendant could thus admit full responsibility, while at the same time, denying liability for the same act (*ibid.*). In the case of civil disobedience, the disobedient would admit responsibility for the act, but deny that it constitutes a criminal wrong, given that they were morally justified in their actions.⁵³ The civil disobedients could thus argue that, given the circumstances and particular context of their actions, they were not wrong, which would then prevent the “transition from responsibility to liability” (*ibid.* 131).⁵⁴ For a further illustration of the distinction between responsibility and liability, consider the analogy of a self-defence case. While someone may be responsible for another person’s death, the fact that the first person was acting in self-defence may mean that they would not be liable to punishment. In other words, a person may be responsible for killing someone, without necessarily being criminally liable for their murder. This can similarly be applied to cases of civil disobedience. Civil disobedients can use the trial to explain and defend their actions as justified under the circumstances and given their ultimate aims.⁵⁵ As with the case of self-defence, the civil disobedients may admit responsibility for the act, but persuade the court that they should not be held criminally liable for the act.

In light of the communicative nature of the trial, one could argue that the civil disobedient may have as part of her communicative aims, an appearance in court. I am not arguing that aiming to appear at trial is necessarily *constitutive* of civil disobedience, however I am pointing out a definite link between the communicative nature and aims of civil disobedience, and the trial as a platform from which civil disobedients can give reasons for their actions. Given that acts of civil disobedience and the criminal trial share the same communicative aims it makes sense to argue that the civil disobedient should regard the trial as the ideal setting in which to aim at rational persuasion of the state.⁵⁶ Civil disobedients should thus

⁵³ See Chapter Two for an important distinction between civil disobedience and ordinary criminal acts. The relevant characteristics of civil disobedience (publicity and the willing acceptance of punishment, in particular) makes it a simple task to (a) sharply and clearly distinguish acts of civil disobedience from ordinary crimes and (b) to regard the former as a justified act of resistance, while the latter merely constitutes a punishable illegal act.

⁵⁴ For a similar argument, see Gardner, who maintains that a justification or an excuse “must be something that blocks the path from an adverse judgement about an action to a correspondingly adverse judgement about the person whose action it is.” (Gardner, 2007: 122).

⁵⁵ I will demonstrate how this has worked in practice by analysing the Rivonia trial, with particular reference to the speech that Nelson Mandela delivers in order to explain and justify the anti-Apartheid movement to the court.

⁵⁶ Recall the parallels drawn between the communicative aims of civil disobedience and lawful punishment by the state, as argued for by Brownlee (2007) and discussed in Chapter Two.

view the trial as an extended site of protest, where they can further pursue their communicative aims.

At this point it is relevant to turn to a practical example in order to illustrate how the analogous communicative nature between the criminal trial and acts of civil disobedience. In the final section of this chapter, I will discuss the Rivonia trial as a paradigmatic example of using the trial and the courtroom as an extension of their resistance movement and their communicative aims.

5.2 The Rivonia trial

The courtroom is often the last forum in which freedom fighters speak out against tyranny and justify their actions not only to the judge but also their fellow citizens and the world at large (Bizos, 2003).

The Rivonia trial of October, 1963 can justifiably be described as “the trial that changed South Africa” (Joffe, 2007).⁵⁷ Ten leading members of the liberation struggle were charged with two counts of sabotage and conspiracy and were put on trial at the Pretoria Supreme Court. In what is now seen as the most significant moment of the trial, Nelson Mandela delivered a speech from the dock in which he explained and justified the actions of the struggle movement. Mandela also criticised the state for the illegitimate laws that it supported and perpetuated and made a case for their justified defiance of these laws. “Mandela used the law as a sword and a shield”, in his strategic engagement with the law and relentless confrontation of the state (Allo, 2015: 2). By addressing the court in this way, he was able to use the space and the communicative opportunities made available by the system in order to re-politicise the trial and “expand the horizon of the legally permissible and imaginable” (*ibid.*).

Nelson Mandela’s speech illustrates precisely the kind of communicative opportunities available to the civil disobedient on trial. Spanning almost three hours, Mandela’s speech was

⁵⁷ Throughout this section I will refer to and quote excerpts from Nelson Mandela’s Rivonia trial speech, in order to unpack the content of this speech, as well as to illustrate relevant points in my argument. This speech is widely available and I take various excerpts from the following: <https://www.sahistory.org.za/archive/i-am-prepared-die-nelson-mandelas-statement-dock-opening-defence-case-rivonia-trial-pretoria>; <https://www.news24.com/NelsonMandela/Speeches/FULL-TEXT-Mandelas-Rivonia-Trial-Speech-20110124>

an extensive explanation and justification of the actions undertaken during the anti-Apartheid struggle, by the ANC, MK and other resistance movements. From the origins of the ANC in 1912, up until the acts of sabotage carried out by Umkhonto we Sizwe, Mandela explains the reasons underlying each of the acts carried out by resisters, as well as the motivating factors that moved them to act in such a way (Joffe, 2007). A large part of Mandela's speech was intended as a lesson on the history of the ANC and its fundamental and long standing policies of non-violence (Broun, 2012: 71). Mandela explains how the ANC was committed to non-violent strategies from its inception in 1912 up until 1961, when the National Government declared a state of emergency in the aftermath of Sharpeville and declared the ANC unlawful (*ibid.*). Even so, the ANC did not disband. As Mandela explained to the court, "I have no doubt that no self-respecting white political organization would disband itself declared illegal by a government in which it had no say" (1964, SAHO). He then goes on to recount the course of events leading up to the launch of Umkhonto we Sizwe. Peaceful demonstrations were met with responses and measure that became increasingly more severe with the government demonstrating "a massive show of force designed to intimidate the people" (*ibid.*). At this point in the struggle it had become clear that the government had intended to "rule by force alone" and the realisation of this was "a milestone on the road to Umkhonto" (*ibid.*). Mandela posed a question that was both rhetorical and directly addressed to the court, the state and the wider public: "What were we, the people to do? Were we to give in to the show of force and the implied threat against future action, or were we to fight it out and, if so, how?" (*ibid.*).

Mandela then answered his own questions by explaining to the court that he and his colleagues had agreed that because the eruption of violence in the country had become inevitable, it would not have been realistic or even right for African leaders to continue preaching non-violence and peace (Broun, 2012: 71). Mandela explained to the court that this is not a decision that was made lightly and that "[i]t was only when all else had failed, when all channels of peaceful protest had been barred to [them], that the decision was made to embark on violent forms of political struggle, and to form Umkhonto we Sizwe." He then went on to recount the process of deliberation over which forms of violence to employ, to which they concluded that they would attack power plants and disrupt rail and telephone communications (*ibid.* 72). Their plans for sabotage were specifically intended to avoid "the loss of life", because they believed that this would offer "the best hope for future race relations". MK's plans and strategies were explained to the court in detail and were

accompanied by specific reasons and motivating factors underlying the respective acts of sabotage performed by members of Umkhonto.

Mandela then continued his speech by outlining the significant and relevant distinctions between the ANC and MK, in order to make it clear to the court that although there was overlap in leadership, the two organisations were very much separate in their aims and methods of resistance (*ibid.* 73). Mandela also deemed it important to draw a sharp distinction between the ANC and the Communist Party, which the government and the wider public had failed to do time and again.⁵⁸ Near the end of his speech, Mandela outlined the demands of Africans, i.e. what the struggle leaders were essentially fighting for:

Africans want to be paid a living wage. Africans want to perform work which they are capable of doing, and not work which the Government declares them to be capable of. Africans want to be allowed to live where they obtain work, and not be endorsed out of an area because they were not born there. Africans want to be allowed to own land in places where they work, and not to be obliged to live in rented houses which they can never call their own (Broun, 2012: 74).

Mandela addressed the court directly when explaining that the anti-Apartheid struggle was a fight “against real, not imaginary hardships” and that the overarching aim of the struggle, was to attain equal political rights for all people in South Africa. This was what African people wanted above all, Mandela said, “because without them our disabilities will be permanent.” This statement was the prelude to Mandela’s closing words, which have remained his most famous (*ibid.*).⁵⁹

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 and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die (*ibid.*).

⁵⁸ The National government condemned any communist activities as unlawful and any person thought to be furthering the aims of communism or acting as a member of the South African Communist Party, could be banned. By linking communism with integration and anti-racist ideas, the National government was able characterise communists and black resistance movements as one in the same. It was thus done strategically in order to ignite fear and hatred of anyone who opposed Apartheid and supported non-racialism (Albertyn, in Allo, 2015:128- 131).

⁵⁹ These final words of Nelson Mandela’s speech can now be seen on the wall of the new Constitutional Court in Johannesburg (Bourn, 2012: 74).

Not only did Nelson Mandela's speech sum up the spirit of the anti-Apartheid struggle and articulate the core aims of the struggle to the world, but it also became "a hymnal, a sort of divine inspiration that breathed life into anti-apartheid activism everywhere in the world" (Montlanthe, 2013: 13). In what Motlanthe calls a "feat of historical irony", the Rivonia trial provided struggle leaders with both a national and an international platform from which they could articulate the underlying reasons and overarching aims of the resistance movement against the Apartheid government (*ibid.*). The trial was successful in "igniting international consciousness" over the injustice of Apartheid laws and policies and the hardships experienced by oppressed and disenfranchised black South Africans (*ibid.*). The trial of Nelson Mandela and his fellow liberation leaders has since been interpreted as representing a symbolic trial of the Apartheid system as a whole. Mandela's utilisation of South Africa's legal system turned the court room into a struggle site and a trial "not of himself or of the ANC but of the racist apartheid government" (Cole, in Allo, 2015: 113). To that end, Mandela said of the Rivonia trial, that is was a "show trial", and that he and his fellow co-defendants, "went into the court room determined to put apartheid in the dock, even if this were to put our own lives at risk" (*ibid.*; Motlanthe, 2013: 13).

Nelson Mandela's use of the Rivonia trial as a platform for communication and publicity illustrates the particular respects in which the criminal trial is co-extensive with acts of civil disobedience. In the Pretoria courtroom, the accused were able to challenge the misinterpretations of their actions by the state and they were able to explain the reasons for their actions to the state, but also to the public and the international world. Given that both the ANC and MK were underground movements at the time, the opportunity to address the public in such a direct manner was a rare one, and one of which they took full advantage (Albertyn, in Allo, 2015: 145). The trial thus allowed the defendants the opportunity to explain and justify their choices to turn to sabotage, as well as a justification for the struggle itself (*ibid.* 123). While the defendants did offer justifications and explanations for their actions, they did not deny responsibility. In fact Mandela said in the opening of his speech that he did not deny that he "was one of the persons that helped form Umkhonto we Sizwe" and that they had plans for sabotage (*ibid.* 167). They specifically decided not to apologise for their actions, but rather to justify and explain their actions (*ibid.*). They recognised the potential for international support and attention that the trial could afford them and aimed to use the court as a platform from which to communicate their message. In his speech Mandela aimed to draw international attention to the racist and oppressive policies of the National

government, in order to appeal to the conscience of the international world and prove that they had no choice in resorting to sabotage. By delivering his speech from the dock as he did, Mandela strategically appealed to the “world jury” to exonerate him and his fellow accused from moral wrongs and turn their condemnation towards the Apartheid regime (*ibid.* 168).

At one point during his speech, Mandela testified to the strength of his convictions: “I can only say that I felt morally obliged to do what I did” (*ibid.* 168). Not only is the criminal trial emblematic of the communicative aims civil disobedience, it also gives defendants an opportunity to demonstrate the conscientiousness of their motives. By risking punishment in the first place, they have already demonstrated the seriousness and sincerity of their aims, but by showing a willingness to participate in the trial and by giving reasons for their actions, they can demonstrate the conscientiousness of their aims even further. It is in this process of ‘reason-giving’ that the defendants best demonstrate their conscientiousness, in that they can explain themselves both to the court, but also to their fellow citizens. The aim here is not only to persuade the court not to condemn their actions as criminal, but also to gain public support for their cause. This can clearly be seen in the Rivonia trial, as the defendants admitted responsibility for their actions, but attempted to persuade the public that they were justified in doing so and should not be condemned as criminals, but seen as freedom fighters (Cole, in Allo, 2015: 111).

The Rivonia trial thus represents a watershed in South Africa’s history. It was the moment during which South Africa’s justice system was boldly and very publicly called out for its racist and unjust policies (Swart, in Allo, 2015: 149). It is precisely due to its public nature that the trial was able to function both as “an object of resistance”, as a site of resistance and “a space of political critique” (*ibid.*). The fact that a trial, like the Rivonia trial, can draw so much attention to the cause of the accused and attract as much publicity as it did, demonstrates that the trial can be used to the advantage of the accused (*ibid.*). A political trial can thus have “positive ripple effects” if the accused use the trial process to their advantage (*ibid.*). The defendants in the Rivonia trial did precisely that. According to defence attorney Joel Joffe, they were committed to upholding their political integrity and had planned to “maximise the trial’s potential as a political forum” (*ibid.*).

Catherine Albertyn describes the Rivonia trial as a tale of “domination and resistance, of despair and hope, of endings and beginnings.” (Albertyn, in Allo, 2015: 123). The culmination of the Rivonia trial certainly presented the ANC and the entire wave of anti-

Apartheid movements with serious setbacks (Montlanthe, 2013: 15). After the ANC and MK leadership was arrested, tried and imprisoned for life, with others fleeing into exile, the internal struggle against apartheid had just about come to a standstill (Albertyn, in Allo, 2015: 123). The racist and oppressive ideology of the Apartheid regime subsequently met with less contestation and became more deeply entrenched in the minds of white South Africans (Albertyn, in Allo, 2015: 123). However, while the trial did curtail the anti-Apartheid movement's overt resistance, the trial opened up a space which enabled an explanation and a full justification of the choice to turn to sabotage, and of the struggle itself (*ibid.*). As such, the trial presented the opportunity for Mandela and his co-defendants to combat the criminalisation and condemnation of political resistance by the state. They were able to "(re)write the history" of the anti-Apartheid movement, and provide a point of departure and inspiration for future struggles that would eventually lead to the unbanning of the ANC in 1990, with the first democratic elections held in 1994 (*ibid.*).

In an article written in commemoration of the 50th anniversary of Rivonia, Kgalema Motlanthe maintains that what is essential about this trial, is its "trans-historical character" (Montlanthe, 2013: 15). That is to say, that while the Rivonia trial exemplified the conceptual and moral basis of the struggle and functioned as a point of departure for further struggles, it also set a precedent for what a post-Apartheid society may look like. Albertyn writes that because the defendants were certain of legal defeat, it enabled them to aim for "political victory" (Albertyn, in Allo, 2015: 147). Nelson Mandela and his fellow defendants were able to relay their experiences and tell their own story to the public of South Africa and to the rest of the world. As a result of its public nature, in that it is both publicised and a matter of official record, the message grows and disseminates, so that it takes on new meanings. When we look back on the events of the trial now, it is not regarded as a moment of defeat, but rather celebrated as a momentous turning point in South Africa's struggle for democracy (*ibid.*). Nelson Mandela's defiant speech and the resistance of the Rivonia trials, sowed the "seeds of transformation" (*ibid.*). It is then in the communicative nature of both the trial as a site of resistance, and acts of civil disobedience as legitimate practices of contestation, that the possibility for such transformation is cultivated.

6. Conclusion

In this chapter, I have set out to explore the complicated relationship between civil disobedience and the law. I first addressed the question – which is also the overarching question of this thesis – of how an act that deliberately violates the law could ever be justified in a democratic society. Following this, I asked whether, and if so, why, civil disobedients ought to show a willingness to accept the legal consequences of their law-breaking actions.

I argued in this chapter that the willing acceptance of punishment is the most convincing justification for civil disobedience, because it represents the fundamental features of a genuine practice of democratic contestation. By accepting punishment, the civil disobedients demonstrate their willingness to commit to future cooperation with the state and their fellow citizens. This represents the conscientiousness of their aims, in other words, the seriousness and sincerity of their commitment to the advancement of justice. We have seen that the acceptance of punishment is a means of communicating the aims, motivations and disposition of the civil disobedient.

With the above in mind, I then examined the communicative nature of the criminal trial. In this section I presented the criminal trial as a furtherance of the act of civil disobedience as a communicative enterprise. In order to illustrate the extent to which the courtroom affords the civil disobedient the opportunity to demonstrate the seriousness and sincerity of his convictions and communicate his message, I discussed the Rivonia trial, with specific reference to the speech that Nelson Mandela delivers in the dock. We have thus seen that accepting the legal consequences of civil disobedience and expressing a willingness to go on trial, gives the defendant the opportunity to persuade the state, society and the international world to absolve him of criminal wrongdoing and lend support to the cause instead.

It can thus be concluded that the requirement to willingly accept punishment for illegal protest exemplifies the communicative aims and conscientious nature of the civil disobedient as a justified and even morally praiseworthy citizen, committed to democratic engagement and participation.

CONCLUSION

This thesis set out to challenge the assumption that civil disobedience is indicative of a “bad” democracy, or a poorly functioning one. I have tried to show that we should reject the notion that disobedience in a democracy is *prima facie* wrong and that it can at most be justified by the particular context in which it occurs. This assumption has problematic implications for what I take to be the full meaning of citizenship and, as such, fails to account for the positive role that civil disobedience can have in democratic societies. My approach was thus not to argue that disobedience can only sometimes be justified in a democracy, but rather that there is nothing inherently wrong with disobedience *per se*, and thus nothing good in obedience *per se*. This thesis thus attempted to show that justified acts of civil disobedience do not undermine the commitments of democratic citizens. The account that I offered thus presented civil disobedience as a practice of contestation that is both compatible with the underpinnings of democracy and with its citizens’ commitment to equality and individual freedom.

The first step towards challenging the assumption that disobedience undermines democracy was to address the question of political obligation. This was necessary precisely because the problem of disobedience only arises when there is at least a *prima facie* duty to obey the law. In order to address the problem of disobedience and democracy, I therefore first needed to establish whether there is a sense of political obligation in the first place. I thus examined five influential theories of political obligation in order to determine the grounds for our political obligation. Specifically, I tried to determine what gives rise to such obligations and how they are incurred. We saw that the argument from fairness presented the most convincing account of what grounds our political obligation in a democratic society. Moreover, I further argued that we should not construct democratic citizens’ obligation towards the law in the restrictive sense of obedience. The connotation of “obedience” is of a subject who is duty-bound to follow the letter of the law without pause to consider their own judgement of the particular law. This implies an approach to the law as one of stringent obedience, with no room or consideration for opposition to particular laws, and as such no sufficient grounds for justified *disobedience*. It further suggests a passively obeying citizenry, as opposed to one that is engaged with the legal system and actively partakes in their democratic society.

In light of the above, I therefore opted for an approach to political obligation that is rooted in a duty of respect for the equality and individual freedom of one’s fellow citizens. The aim

here was to show that our political obligation is in the first place a duty of respect towards one's fellow citizens, and that this obligation can sometimes be fulfilled by disobeying the law. In breaking the law under those circumstances, a citizen could be viewed as demonstrating the highest respect for the law, insofar as the law is meant to secure the foundations for mutual respect between citizens. Under these circumstances, her actions could be considered morally justified.

Once I had established that citizens do have a general sense of political obligation, but that that obligation is not fulfilled solely by stringent obedience to the law of the state, I could address the particular kind of disobedience that this thesis was concerned with, namely civil disobedience. I devoted Chapter Two to analysing the concept of civil disobedience. I first analysed the distinctions between civil disobedience and conscientious objection and revolutionary action respectively. By explaining the points on which civil disobedience differs from these kinds of dissent, I was able to conclude that civil disobedience importantly aims for a *change in the legislation*, rather than mere *exemption from the law*, but also without aiming to overthrow the entire system of governance.

I then turned to Rawls's influential account for an outline of the defining features of civil disobedience. We saw that civil disobedience is in the first place an illegal action, which can be performed either directly or indirectly. Secondly, such actions are carried out in public, with the aim to communicate a particular message to that public. The third feature of Rawls's definition of civil disobedience is its non-violent nature, which was shown to require more serious examination, and was therefore addressed in the third chapter. In the fourth place, acts of civil disobedience aim at changing a particular law or policy. This was shown to be crucial for an understanding of the concept of civil disobedience as it both distinguishes civil disobedience from other kinds of dissent and informs the tactics and strategies that are available to civil disobedients. Given the aims of changing particular laws and policies, as opposed to overthrowing an entire system of government, already limits the kind of actions available to civil disobedience as a potentially successful form of protest.

The features of conscientiousness and communication emerged as fundamental for an understanding of the concept of civil disobedience, but also of its particular aims as a distinct kind of resistance. Given that conscientiousness requires moral consistency, someone who sincerely believes that a particular law or policy is in need of reformation has serious reasons to communicate that belief. The conscientiousness and communicative aspects of civil

disobedience are linked to achieving particular aims, one of which is to demonstrate dissociation and protest against a law or policy, and the other to bring about a lasting change in that legislation. The sincerity and seriousness of these aims, particularly the aim to bring about a change in the law, are reflected in the means of communication that the civil disobedient chooses to adopt.

In Chapter Three, I dealt with the problem of violence. The issue here was the seeming incompatibility between civil disobedience as a *democratic* practice of contestation and civil disobedience as an act that employs violence. As we have seen, it is generally accepted that an illegal act of protest is characterised as civil disobedience if it aims for persuasive communication, rather than coercion. For an act of civil disobedience to be justified by democratic principles, it must adhere to the duty to respect individual autonomy by aiming to persuade rather than to coerce. The civil disobedient must therefore acknowledge that each individual retains the final say as to whether or not they decide to support their protest. The civil disobedient is thus obligated to respect the individual autonomy of the targeted recipients of their message, and act in such a way that treats others at the same time always as an end in themselves and never merely as a means to achieving their ends. Having provided this background argument, I then challenged the view that acts of civil disobedience may never use violence as a means of communication. I showed that non-violence is not a necessary feature of civil disobedience, and that, conversely, the ‘civil’ character of civil disobedience is not necessarily compromised when a degree of violence is employed. Rather, a degree of violence, insofar as it respects the autonomy of individuals and does not deprive civil disobedience of its communicative nature and aims, may be employed in acts of civil disobedience and still be regarded as a genuinely democratic practice of contestation.

In the final chapter of the thesis, I provided a detailed explanation of why acts of civil disobedience that deliberately violate the law can nevertheless be justified as a democratic practice of contestation. I specifically argued that the willing acceptance of punishment is the most persuasive justification for civil disobedience, because it represents the fundamental features that make this kind of protest a genuine practice of democratic contestation: respect of the law and the democratic system as a whole and the willingness to commit to future cooperation with the state and their fellow citizens. We saw that the acceptance of punishment is a means of communicating the aims, motivations and disposition of the civil disobedient, and demonstrates the seriousness and sincerity of their commitment to the advancement of justice.

With the emphasis on the communicative aspects of civil disobedience, I then presented an account of the criminal trial as a continuation of the act of civil disobedience as a communicative enterprise. Here I discussed the Rivonia trial, with specific reference to the speech that Nelson Mandela delivered from the dock. The specific features of the trial and Mandela's speech served to demonstrate how the willingness to go on trial gives the civil disobedient the opportunity to persuade the state, society and the international community to absolve him of criminal wrongdoing and lend support to the cause instead.

It can thus be concluded that the requirement to willingly accept punishment for illegal protest exemplifies the communicative aims and conscientious nature of the civil disobedient as a morally praiseworthy citizen, committed to democratic engagement and participation. While civil disobedience may constitute an 'unconventional' form of participation, it nevertheless demonstrates a commitment of democratic citizens to cooperate with one another in service of their shared interest in justice.

The above argument has also made it clear that the debate about civil disobedience is better served by shifting the focus from attempts to define the concept – definitions are no substitute for arguments – and asking instead after the motivations of the citizens engaged in civil disobedience and what this tells us about the society in which they are protesting. I have tried to show that we ought to consider conscientious acts of civil disobedience not as the idiosyncratic actions of individual rights bearers, but rather as a practice of contestation that is essentially political and democratic. The presence of civil disobedience in a democracy is thus representative of an actively engaged citizenry, committed to upholding the principles of democracy and willing to partake in the democratic society. Civil disobedience can thus show us that a particular society is a democratic one.

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