

# Civil Disobedience and Civic Virtues

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This thesis examines the concept of civil disobedience, and the role the latter can play in a democratic society. It aims to offer a moral justification for civil disobedience that departs from consequentialist or deontological considerations, and focuses instead on virtue ethics. By drawing attention to the notion of civic virtues, the thesis suggests that, under some circumstances, an act of civil disobedience is the very act displaying a virtuous disposition in the citizen who disobeys. Such disposition is interpreted in light of a duty each individual has to respect her fellow citizens as autonomous agents. This grounds, in turn, a moral obligation to *respect* the law. The central claim of the thesis is that the obligation towards the law is fulfilled not only through acts of obedience but also, under different circumstances, through acts of disobedience. The status of non-violence as a necessary component of civil disobedience is questioned, and it is argued that a degree of force or violence may be permissible in civil disobedience, when it is compatible with the duty to respect others' autonomy. Subsequently, the thesis offers an analysis of 'reasonableness' as a civic virtue, and by comparing three different approaches to the issue of reasonable disagreement among democratic citizens, it defends the deliberative approach as the most suited for treating fellow citizens as autonomous agents. The last two chapters focus on the importance, for an act of civil disobedience, of the agent's willingness to accept the legal consequences of her law-breaking behaviour. It is argued that a civil disobedient has an obligation to face the prospect of being punished for the breach of the law. However, in considering the behaviour of a virtuous civil disobedient who appears at her criminal trial, it is also claimed that she should plead not guilty and aim to persuade her fellow citizens that she does not deserve to be punished, because what she did does not constitute a criminal wrong. In doing so, this thesis depicts civil disobedience not as a merely permissible form of behaviour, but as a morally praiseworthy conduct within a democratic community.

## TABLE OF CONTENTS

INTRODUCTION.....	5
CHAPTER 1 .....	9
The Place of Disobedience Within a Democracy .....	9
1. Democracy and Disobedience.....	9
2. Moral Theories and Political Obligation.....	14
3. Citizenship Theory and Civic Virtues.....	21
4. ‘Inside-Out’ Vs. ‘Outside-In’: Virtue Ethics and Political Obligation .....	26
5. On Aristotle’s Virtue Ethics.....	29
6. Virtue is not a specific activity .....	33
7. Obeying vs. Respecting the Law .....	35
CHAPTER 2 .....	39
An Account of Civil Disobedience .....	39
1. Overview .....	39
2. Rawls’ Theory of CD.....	42
3. Persuasion Vs. Coercion .....	45
4. CD and Permissible Violence .....	48
5. Willingness to Accept Punishment.....	51
6. Nearly-Just Societies and “Last resort” .....	53
7. The Communicative Nature of CD.....	57
CHAPTER 3 .....	66
Violence And Coercion In Civil Disobedience.....	66
1. The Problem of Violence in CD.....	66
2. Democracy and Self-legislation.....	67
3. Two Different Cases of CD .....	69
4. Coercion and Compulsion.....	71
5. The Right of Autonomy.....	74
6. Autonomy as Condition.....	77
7. Autonomy and Community.....	79
8. Autonomy Vs. Freedom.....	81
9. CD and Justifiable Interferences.....	85
10. Autonomy And The Duty To Promote It .....	88
11. Permissible Violence in CD .....	91
Conclusions .....	94
CHAPTER 4 .....	96
Disagreement, Reasonableness, Respect .....	96
1. Overview .....	96
2. The Meaning of ‘Reasonableness’ .....	98
3. Scanlon on Moral Motivation .....	100
4. Deliberative Disagreement and Mutual Respect.....	103
5. Handling Disagreement: Reasonableness as ‘Avoidance’.....	104
6. The Agonistic View of Democracy .....	107
7. An <i>Agonistic</i> Account of Respect.....	109
8. A Third Possibility: The Deliberative Approach of Discourse Ethics.....	116

9. Defending Deliberative Democracy .....	122
10. Three Accounts of Reasonable Behaviour.....	129
CHAPTER 5 .....	135
The Willingness to Accept the Legal Consequences .....	135
1. Overview.....	135
2. Instrumental Arguments.....	137
3. Non Instrumental Arguments.....	139
4. Accepting Punishment as a Duty Towards Fellow Citizens.....	143
5. The Moral Obligation to Obey the Law.....	145
6. The Principle of Fairness .....	146
7. The Wrongness of Law-Breaking.....	149
8. Civil Disobedience, Acceptance of Punishment and Fairness.....	156
CHAPTER 6 .....	161
From the Streets to the Courtroom: CD and the Criminal Trial .....	161
1. Overview.....	161
2. The Civil Disobedient on Trial.....	163
3. The Communicative Nature of the Criminal Trial and of CD.....	166
4. The Criminal Trial as Communication.....	169
5. Responsibility and Liability.....	173
6. Appearing at the Trial .....	175
7. On Pleading Guilty .....	176
8. Plea Bargain and Civic Courage.....	181
9. On Pleading Not-Guilty after CD .....	185
10. Taking the Law Seriously: Narrow Vs. Broad Acceptance of Punishment.....	187
11. Justification Vs Excuse .....	197
Summary.....	200
CONCLUSION .....	202
ACKNOWLEDGMENTS.....	204
BIBLIOGRAPHY .....	205

## INTRODUCTION

This thesis defends the claim that, under some circumstances, ‘good citizens’ disobey the law. What makes this claim relevant to the current debate on citizenship is that it considers disobedience as carried out within democratic regimes, and not in response to seriously unjust governments that may justify defiance of the law. Thus, the kind of disobedience I discuss in this thesis is not one that seeks to overthrow the regime, i.e. revolutionary disobedience, but one that aims to be a contribution to the workings of a democratic regime, i. e. civil disobedience (henceforth, CD). The object of this thesis is the study of CD as a form of participation in the life of the political community: the central claim is that, in spite of its law-breaking nature, CD can represent the behaviour of a citizen who respects the law. When this is the case, an act of CD should be deemed not just permissible, but morally praiseworthy.

I develop this claim by departing from traditional accounts of CD, which tend to focus on either the good consequences the act of CD may bring about, and/or on the compliance with deontological constraints that the act of disobedience may fulfil. I suggest that, in order to assess the moral value of an act of CD, these kinds of considerations are certainly important, and in fact will play a role in the present discussion of CD. However, the thesis will highlight how consequentialist and deontological accounts overlook a central element for the study of political obligation: this, I argue, is the analysis of the character traits of the agents *qua* citizens. In order to understand, and explain, citizens’ political obligation, we need also an account of what kind of disposition towards the law citizens ought to possess. Hence, I will propose to analyse the problem of political obligation by focusing on *civic virtues*.

Peculiar to the approach presented in this thesis, then, is a change of perspective from the ‘outside-in’ to the ‘inside-out’: I contend that acts of CD should

be judged also in relation to whether they reveal ‘virtuous’ traits of character in the agent who disobeys. The ‘external’ features of the act are not sufficient, by themselves, for a moral assessment of a particular act of CD. To develop this argument, I apply ideas from a broadly Aristotelian virtue-ethical account, and I argue that the same kind of civic virtue, namely *respect for the law*, can be displayed by an act of obedience, or by one of disobedience, according to the different circumstances. It follows that, in the view I present, an act of CD can constitute a ‘virtuous action’.

At the core of my argument for the justification of CD within a democratic system, there is the claim that the value of a democracy centres on the protection and the promotion of the autonomy of its subjects. By offering an account of autonomy as the character trait of an agent who is in the condition of choosing her own conception of the good, I argue that what characterizes the behaviour of ‘good citizens’ of a democratic community is their willingness to respect others as autonomous agents. In the account presented in this thesis, a ‘virtuous’ action is one that displays a disposition to *respect* the autonomy of fellow citizens. An act of CD might constitute a ‘virtuous action’ when it is based on the same disposition. When this is the case, CD might represent the morally right act to do under the circumstances.

In Chapter 1, I argue in favour of an account of political obligation built on the main tenets of virtue ethics. I show that focusing on the attitude of respect for the law can account for why, under certain circumstances, ‘obedience’ to the law of a democracy might be the wrong course of action. Chapter 2 spells out a conception of CD that emphasizes its communicative nature, and offers a critical analysis of Rawls’ theory of CD. In Chapter 3, I focus on the problem of violence in CD. Arguing that a degree of force or violence might be allowed in CD, I show how this can be reconciled with the nature of CD as a communicative action that aims to *persuade*.

Chapter 4 focuses on the problem of substantive disagreement among reasonable citizens, and argues that the way in which citizens treat each other with respect, while defending their own different conceptions of the good, is through a deliberative approach that privileges a ‘performative attitude’.

Chapter 5 and 6 offer what I think is the main contribution of this thesis to the debate on CD. Chapter 5 analyses in detail the requirement that, for an illegal act to constitute an instance of CD, the agent who breaches the law ought to be willing to accept the legal consequences of her action. After analysing various arguments asserting, or denying, the importance of this disposition for an act of CD, I argue that civil disobedients have a *pro tanto* moral obligation to accept the legal consequences of their breach of the law, based on a duty of fair play owed to their fellow citizens. The duty of fair play is also discussed as offering the best account of what constitutes the wrongness of illegal behaviours in standard cases. This refers to the fact that, by disobeying the law, an individual may wrong her fellow citizens.

Chapter 6 develops the claim made in Chapter 5 in a somewhat surprising direction. It argues that, although civil disobedients have a *pro tanto* obligation to accept the legal consequences, they should plead *not guilty* when appearing at the criminal trial. By presenting the trial as a communicative enterprise, I claim that an act of CD, as a form of communication, may carry from the streets to the courtroom, and that it is consistent, for a civil disobedient, to try to *persuade* the jury, and the rest of the community, that she should not be punished, since she acted out of *respect for the law*.

The six chapters of this thesis, therefore, make different claims regarding the role of CD within a democratic community. They are all intended to support the main argument of this work, namely that an act of CD can display the virtues of good

citizenship, and that by breaching the law in CD, citizens can reveal admirable character traits. This can be conducive, finally, to the idea that an act of CD is not only permissible, but morally right.

Overall, this thesis aims to highlight the positive role that some illegal forms of protest can play within contemporary pluralist democracies, and to argue that citizens who resort to violating the letter of the law, in order to communicate their concerns to their fellow citizens, should be treated as “excellent” members of the community, rather than as self-interested outlaws.



# CHAPTER 1

## The Place of Disobedience Within a Democracy

### 1. Democracy and Disobedience

It has been said that democracy represents the worst form of government, except all the other ones that have been tried.<sup>1</sup> The reason for such a claim usually refers to the fact that a democratic government is considered the only one that can guarantee a degree of equality among its subjects. On a very basic understanding of the matter, we can say that democracy, by allowing each person an equal say in the decision about who should rule, allows for the government “of the people, by the people, for the people”.<sup>2</sup> It seems obvious, however, that the mere appeal to ‘equality’ is not sufficient to show why democracy is better than other forms of government: some degree of equality would as well be guaranteed under a Leviathan, which would ‘equally’ subject everyone to its will. Hence, we need to say more as to the kind of equality a democratic system is supposed to bring about.

For the purposes of this discussion, I will assume that democracy is the only form of government that can guarantee each person an equal possibility to advance her own well-being, and that this is what grounds its value.<sup>3</sup> More specifically, I will argue that there is an important connection between an individual’s well-being and her enjoyment of an autonomous life, and that the value of democracy lies in the fact that it can allow for the protection and promotion of the autonomy of each member of the community. Thus, in this work, I will emphasize the role of *democracy* as the

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<sup>1</sup> As Winston Churchill famously stated in his House of Commons Speech on 11<sup>th</sup> November 1947.

<sup>2</sup> In Abraham Lincoln’s words. Quoted in Jonsson (2005), p. 164.

<sup>3</sup> See Christiano (2008), chapter 1.

form of political organization that best allows for the protection, and for the *promotion*, of the autonomy of its subjects.<sup>4</sup>

From the standpoint adopted in this work, a democratic decision gains its legitimacy from the fact that it is achieved through a procedure that aims to resolve “a whole variety of disagreements in order to get people to treat each other reasonably well.”<sup>5</sup> The same commitment to individual autonomy that, in my view, grounds the legitimacy of democratic decisions, is also at the core of citizens’ obligation to comply with the legal directives of a reasonably just democratic state. Within this framework, then, the decision to challenge a law or policy arrived at through a democratic procedure, by resorting to acts of disobedience, that is, actions that aim at overtly violating the law, is a decision whose justification poses a serious problem. If the government is a legitimate one, there appears to be a conflict of rights and duties; that is to say, where the state has a right to coerce its citizens into obedience, its citizens have a corresponding duty to act in accordance with the instructions of their government.<sup>6</sup> What follows from this is that the language of equal respect or, as we will see in more detail in chapter 4, of ‘having an equal say’, to which citizens of a democracy are expected to be committed, might be at variance with the subjects’ decision to protest illegally *against* the decisions of their own democratic government.

This issue is complicated by the fact that, within a democratic system, citizens have *legal means* available to them in cases where the outcome of the decision-making process meets with their discontent. Disagreeing citizens can express their

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<sup>4</sup> The connection between democracy and autonomy will appear more clearly in chapter 3, below, where I present my account of the *right of autonomy*.

<sup>5</sup> Christiano (2008), p. 239.

<sup>6</sup> This is known as the ‘correlativity thesis’: “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”, In Simmons (1979), pp. 14-15.

view over a particular opinion and demand a further deliberation, by organising meetings for debates, using the media, writing to the members of the Parliament, etc. Where these legal appeals fail to bring about a change, citizens can ultimately rely on the next election and have their say over who, according to them, should rule. Provided some ‘democratic channels’ for protest remain open, the appeal to illegal means may conflict with the obligations that ground the life of democratic citizens, and that reflect a commitment to equal respect.<sup>7</sup> I will refer to this claim as ‘the democratic objection’ to disobedience.

In the attempt to reply to this objection, and to justify some forms of illegal protests within a democratic system, two lines of argument could be followed. On the one hand, we may question whether these legal means of protest are indeed available to citizens in everyday life. We do not need to embark on a deep sociological analysis in order to realise that there is no such thing as a perfect democracy: even the most advanced political communities often turn a blind eye to issues of accountability, civil liberties violation, corruption, repression of dissent, etc. The history of social movements reveals that, in several cases, in order to have their view acknowledged by the majority in power, citizens have to engage in forms of confrontation that might involve defiance of law.<sup>8</sup> This suggests, in turn, that one reply to the democratic objection would be simply to dismiss it, by pointing out that the ideal of democracy upon which the objection relies is, in fact, just *an ideal*. A fully democratic and just society is, a “utopia” in the classic sense of the term: it can never be finally realised, for it appears that a society can always become “more just” or “more democratic”.<sup>9</sup> Democracies are imperfect: therefore, citizens might have a right to address *serious*

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<sup>7</sup> See Raz (1979), chapter 14, for a denial of the existence of a *right* to do CD under a democratic regime.

<sup>8</sup> Bleiker (2000).

<sup>9</sup> See Cohen & Arato (1992), p. 567.

imperfections by employing *extra*-legal means of action. Highlighting this aspect of the democratic polity opens up the possibility of justifying (at least) some forms of illegal protest, which are meant to redress faults of imperfect democracies.<sup>10</sup>

From the fact that we have not yet realised the ideally democratic State, however, it does not follow that we can therefore disobey a system that at least *approximates* that ideal. Of course, humankind might never realize a ‘perfect democracy’: nonetheless, it seems plausible to hold that the closer a state gets to the *regulative ideal* of democracy, the more stringent the reasons for obedience become (and the weaker the case for *disobedience*). Hence, we should start from the assumption that, in a sufficiently just society, ‘disobedience’ is generally wrong (it requires a justification) and then, by considering the level of “imperfection” of the democratic government in question, we establish whether the act of disobedience is justified or not. This view assumes, therefore, an inverse proportionality between the justice of the state and the permissibility of disobedience: the closer the state is to the ideal of democracy, the harder it is to justify disobedience to its laws. Similarly, it could be argued that the better functioning the society is, the less prone to disobedience its citizens are; the more democratic the government is, the more obedient the citizens are.

The aim of this work is to challenge the latter assumption., That is to say, I deny that disobedience, within a democratic government, is *pro tanto* wrong and that, at most, it can be justified by the context in which it is performed.<sup>11</sup> It is my belief that this assumption could have dangerous implications for the understanding of the

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<sup>10</sup> For an account of some of these inadequacies, see Young (2000).

<sup>11</sup> I follow Kagan’s suggestion about talking of ‘pro tanto’, rather than ‘prima facie’, obligations. See Kagan (2002), p. 17.

meaning of *citizenship*,<sup>12</sup> and lead to a misleading idea of the role of political *disobedience*. Therefore, rather than arguing that disobedience is sometimes *justifiable* within a democratic system, I will highlight that there is nothing wrong in disobedience *per se*, even in a democracy. By the same token, I will stress that there is nothing good in obedience *per se* either. My argument aims to show that *an act of disobedience is not alien to the behaviour of democratic citizens, even within reasonably democratic societies*.

I intend to challenge the idea that disobedience is a *negative* element in a political community that approximates the ideal democracy, that is, that it can be, at most, justifiable. I will offer an account of ‘disobedience’ that is compatible with democratic ideals and with the commitment to individual autonomy. Even in societies that approximate to a sufficient degree the ideal of democracy, an act of disobedience can have positive value. In fact, I will suggest that the very presence of acts of political disobedience within a society may signal that that society is a democratic one.

My argument relies on the assumption that, in a liberal democracy, citizens have a moral obligation *towards* the law of their state.<sup>13</sup> This obligation, as I already mentioned, hinges on the further assumption that an individual can achieve full autonomy only as a citizen, that is, as member of a democratic community based on the rule of law. For reasons I will spell out in chapter 3, I reject the anarchist view that upholds individual autonomy *against* the shackles of the state. Without a state regulating our lives, our power to make choices is seriously limited: life outside the

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<sup>12</sup> In this work, I am exclusively concerned with obligations arising from *within* a political community. My argument in favour of a moral obligation to obey the law will refer to the case of a citizen and her own political community, that is, to obligations arising from *citizenship*. Thus, I will not consider, for example, what obligations one has toward the law of a foreign country.

<sup>13</sup> It is an obligation *towards* the law, rather than an obligation *to obey* the law because, as I intend to show, it is sometimes discharged by *disobeying*.

political community allows for the enjoyment of a much lesser degree of autonomy. This would constitute, from this perspective, a *less valuable life*.<sup>14</sup> On realising the inextricable connection between individual autonomy and *social life*, we are then in a better position to identify what kind of obligations individuals owe to each other *qua citizens*. By taking this stance, I will argue that individuals have a *moral* obligation to *respect* the law: the stress upon the notion of *respect*, rather than *obedience*, constitutes the ground for my main claim that *an act of disobedience may be an act of respect for the law*.

In presenting my account of political obligation, I will avoid appeals to purely consequentialist or deontological reasons for obeying the law, and will develop an account, broadly based on virtue ethics, that focuses on the agent's character. I hope the ensuing discussion will help clarify why in my opinion, theories of political obligation based on strict consequentialist or deontological considerations miss an important aspect of the relationship between the citizen and the institution of law. That is to say, they fall short of accounting for the attitude of *respect for the law* that characterizes the political dimension of life. Once that attitude is identified, it becomes possible to explain how an act of disobedience within a democratic regime might be not merely 'justifiable', but morally *right*.

## **2. Moral Theories and Political Obligation**

The aim of this work is to analyze the kind of attitude citizens should have towards the law of their state and towards their fellows. As I mentioned above, my discussion will depart from purely consequentialist or deontological assumptions, to adopt a position broadly construed in terms of Aristotelian virtue ethics. In this

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<sup>14</sup> Not necessarily "nasty, brutish and short", but surely with less 'value' in it. In chapter 3, below, I explain in great details the connection between 'autonomy', 'making choices', and 'having a valuable life'.

section, I say something as to why I prefer to *avoid* consequentialism and deontology in accounting for political obligations.<sup>15</sup> In the next section, I will then explain my preference for virtue ethics.

I shall begin by identifying the problem of political obligation with the question

whether anyone and everyone, simply in virtue of the fact that he lives in the territory over which a given state has political authority, is [pro tanto] obliged, or has a [pro tanto] obligation to do a certain sort of thing, namely, obey the directives (laws) of that state, whatever (within certain limits) they may be.<sup>16</sup>

Traditional accounts of the nature of this moral obligation have tended to highlight the *goodness produced* by general compliance with the law, or the existence of an independent duty to obey. Both accounts, I argue, fail in an important sense to describe citizens' relationship with the laws of their state.

The basic assumption of a consequentialist view is the Principle of Utility, according to which an action is morally right if it brings about an outcome that is qualitatively superior to the outcome of the other actions available. Applying this principle to the issue of what motivates obedience to the law, Bentham wrote that the latter is required "so long as the probable mischiefs of obedience are less than the probable mischiefs of resistance": citizens have an obligation to obey insofar as it is in their own interest "and no longer".<sup>17</sup> While I do not intend to enter into a discussion of the plausibility of the Principle of Utility, my aim is to show why its application to

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<sup>15</sup> I use the word "avoid" as distinguished from "reject": while I highlight some difficulties that both consequentialism and deontology face in accounting for citizens' obligations, I do not claim that "consequences" and "duties" play no role in the assessment of citizens' behaviour.

<sup>16</sup> Baier (1970), p.117

<sup>17</sup> Bentham (1988), p. 56.

the issue of political obligation is as easy as it is unattractive.<sup>18</sup> From this basic act-consequentialist perspective, the reasons to comply with the law depend on the overall goodness produced by the general compliance with a system where actions are coordinated by rules: thus, where an act of *disobedience* would bring about a better state of affairs, disobeying the law would be right because of its outcome. Obedience has, in this context, an instrumental value: consequentialism finds the value of obedience to the law in its capacity to bring about good consequences, which implies that there is nothing valuable per se in obeying the law apart from the outcome it produces. As Simmons has pointed out, when applied to the problem of political obligation, this view does show that we ought to obey, but also that we ought to disobey.<sup>19</sup> More important, and the main reason for avoiding consequentialism as the source of citizens' political obligations, is that the consequentialist perspective can say very little, if anything, about the specific *relationship* between the subject and the law.<sup>20</sup> These problems persist in more articulated utility-based approaches, like R. M. Hare's attempt to give an account of the specific "moral obligations that we have because we are citizens", and of how they arise.<sup>21</sup> Hare's account, built on a more refined *indirect* consequentialism, does no better than defending the existence of a "more or less unbreakable" principle according to which we ought to obey the law.<sup>22</sup> What I find most unsatisfying in Hare's defence of political obligation is his explanation of the wrongness of law-breaking: in his view, the problem with disobedience is that

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<sup>18</sup> This might probably be one reason why defenders of consequentialism have not devoted much time to defending an account of political obligation based on these premises, as pointed out by Simmons (1979), pp. 46-47, and Horton (1992), p. 56

<sup>19</sup> Simmons (1979), p. 48.

<sup>20</sup> Horton (1992), p.61

<sup>21</sup> Hare (1976), p.2.

<sup>22</sup> Hare, op. cit., p.4. The locus for the discussion of *indirect consequentialism* is Sidgwick (1874). See also Railton (1984)



if I break the law, I shall be taking advantage of those who keep it out of law-abidingness *although they would like to do what it forbids.*<sup>23</sup>

This account is highly misleading, for the same reason as that which applies to simple act consequentialist accounts as mentioned above, i.e. the failure to offer an appropriate portrayal of the relationship between citizens and the law of their state.<sup>24</sup> The consequentialist perspective on political obligation, in fact, *cannot* highlight what is special in such a relationship. The argument offered by Hare starts from the assumption that citizens would rather not obey the law, yet when faced with the “harm” of taking advantage of others, they comply with the obligation to obey the law in abidance with the Principle of Utility. In doing so, Hare’s argument portrays the citizen as a self-interested individual who is able, at best, to restrain herself in order to avoid bad consequences. This view starts off on the wrong foot, for it neglects the fact that citizens could have a very different approach to the law: what I will argue is that, contrary to Hare’s view, *citizens might not like to do what the law forbids.* Furthermore, consequentialism does not appear helpful for the analysis of the *positive* role of disobedience in circumstances of near justice. It suffices to say, for the purpose of the present discussion, that consequentialism can, at best, provide an impoverished account of the life of individuals as members of a political community, and therefore I will avoid it in my discussion of what grounds citizens’ obligation.<sup>25</sup>

For similar reasons, I will eschew focusing on an independent duty to obey the law, which grounds deontological approaches to political obligation. These views

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<sup>23</sup> Hare, op. cit., p.11. Added emphasis.

<sup>24</sup> For a criticism addressing specifically the validity of Hare’s argument, see Dagger, R., “Harm, Utility and the Obligation to Obey the Law”, quoted in Horton (1992), p.69.

<sup>25</sup> In spite of this, my view will overlap with act-consequentialism, insofar as I will hold that an act of disobedience can be morally *right*. It will appear clear, however, that my reasons for holding this view are not those that follow from consequentialism.

have the advantage of supporting the moral obligation to obey the law from a non-instrumental perspective, according to which the reason for complying with the law does not hinge upon the consequences that doing so will produce. There is something *good in itself* in complying with the law.<sup>26</sup> This is the standpoint of theories based on consent, gratitude, samaritanism, natural duties, or fair-play, according to which it is *pro tanto* wrong to disobey the law of a reasonably just state.<sup>27</sup> These theories appear to be better candidates for an explanation of citizens' moral obligation *to obey* but also, as I suggest below, are still incomplete.

A deontological approach to the problem of political obligation falls short of accounting for the value of the law *as such* and, in this respect, it fails to capture the relationship between a citizen and the law. As in the case of Hare's indirect consequentialism, a strict deontological view might portray citizens who 'would like to do what the law forbids', but refrain from doing so, because they have a duty to obey (and to not disobey). This, on the one hand, posits once again a misleading idea of the role of the law in citizens' life; furthermore, it suggests that an act of disobedience is in need of justification, being *per se* morally wrong. A deontological approach would allow very little room, if any, for acts of disobedience when the state is reasonably or "nearly just".<sup>28</sup> It might also do very little to explain the special relationship between the subjects and the law of the state. By focusing on the attitude of *respect* for the law, which I will defend as the ground of this relationship, I seek to argue that what motivates citizens' compliance with the law is more than just a

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<sup>26</sup> See Edmundson (2010).

<sup>27</sup> For a (merciless) overview of some of these accounts, see Simmons, (1979), esp. pp. 57-190. For other comprehensive and, to some extent, less sceptical surveys, see Horton (1992); Edmundson (2004); Knowles (2010).

<sup>28</sup> Rawls (1999), p. 320.

requirement to conform to a moral constraint.<sup>29</sup> One's obligation to obey the law, from a deontological perspective, is in place as long as the law is reasonably just: when the law is unjust, disobedience becomes morally permissible, if not morally necessary. That is to say, according to this view one's obligations qua citizen depend on the reasonableness of the law. When the state is seriously unjust, these *pro tanto* obligations are overcome by other considerations. I certainly have strong moral reasons to disobey an immoral law: it would be *right* for me to disobey a law telling me to kill a person merely based on her racial profile. Even more, it would be morally wrong for me to obey such law. My obligation qua human being would take priority over my obligations qua citizen.

What I want to argue, and in this I depart from strict deontological accounts of the obligation to obey the law, is that disobedience need not be justified by the fact that in some cases moral obligations trump political ones: according to the view I will present, an act of disobedience might be prescribed by one's duty qua *citizen*. That is to say, disobedience might be the action fulfilling one's own political obligation. Thus, in my view it is not correct to say that we have obligations towards the law of the state *insofar as* we are faced with a not-unreasonably-unjust law.<sup>30</sup> My claim is that *even in the face of very unjust laws*, our reasons for disobedience are, in part, based on obligations we have *qua* members of a political community. The fact that a law is seriously defective does not, therefore, pre-empt our political obligation. In the account I will present, I will claim that the relation between a subject and the law is representative of the relationship among fellow subjects: I will argue that our duty

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<sup>29</sup> I am here ignoring a second, and major, problem with adopting one of the duty-based accounts mentioned above, namely the fact that they have been the object of ferocious and, to a serious extent, successful attack by philosophical anarchists. See Smith (1973).

<sup>30</sup> Although I use the word 'unjust' to refer loosely to laws that are in some way defective, I do not argue that 'justice' is the only yardstick to judge whether obedience is in place.

towards the law reflects our more fundamental duty to our fellow citizens. Avoiding a strictly deontological approach, I seek to describe what grounds these (political) duties and, more importantly for this discussion, how an act of disobedience can, under some circumstances, be the very act fulfilling them. My final goal, therefore, is to show that disobedience may issue not only from one's moral obligation qua human being, but also from one's *political obligation* qua citizen.

I should also add that, in the account I will present, I will refer to political obligations as being incurred by citizens, at least to some extent, in a non-voluntary way. The argument from voluntariness is at the core of the anarchist attack on the idea of a moral obligation to obey the law: given that obligation can only be incurred voluntarily, no one can have an obligation to do something to which she has not previously given her consent.<sup>31</sup> In my discussion of the nature of political obligation, which I will present in chapters 3 and 5 below, I will argue that citizens have obligations to their fellow members, which they incur without 'accepting' them in the traditional contractual sense. I will therefore be sympathetic to 'associative' accounts of political obligation, broadly conceived, which hold that some political obligations arise simply in virtue of the fact that one is a member of a community.<sup>32</sup>

In order to do so, I will say more about the richer notion of political obligation I want to defend, and according to which *disobedience*, in some cases, is also a (political) requirement. I will then suggest that this account of political obligation teaches us an important methodological lesson concerning how to approach the study of the political dimension of life. After that, I will consider some aspects of

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<sup>31</sup> Simmons, *op. cit.*, chapter 3; see also Wolff (1970). For a discussion of the consent theory of political obligation, see Pateman (1979).

<sup>32</sup> See Horton (1992), pp.137-171; Horton (2007); Gilbert (2006); Scheffler (2001).

Aristotle's theory, and show how they can still help us today in the analysis of our obligations qua members of democratic communities.

### **3. Citizenship Theory and Civic Virtues**

In emphasising the dispositions of citizens towards the law and towards their fellow citizens, my work follows in the footsteps of 'citizenship theory'. This outlook, that defends the importance of the study of citizens' traits of character in order to analyse the organization of a political community, arises out of a critical view of some forms of liberalism instantiated by Rawls' theory of justice, according to which the core of the political analysis is "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."<sup>33</sup>

While this position states certainly an important truth, many have criticised it for the risk of over-emphasising the 'basic structure of the society' against the dispositions and motivations of citizens to whom they are meant to apply.<sup>34</sup> In fact, for the structure to be efficient, it is also necessary that citizens possess the capacity to exercise some degree of self-restraint to preserve the stability of the community. In the face of reasonable disagreement, arising from "the fact of reasonable pluralism", Rawls relies on the overlapping consensus as the possible solution to the problem of conflict among different conceptions of the good. This, as we will see in chapter 4, points out his appeal to citizens' capacity to 'retreat to neutral grounds'.<sup>35</sup> To this extent, the Rawlsian model constitutes an attempt "to keep the ship of state on an

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<sup>33</sup> Rawls (1999), p. 6.

<sup>34</sup> For example, see the communitarian critic of McIntyre (1981); Sandel (1998). For the criticisms from a republican perspective, see Barber (2003); Dagger (1997).

<sup>35</sup> Larmore (1987)

even keel by steering clear of the winds of controversy”.<sup>36</sup> However, as I will argue, this oversimplifies the matter, by relying on the fact that ‘reasonable citizens’ will dispose of conflict quickly by appealing to neutrality.

According to Rawls, the fact that society is a “fair system of cooperation”, and that all individuals are equal and free, are basic components of democratic life: these are “fundamental political ideas”, to be distinguished from particular and contentious ones (based on comprehensive conceptions of the good).<sup>37</sup> Nevertheless, this is too *thin* a conception of citizenship: my aim is to show it is insufficient to support the life of a flourishing and stable community. In fact, for a liberal state to maintain its stability, the ‘basic structure’ needs to be sustained by citizens’ commitment to democratic values going well beyond a notion of self-restraint. We should be wary of the idea that the problem of good government can be solved “even for a race of devils”: the principles of justice cannot guarantee, by themselves, the subsistence of the overall structure of the community.<sup>38</sup> Even when institutions ‘work’, the lack of civic engagement can lead to a progressive decline in citizens’ ability to bond and interact with each other in the interest of the common good. As Robert Putnam’s analysis has showed in detail, focusing only on the way society is organised does not account for the risk of a decrease in “social capital”:

Whereas physical capital refers to physical objects and human capital refers to properties of individuals, social capital refers to connections among individuals – social networks and the norms of reciprocity and trustworthiness that arise from them. In that sense, social capital is closer to what some have called “civic virtue”.<sup>39</sup>

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<sup>36</sup> Bellamy (1999), p. 101

<sup>37</sup> Rawls (1993), p.167.

<sup>38</sup> See Kymlicka & Wayne, (1994).

<sup>39</sup> Putnam (2000), p. 19.

This refers to elements of social organization, such as mutual trust, norms, networks that improve a society's stability by facilitating coordinated action.<sup>40</sup> This, in turn, requires a degree of citizens' participation in the life of their political community: 'citizenship', as a status, implies duties that go beyond e.g. the mere casting of a vote at election time. For a society to maintain stability, it is necessary that citizens show to possess a 'civic' character, by displaying "civic virtues" such as loyalty, reasonableness, willingness to cooperate with each other, and dedication to the promotion of the public interest.<sup>41</sup>

In this work, I follow this approach, and focus not on the kind of principles we need in order to identify the structure of a stable society, but on the kind of individuals a society needs to nurture for any structure to remain stable.<sup>42</sup> My goal is to analyse *citizenship* as one of the *roles* individuals have, with the aim to highlight what attitudes and dispositions *a citizen* needs to possess, and to display, in order to live up to the requirements of this role.<sup>43</sup> It is against this background that I intend to focus on "civic virtues": an individual exhibits *civic virtues* when she does what a citizen is supposed to do.<sup>44</sup> I am, therefore, sympathetic with accounts that argue in favour of a *strong* conception of democracy, one that views citizenship as a call for 'action'.<sup>45</sup> Like Benjamin Barber points out, *being a citizen* is "something that we do, not something (such as a power, for example) that we possess or use or watch or think about."<sup>46</sup> From this perspective, being a citizen means occupying a role, and this bestows upon the individual duties as well as rights. A study of the source and nature

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<sup>40</sup> On "social capital", see also Coleman (1990), pp. 300-321; Barbalet (2000).

<sup>41</sup> See Macedo (1991); Galston (1991); Dagger (1997).

<sup>42</sup> Once again, I am not denying that both aspects are central to the analysis of political philosophy, although in this work I focus only on the latter.

<sup>43</sup> For an account of citizenship as 'role', see Hardimon (1994).

<sup>44</sup> Dagger (1997), p. 13.

<sup>45</sup> "[F]or the end [of political science] is action, not knowledge." Aristotle, *Nicomachean Ethics*, book I, chapter 4, 1095a5. All quotations to this book refer to Irwin (1999).

<sup>46</sup> Barber (2003), p.123.

of political obligation should build from a perspective that abandons the idea of citizenship as something done *to* the subjects, i.e. the idea that citizenship is essentially a matter of ensuring that everyone is treated as a full and equal member of society. Against this view, I will follow the suggestion that citizenship is something that is done *by* us.<sup>47</sup> We certainly support the value of citizenship in protecting *equal rights* for all: freedom and security, to name but a few, are core values under a liberal regime. However,

[t]here is another, more active and demanding dimension to liberal citizenship, vital though perhaps subordinate. By exploring the active, public side of liberalism (...) we can distil liberal conceptions of virtue and community that constitute positive rejoinders to republican and communitarian criticisms; we can, as well, better understand what the liberal polity requires of its citizens to flourish or even survive.<sup>48</sup>

Following from what I said before, I will argue that acts of disobedience represent one of the ways through which citizens *do* things. The status of citizen not only confers rights, but also imposes duties on the individual, and we need to identify what the latter ones are. To this end, I aim to connect the liberal emphasis on *autonomy* to the *republican* view that highlights the value of civic virtues, thus supporting a form of ‘liberal republicanism’.<sup>49</sup> My aim is to show that once we understand citizenship from this richer viewpoint, and grasp the relevance of playing an active role in the life of the community, we can also see how disobedience to a law can sometimes be the expression of a commitment to ‘action’. Hence, we might have to praise an individual who embarks upon an act of disobedience for being ‘a good citizen’.

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<sup>47</sup> Barber (2003), p.133.

<sup>48</sup> Macedo, (1991), pp. 38-39.

<sup>49</sup> See Kymlicka (1997); Duff (2001), esp. pp.48-56



I should also point out how, in my view, the focus on citizens' inner dispositions acquires additional relevance in the present globalised society where a higher degree of interaction, among competing conceptions of the good, is required. The individual's sense of identity nowadays is constantly challenged by alternative forms of national, ethnic or religious identities: stability requires an increasing degree of tolerance and cooperativeness.<sup>50</sup> Without focusing also on the possession of these traits, democracy risks to remain a 'weak' ideal, whose role in the life of its subjects might be lost. As Habermas has argued, against Rawls's faith in the basic structure, "the institutions of constitutional freedom are only worth as much as a population makes of them".<sup>51</sup>

Once the focus of the analysis of political obligation moves onto the character of the agent, acts of disobedience can be assessed under the same light. An act of disobedience might have positive, non-instrumental value in a democracy, when it is the expression of a 'civic' disposition in the disobeying citizen. A richer account of life in a democratic community can highlight what reasons citizens have for 'taking action' when a law conflicts with the basic values underlying the community. From this standpoint, we might be able to distinguish acts of 'plain' disobedience, from what I will refer to as acts of 'virtuous' disobedience: the latter ones should be seen as morally praiseworthy, for they display civic virtues in the agent.

In order to spell out my account, in the next section I will say more about the methodological approach I will follow in my analysis.

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<sup>50</sup> See Kymlicka & Wayne (1994)

<sup>51</sup> Habermas (1992), p. 19.

#### 4. ‘Inside-Out’ Vs. ‘Outside-In’: Virtue Ethics and Political Obligation

In the previous section, I have sketched a conception of citizenship in which liberal concerns about individual rights, and the republican emphasis on duties to participate in the life of the community, come together in what is called “liberal republicanism”.<sup>52</sup> In the remaining part of this chapter, I want to consider in more details the role of the agent’s *character* in my account, and how it can support an argument defending some forms of illegal behaviour within a democracy. By choosing to emphasize the moral disposition of the agent, I endorse a virtue ethical approach, whose main tenets I analyse in this and in the next section.

The main assumption of an ethics of virtue is that the rightness of an action depends ultimately on whether the agent who performs it displays a certain kind of moral disposition. For the action to be morally right, it is not enough that it achieves what is ‘good’: it is necessary that the act be done “at the right time, for the right motive, in the right way”.<sup>53</sup> This moral approach gives central importance to the context in which agents act, and their capacity for situational appreciation. This initial assumption suffices already for pointing out one key difference between virtue ethics and its rival approaches. Both consequentialism and deontology insist that moral inquiry should aim to settle on universally valid criteria: aiming to answer the question ‘how should one act?’, these two theories seek to find action-guiding rule(s) to be used as criteria for a moral judgment of human conduct. Consequentialism, broadly conceived, judges an action to be right according to the latter’s tendency to bring about the best possible outcome;<sup>54</sup> deontology, on the other hand, focuses on the action’s conformity to a universal moral rule, e.g. the Categorical Imperative, as the

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<sup>52</sup> See fn. 49.

<sup>53</sup> Aristotle, *Nicomachean Ethics*, book II 1109a27

<sup>54</sup> I am not interested here in mentioning the different versions of consequentialism. For an examination of this topic, see Scheffler (1988).

ground for its moral rightness.<sup>55</sup> A virtue ethical perspective, on the other hand, while still aiming to provide a criterion of rightness, connects the moral assessment of an action to the analysis of the character traits of the agent.<sup>56</sup> It thus abandons a concern with *external* constraints in favour of an approach that focuses on the agent's *inner* traits of character.

We should notice from the outset that a virtue ethical standpoint is compatible with consequentialism and/or deontology: the latter two could accommodate a notion of virtue within their own theories.<sup>57</sup> The emergence of virtue ethics has led some consequentialists and deontologists to acknowledge the value of an approach based on virtues, and to reformulate it in the language of their own theories.<sup>58</sup> This suggests, on the one hand, that consequentialists and deontologists are not bound by their theories to neglect the idea of the virtuous agent. The 'virtuous traits of character' may well amount to a disposition to act so to bring about the best possible outcome (in the case of consequentialism), or a disposition to follow, e.g. the Categorical Imperative (in the case of deontology).<sup>59</sup> In both cases, there might be an additional requirement for *intending*, i.e. *having a disposition*, to follow the moral rule.

These kinds of development may well be welcome from the perspective of virtue ethics: as Rosalind Hursthouse notes in the Introduction to her book *On Virtue Ethics*, there should be nothing bad in seeing that philosophers, from different sides of the debate, agree on what characterizes our behaviour as moral agents.<sup>60</sup> However,

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<sup>55</sup> For an overview of different deontological positions, see Darwall, S., *Deontology*, 2003, Blackwell Publishing.

<sup>56</sup> See Crisp (2003).

<sup>57</sup> As pointed out in Hursthouse (2002), p.7.

<sup>58</sup> See, for example, O' Neill (1984); Louden (1986); Driver, J., "The Virtues of Human Nature", in Crisp (2003) pp.111-130.

<sup>59</sup> For example, Julia Driver (2001), p. 82, defines virtue as "a character trait that produces more good (in the actual world) than not *systematically*." For a deontological approach to virtues, see Korsgaard (1996).

<sup>60</sup> Hursthouse (2002).

one problem with such ‘mixed’ accounts of morality is that they might confer to the notion of ‘virtue’ only a secondary role, one that is subordinate to the preferred moral rule. This means that a consequentialist or deontological account of a *virtuous agent* would begin with an analysis of what constitutes the best outcome, or of what rule requires the action’s compliance: and *from that*, it would derive the idea of virtue. Such an approach would explain the nature of virtue from the *outside in*.<sup>61</sup> In this respect, this view fails to grasp the core aspect of a virtue ethical approach. A moral conception based on virtues does not run in the sense just mentioned. Although the question to answer still hinges on how to identify the right action, virtue ethics addresses it via a discussion of the actor herself.

In contrast to other accounts, virtue ethics develops a moral outlook that runs *from the inside out*.<sup>62</sup> The moral inquiry focuses on the agent, leaving aside the quest for universal criteria to guide human behaviour. This is the approach I will adopt to look at the problem of political obligation: I will argue that, in assessing the behaviour of citizens in a democratic community, we should consider not only whether they comply with the law, but also their (inner) moral disposition towards the law and towards their political obligation. To sum up, my claim in this thesis will rely on the following points:

- a) the discussion of citizens’ political obligation should focus not only on what citizens do, but also on what kind of dispositions they display towards the law and the community
- b) an act of obedience is not *per se* morally right; nor is an act of disobedience morally wrong *per se*;

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<sup>61</sup> See McDowell (1979).

<sup>62</sup> See McDowell, *ibid*; Edmundson (2006).

- c) acts of CD may be justifiable as displaying the appropriate kind of disposition towards the law and the community.

Like other accounts that are based on ‘virtue’, this argument owes a lot to Aristotle’s theory of virtues in the *Nicomachean Ethics*. In the next pages, I will consider some of the central points in Aristotle’s view, aiming to highlight what, in my opinion, can provide the means to defend the practice of CD as part of the life of a democratic community. After that, I will move to the next chapter, to present my conception of CD in more details.

Before proceeding, I should specify, once again, that by no means do I intend to declare the victory of virtue ethics over its rival moral theories. While I show the relevance of citizens’ inner traits, I am not denying the role played by other factors as well. Thus, although the ensuing discussion will analyse the issue of political obligation mainly from an “inside-out” perspective, I do not deny that *consequences*, as well as deontological constraints, also play an important role in the assessment of citizens’ obligation to comply with the legal directives of their government.

## **5. On Aristotle’s Virtue Ethics**

The aim of this thesis is to argue that an act of disobedience of the law, even under condition of near justice, may display a *virtuous* disposition in the agent, and may therefore be a morally praiseworthy action. In order to clarify this claim, I begin with a definition of what constitutes a *virtue*:

if x is an F (e.g., a knife), then the virtue of x as an F is the *state* of x that makes x a *good* F (in a knife its virtue will be cutting well, durability, etc.,

that make it a good knife). Hence x's virtue will reflect its good performance of the *function* of Fs.<sup>63</sup>

It is possible to highlight two elements emerging from this initial characterization. One is the concept of 'function' (*ergon*): behind a conception of *human* virtue, there is the thought that human beings have a proper 'function', whose performance requires the possession of adequate traits of character. I am not concerned with the details of Aristotle's 'function argument', even less with the task of identifying 'the proper function' of the human being. My interest lies with what characterizes citizenship as a 'role' the individual occupies, and what this role implies. Thus, I will limit my discussion over what it may be plausible to argue is characteristic of a 'good' citizen, i.e. one who lives up to the requirements of her role.

Another element in the definition just mentioned is that virtue is a "state" (*hexis*), that is, it constitutes a stable disposition in the agent who is 'virtuous'. A central characteristic of virtue is that it is neither just a *feeling* nor a *capacity*.<sup>64</sup> A *state* is an actual *tendency* or *disposition* to do an action F on the right occasion, a tendency formed through repeated activities, i.e. by habituation in the regular practice of F-like actions.<sup>65</sup> With reference to the case of citizenship, a virtue is therefore a *predisposition* to do "citizen-like" actions, rather than a simple feeling towards doing so: this is because virtue is achieved through a process of habituation, that makes it stronger, and more stable, than a mere capacity to do F.<sup>66</sup>

These initial considerations can help develop an account of right action: according to virtue ethics, an action is right if and only if it displays virtue. Thus, an action will be right if, for example, it is courageous. In Aristotle's original

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<sup>63</sup> Irwin (1999), p. 352-353.

<sup>64</sup> *Nicomachean Ethics*, II, 1106a1-13.

<sup>65</sup> Irwin (1999), p. 349

<sup>66</sup> The distinction between having a 'capacity', and being in the 'condition' to use that capacity will be the object of the discussion in chapter 3.

formulation of virtue ethics, the ‘virtuous’ action is characterised as ‘the right mean’ between two extremes:

[virtue] is a mean between two vices, one of excess and one of deficiency. It is a mean for this reason also: some vices miss what is right because they are deficient, others because they are excessive, in feelings or in actions, whereas virtue find and chooses what is intermediate.<sup>67</sup>

The main characteristic of a *virtuous* action is that it falls in an intermediate position between actions that display *vicious* dispositions. This idea of “intermediacy” suggests that virtue is displayed by actions and passions that are in some way ‘intermediate’ relative to the actions and passions in which its correlative vices are expressed.<sup>68</sup> Thus, for example, an act may express ‘the right amount’ of courage, and display virtue, when it is neither foolish (expressing ‘too much’ courage) nor cowardly.<sup>69</sup> To anticipate what I will argue below, taking this stance on the problem of political obligation can reveal how an act of *obedience* may, under some circumstances, not represent ‘the right mean’ displaying appropriate respect for the law.<sup>70</sup>

What is peculiar in this discussion of the ‘right mean’ is that the latter does not set an absolute criterion that is universally valid: it refers, in fact, to *the particular individual and situation*. From a virtue-ethical standpoint, the right action to do (i.e. that which displays a virtuous character in the agent) varies with the context. The virtuous agent or, as in the case at hand, the virtuous citizen, has to identify on a case-to-case basis what her *role* requires her to do. This, in turn, involves an ability to

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<sup>67</sup> *NE* II, 6, 1107a3-6

<sup>68</sup> However, though virtue is a mean “as far as its essence and the account stating what it is are concerned”, it is an extreme “as far as the best [condition] and the good [result] are concerned”. Ibid, 1107a7-8.

<sup>69</sup> *NE*, III, 7

<sup>70</sup> When we take, as I will suggest we should, an attitude of respect for the law to be a virtue, we should see it as a mean between two vices. These might be called, on one extreme, ‘relentless disobedience’, and on the other, ‘uncritical obedience’. Hence, it might turn out that sometimes obedience is a *vice*.

*appreciate* the features of the context in which she finds herself, so to *understand* what action is the most appropriate.<sup>71</sup> The virtuous citizen engages with the particular situation, in order to identify what the right action is, under the circumstances, for her *qua* citizen. She strives to grasp the particular elements of the context in which she is called to choose how to act.

The case of a context sensitive analysis of the right action can be exemplified with reference to the case of friendship. Caring for a friend usually implies doing things that avoid the friend's suffering and promote her happiness: under some circumstances, however, 'caring' could require raising one's voice against the friend, or telling her a hurtful truth, or even causing her some inconvenience.<sup>72</sup> In all these cases, a good friend possesses a degree of 'perception' or situational appreciation, through which she identifies important aspects of the particular context ("in this cases, this is what a good friend should do").<sup>73</sup> Virtue, therefore, implies the capacity to analyse the situation *in which one is to act*, so to identify *how she* has to act.<sup>74</sup> This same capacity characterizes the 'good' citizen, as someone who considers the context in which she is called to act, and understands whether a particular action, e.g. obeying the legal directive, is what her role as citizen requires from her in that case. What follows from this is that there is no *specific* action that can be pointed out as the right one without looking at the situation in which it is performed.

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<sup>71</sup> *NE*, III, 1112b16-20

<sup>72</sup> I have in mind here some extreme case, such as smacking a friend who is about to do something very stupid and does not want to listen to our warnings concerning her plans. This extreme act might even be *required* by the special relationship with the friend: maybe one could be accused of not being 'a good friend' if she were to let the friend go along with her plan without trying everything to persuade her to change. I will argue that acts of illegal protest can sometimes be interpreted in analogous way, as *required* by the relationship with one's own fellow citizens.

<sup>73</sup> See *NE* II, 7, 1107a31-33: "For among accounts concerning actions, though the general ones are common to more cases, the specific ones are truer, since actions are about particular cases, and our account must accord with these."

<sup>74</sup> See J. McDowell (1979) p.333, who conceives of virtues as "specialized sensitivities to requirements [of a particular situation]"; Swanton (2001), who defines a virtue as "a disposition of acknowledging or responding" to the features of a particular situation.



## 6. Virtue is not a specific activity

I mentioned above that the analogy ‘virtue of a knife/virtue of a human being’ is problematic, for it is not clear what the function of a ‘good human being’ should amount to. This is also reinforced by what I said in the previous paragraph: we should not tie a specific virtue to a specific activity. We define a knife as excellent with reference to the specific activity of cutting. Similarly, we may say that a man is good or excellent at some specific activity: *yet, there is no specific activity at which the virtuous agent has to be good.*<sup>75</sup> To be virtuous is not an ‘activity’ in the same way that, for example, ‘walking’ is:

If I ask a person who is engaged in some activity, ‘What are you doing?’, and he answers ‘I am courageous: this is very dangerous’, he may be speaking the truth, but he is not telling me what he is doing.<sup>76</sup>

An excellent football player is one who performs a particular activity (i.e. playing football) in an excellent way. Yet, there is no specific skill that, for example, the courageous man has to perform. Aristotle suggests this by distinguishing virtue (*aretê*) from ‘craft’ (*technê*): the former is concerned with ‘action’, where the latter focuses on ‘production’.<sup>77</sup> One way to understand this distinction is by pointing out that while the value of a *craft* refers to the object of production, the value of a *virtue* lies in itself being a good that individuals choose ‘for its own sake’. Virtuous acts are not characterized, at least not primarily, in terms of what they achieve: a virtue is an inner trait of the agent, and it is displayed by her acts: yet, it has not any specific outer feature. There is no definite typology of acts (or “act-category”) attached to a virtue:<sup>78</sup> there is no specific act that shows, for example, courage, in the same way in which there is an act that shows, for example, excellence in playing football.

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<sup>75</sup> See Von Wright (1963), p.139.

<sup>76</sup> Ibid.

<sup>77</sup> *NE*, VI, 4.

<sup>78</sup> Von Wright, op. cit., p.141-143.

My account of political obligation, based on citizens' inner traits, starts from the same premises. I focus on the disposition of the individual as citizen, and highlight the centrality of virtue as a 'state' (*hexis*) of respect for the law. By emphasizing the nature of the citizen/law relationship, I seek to shift the focus of the discussion from the *outward* features of the action, e.g. the results it accomplishes, to the *inner* traits of the agent or, in this particular case, the citizen. This does not mean that, in my analysis, I will not consider *also* the outer traits of an action: in chapter 6, for example, I will analyse different pleas available to a civil disobedient who appears at the trial, and what they can tell us about the agent's disposition towards the law. However, I will emphasise that what defines a 'good citizen' is, among other traits, a stable disposition to act out of respect for the law, although I will specify, in later chapters, that 'respect' is not owed *directly* to the law, but to fellow citizens. Following what I pointed out above regarding the nature of virtues, I will argue that an attitude of respect for the law may be displayed by quite different acts, depending on the circumstances.

This does not mean, of course, that everything is 'up for grabs' for a citizen. The idea that citizenship requires obedience to the law should be seen, following Aristotle's terminology, as a "usual truth": that is to say, a universal judgment that is true for *most of the cases* it applies to, but not for all.<sup>79</sup> Hence, while it is usually true that citizens should obey the law, in some contexts it may be true that citizens should disobey it. This argument, if developed coherently, might lend support to the idea that a virtuous citizen is one who, under particular circumstances, chooses to disobey the law. It is in this sense that an act of disobedience might be not just 'permissible', but morally right.

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<sup>79</sup> See NE, I, 2, 1094b21-23.

## 7. Obeying vs. Respecting the Law

In this last section, I intend to say something more about the attitude of respect that citizens need to develop in order to display the virtues of good citizenship. I began this chapter by arguing in favour of democracy as a *demanding* form of political regime, one that not only confers rights to its members, but also requires them to take action to maintain the stability of the community. The ‘basic structure’ of a society cannot guarantee the stability of the community by itself: without stressing the importance of citizens’ engagement with the life of their community, we face the risk of a loss in that ‘social capital’ necessary for the polity’s cohesion.<sup>80</sup> Developing a *civic disposition*, to protect and promote the core values underlying the life of the polity, is also required of ‘good’ citizens: this, however, is not cashed out through a *duty* to obey the law. Under different circumstances, the behaviour of virtuous citizens changes accordingly, and *disobedience* might then display the agent’s possession of civic virtues.

Adopting a virtue-ethical approach to the analysis of political obligation allows for a reassessment of the traditional terminology used in the debate on this issue. The problem of political obligation, once again, has been generally identified with the question whether citizens have a moral obligation to *obey* the law. However, by highlighting an inside-out perspective, whereby the value of an action depends also on the disposition of the agent performing it, we may cease to see an act of ‘obedience’ as the kernel of citizens’ obligation towards the law. For example, obeying the law out of the wrong motivation, like *fear* of the consequences, would hardly be worthy of praise. In some cases, an act of obedience would be intrinsically

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<sup>80</sup> To be fair to supporters of the basic structure, and to Rawls, I acknowledge that they do not deny the importance of citizens’ dispositions for the stability of the political community. Rawls, for example, highlights in several cases the centrality of citizens’ “sense of justice” for the society’s stability. See Rawls (1993), p. 19. For reasons that will appear clearer in chapter 4, I think this idea is too narrow, since it relies on a dubious notion of an “overlapping consensus” (ibid, p.15).

wrong – as in the case of obeying an immoral law. This suggests that we should not put excessive emphasis over the act of obedience in defining what describes a ‘good’ citizen. As I have been suggesting in the above discussion, we should grow accustomed to the idea *there is nothing valuable in obedience to a political authority per se*.<sup>81</sup>

“Obedience” has only a *conditional* value, depending on the command one is faced with. It seems plausible to argue that obedience to an unjust constitution would lead the community to ruin. For

[j]ust as ethics calls for non-compliance with, indeed rejection of, immoral beliefs and desires, so political theory, if brought to bear upon the question of what the virtuous man should do in certain circumstances, seems to support the conclusion that disobedience of bad laws and decrees may well be called for.<sup>82</sup>

Given that virtues are unconditionally valuable, then obedience is *not* a virtue.<sup>83</sup> Therefore, in searching for the character traits of the virtuous citizen, we would be misled in focusing only on ‘obedience’. We need to reinterpret the relation citizen/law under a different light, and maybe abandon the label ‘obedience’ altogether.<sup>84</sup>

‘Obedience’ is neither “clearly admirable” nor “clearly beneficial to the actor”.<sup>85</sup> Limiting the role of ‘obedience’ in the analysis of political obligation is the

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<sup>81</sup> A view defended by Simmons (2003), p. 51, according to whom “[o]bedience and disobedience to the law would be equally in need of justification”. See also Walzer (1970), p. 16.

<sup>82</sup> Rosler (2005), p.237.

<sup>83</sup> *NE*, I, 1094a18-20

<sup>84</sup> William Edmundson, developing a virtue ethical account much alike to the one I sketch here, suggests to replace ‘obedience’ with ‘abidance’: the latter “has ties both to the ideas of continuously dwelling in a place and to acquiescence if not cooperative engagement. (...) [Law-abidance] refers to a settled disposition to act and to feel: but it is not itself a feeling or a faculty. (...) (I)t is a character trait that harmonizes well with other standard virtues, such as honesty and fairness.” See Edmundson, (2007), p. 3. In this section, I borrow his terminology concerning the comparison between ‘obedience’ and ‘abidance’.

<sup>85</sup> Edmundson, *ibid*.

first step towards understanding the idea of an obligation *towards* the law, with which I opened this chapter. The concept of ‘obedience’ embodies the idea of a subject who is compelled to follow the legal enactment, with little or no room left to her own assessment of the qualities of the particular law. The law is there to be obeyed, and the fact that the agent disagrees with the law is, in itself, no sufficient ground for justified disobedience. This was the main problem I pointed out with reference to deontological approaches to political obligation, namely their ‘outside-in’ approach to the issue. On the other hand, a subject that ‘respects’ the law might choose not to comply with a legal requirement, in the same way in which, as we saw above, someone who respects her friends might choose to cause her some inconvenience. She might decide to depart from what the law requires *out of respect* for the law.<sup>86</sup> Focusing on *respect*, instead than obedience, suggests that at the core of citizens’ obligations there is a disposition *to engage actively* with the law, based on an acknowledgment of law’s role and function. This seems to be Aristotle’s view in the *Politics*:

to have been educated in the spirit of the constitution is not to perform the actions in which (...) democrats delight, but those by which the existence of (...) a democracy is made possible.<sup>87</sup>

I argue that ‘disobedience’ is one of the actions “by which the existence of a democracy is made possible”. Political obligations, therefore, go well beyond the duty *to obey* the law, and by no means are exhausted by it: in some cases, political obligations might require *disobedience* of the law. Focusing on an obligation *towards* the law can capture the idea, which I will discuss in chapter 3, and then especially in chapter 6, that a particular legal enactment is part of a system of laws (the Aristotelian

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<sup>86</sup> See Raz (1979), p. 261. However, Raz’s idea of respect for the law differs from mine, particularly since he separates it from the idea of loyalty to one’s own community. In my account, the former relies on the latter. See below, chapter 3 and 6.

<sup>87</sup> In Everson (1984), p.139

“constitution”) whose chief function is to protect and promote the autonomy of its subjects. The main reason for an individual to obey a particular law X is that X is part of this larger system, backed by some fundamental principles: in my view, this principle is the value of individual autonomy.<sup>88</sup> When a particular law is at variance with this fundamental principle, an act of disobedience might display a virtuous disposition in the disobeying agent. As Horton has pointed out, political obligation is “a normative, not a behavioural concept”.<sup>89</sup> It is then the case that political life bestows upon citizens duties that go beyond that of following a particular behaviour, i.e. obedience, and I will argue that violating the law, even in a context of near justice, might be what characterizes good citizenship.<sup>90</sup>

In the next chapter, I analyse more closely the kind of disobedience with which I am concerned in this work, namely, *CD*. I will devote some time trying to assess what distinguishes it from other forms of disobedience, and what, in my view, makes it an attractive element within the life of a political community. After that, I will devote the rest of this work to showing how this particular form of law breaking behaviour may qualify not only as ‘permissible’, but as virtuous –that is to say, as a form of behaviour that displays the traits of character of a ‘good’ citizen.

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<sup>88</sup> See below, chapter 3.

<sup>89</sup> Horton (2007), p. 15.

<sup>90</sup> See also Parekh (1993).

## CHAPTER 2

### An Account of Civil Disobedience

#### 1. Overview

On the morning of the 18<sup>th</sup> of March 2003, two peace activists entered the Royal Air Force station at Fairford, in Gloucestershire, UK, and set out to disarm a B-52 aeroplane using hammers. They were stopped after attaching photographic images of ordinary Iraqi people, which they labelled “Collateral Damage”, to the fence, planting white poppies as a symbol of peace, and sowing seeds to represent life. The action was meant to halt aeroplanes due to take off to drop depleted uranium bombs over Iraq. However, the act was based upon a broader intention to denounce the effects on Iraqi civilians of a war the protesters deemed illegal.<sup>1</sup>

On the early hours of the 8<sup>th</sup> of December 2008, fifty-seven activists cut through the security fences surrounding the runway at Stansted Airport, UK, and after walking for 300m along the border of the runway, assembled fencing panels creating a little fort, and hooked themselves to the panels with chains and D-locks. The activists were wearing high-visibility vests with the inscription “Please Do Something” on the back. The action was intended to draw public attention to the UK Government’s intention to promote aeroplane traffic by building a further runway at Stansted Airport. The activists’ protest led to many flights being cancelled, which caused great disruptions to passengers due to fly on that day.<sup>2</sup>

On the 8<sup>th</sup> of July, 2010, over one-hundred activists from the environmental group Greenpeace occupied coal conveyors and climbed smoke stacks and cranes on four power stations in Italy, including the one in Brindisi, Italy's biggest coal-fired power station and the country's largest single source of CO<sub>2</sub> emissions. Activists planned to stop the pollution caused by these

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<sup>1</sup> Wade, A. (2003)

<sup>2</sup> Percival (2008)

stations, by blocking the coal conveyor belts and preventing coal from going into the plant. The protest aimed to send a message to the G8 leaders, who were meeting in L'Aquila on the same day, asking them to promote policies that would put environmental concerns ahead of economic ones.<sup>3</sup>

The three cases mentioned above all represent, in different ways, cases of CD. The goal of this thesis is to show how actions like these may display, in spite of their law-breaking nature, an attitude of respect for the law. In this chapter, I am going to focus on the concept of CD, aiming to explain its main features, and what distinguishes it from other kinds of illegal conduct. I intend to discuss, first, what kind of requirements an illegal act should fulfil in order to qualify as a case of CD. It will emerge that the task of giving a *definition* of what constitutes an act of CD is not an easy one. In fact, in the recent debate on CD there have been suggestions that we should abandon the attempt to arrive at a clear-cut definition, and try instead to focus on what characterizes paradigmatic cases of CD.<sup>4</sup> I will follow a similar approach, arguing that in our analysis and moral assessment of an act of CD, as I explained in chapter 1 above, we should look not only at the external features of the act, but also at the inner traits of the agent's character. However, I will also explain that, in my view, there is *at least one* necessary requirement for an illegal act of protest to constitute a case of CD. This is the agent's willingness to accept the legal consequences that follow from breaching the law, which will be the centre of my discussion in chapter 5.

I should start by stating that, throughout this work, I will emphasize repeatedly that the best way to interpret the nature of an act of CD is as a *communicative action*. The label "communication" is the pivotal element in my argument of CD as a behaviour displaying the traits of good citizenship, for it reveals how this kind of conduct does not simply aim to *express* dissent:

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<sup>3</sup> Hooper (2009).

<sup>4</sup> See Brownlee (2004).



rather, it seeks to involve other citizens into a discussion.<sup>5</sup> If, on the one hand, an act of expression can be successfully accomplished by an individual alone, *communication*, on the other hand, *requires* someone else with whom the individual aims to communicate.<sup>6</sup> In the account that I will offer, CD aims to bring fellow citizens closer to each other, not to place them one against the other. The next chapter will reveal that, by resorting to an illegal act of protest, the civil disobedients show their respect for their fellow citizens as rational and autonomous agents.

I start my discussion by considering Rawls' account of CD, for I believe it provides a good basis for the present discussion.<sup>7</sup> Furthermore, Rawls' definition of CD has been the object of the recent debate on the topic: thus, by assessing his view, I can also place my own argument in the context of the current literature. I will highlight some aspects emerging from Rawls's definition, aiming to show why his view results too narrow, particularly for its emphasis on 'non-violence'. The issue of non-violence, and the related question whether an act of CD ought to rule out any use of force, will be the object of further analysis in chapter 3. I will, nonetheless, endorse Rawls' view about the relevance, for an act of CD, of the agent's willingness to accept the legal consequences of her illegal act: as with non-violence, my view as to this point will be developed further in later chapters.<sup>8</sup> What I will focus on, in this chapter, is the already mentioned *communicative nature* of CD.<sup>9</sup> At the core of my argument is the claim that the communicative aims behind the breach of law allow for a justification of CD as an act that respects the autonomy of fellow citizens, and that plays a positive role during the process of democratic deliberation. By reference to Grice's notion of non-natural meaning, I will explain how an act of CD, in spite of the defiance of the law, and of the possible inconvenience caused to other citizens, seeks to treat the latter ones as *subjects*, respecting them in their status as autonomous, self-legislating agents. Through the appeal to this kind of

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<sup>5</sup> See Duff (2001), p. 79: "for communication involves, and expression need not, a *reciprocal* and *rational* engagement".

<sup>6</sup> Ibid.

<sup>7</sup> Rawls (1999), pp.319-343.

<sup>8</sup> See chapter 5, below.

<sup>9</sup> See Brownlee, op. cit., esp. pp. 343-350

behaviour, the civil disobedients display what in the previous chapter I referred to as “civic virtues”, that is, the virtues of ‘good citizens’. Their action can then be justified, from the moral point of view, as not merely permissible, but morally *right*, for it respects the obligations they have *qua* citizens. From this standpoint, it will then become possible, in the rest of this work, to defend the compatibility of CD with the core values of a democratic regime, which I identify with the respect for individual autonomy and for the rule of law.

This chapter aims to offer an outline of the topics that will be analysed in more detail in the next chapters. As I anticipated, the notions of violence and coerciveness in CD will then be at the centre of Chapter 3. Chapter 4 will consider how CD can be a positive contribution in cases of *reasonable disagreements*. In Chapter 5, I will explain why I take the willingness to accept the legal consequences of breaching the law as a necessary requirement of CD. Finally, chapter 6 will analyse the behaviour of a civil disobedient who appears at the criminal trial.

## **2. Rawls’ Theory of CD**

A study of CD faces a series of difficulties that begins with the attempt to identify the specific characteristics of such form of protest. In fact, if we need to single out CD as one particular form of illegal behaviour, it is necessary to spell out, first, what characterizes an act of disobedience as ‘civil’, and how to draw a line between civil and *uncivil* disobedience.<sup>10</sup>

In this work, I choose to focus on the definition of CD presented by John Rawls, for the simple reason that it provides a good starting point for the analysis of this topic. As I seek to show, Rawls’ account is unsatisfying in many respects: however, it has the merit of attempting to single out some basic features that help distinguish CD from other kinds of illegal behaviour. Although, as I will show, Rawls’ discussion of CD is too narrow and risks excluding from the realm of CD acts that might well qualify as ‘civil’, its merits in contributing to the debate on the issue should not be underestimated. According to his definition, an act of CD is “a public, non-violent, conscientious

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<sup>10</sup> On the concept of uncivil disobedience, see Kirkpatrick (2008).

yet political act, contrary to law, usually done with the aim of bringing about a change in the law or policies of the government.”<sup>11</sup> While I will agree with this initial account of an act of CD, I will criticise some of the requirements that Rawls builds into it.

The first point that arises from Rawls’ definition is that an act of CD is *illegal*, that is, it entails the deliberate violation of a legal directive: it is, therefore, an action against the letter of the law.<sup>12</sup> Regarding this point, it is important to notice that, in many cases, the act of CD can only be performed in an *indirect* way. That is to say, there are situations in which the law that is violated and the one that is questioned are the same: e.g. a ban of religious garments in public places may be protested by openly wearing those garments publicly, in defiance of the law. However, this kind of strategy is not possible in cases where the ‘direct’ breach of the law cannot be carried out. Typical examples are protests against military or environmental policies, or about the violation of rights of minorities to which one does not belong: under such circumstances, protesters could not directly violate those policies. Hence, they might resort to protesting against them in an indirect way, by breaching a law that, in principle, they accept as appropriate. All the three examples mentioned above seem to be, in this regard, cases of *indirect* CD. In chapter 6, I will suggest that the distinction between direct and indirect CD can influence the behaviour of the civil disobedient who appears at the criminal trial, in terms of the plea she might offer when questioned by the prosecutor.

Second, this violation of the law is carried out *publicly*: while a plain law breaker usually seeks to act covertly, disguising her identity or the very act she is carrying out, a civil disobedient intends her identity, and her behaviour, to be clear to the rest of the community. Thus, revealing one’s identity before, during or *immediately after* the breach of the law is a defining aspect of an act

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<sup>11</sup> Rawls (1999), p.320.

<sup>12</sup> In chapter 6, I will argue that the ‘illegality’ of CD might not be sufficient to judge it a ‘criminal’ action.

of CD.<sup>13</sup> Rawls specifies, thirdly, that an act of CD is non-violent: this is a central aspect, upon which I will focus in detail in this and in the next chapter. It implies that, in breaking the law, a civil disobedient *avoids* the use of *violent means* of protest – a requirement that, as we will see, is not easy to cash out. Fourth, and very important, CD aims for a *change* in the law or policy of the government. An act of disobedience of the law might be done for very different reasons: it might express the agent’s refusal to obey an immoral command; it might aim for a legal exemption *for the particular individual*; or, if it is a case of CD, its aim is to have the legislator change or repeal a particular law or policy.<sup>14</sup>

The emphasis on this latter aspect is central for the distinction between CD and another kind of principled disobedience, namely ‘conscientious objection’. Both these forms of protest involve non-compliance with a legal injunction, carried out in a public way: in fact, the ways in which the protest is carried out might be very similar. A typical case of conscientious objection is that of pacifists who oppose compulsory military conscription: by appealing to an incompatibility between that legal precept that prescribes participation in military training, and *their own* reasonable beliefs about the immorality of any war, they publicly object to the law about military draft by acting illegally. Like CD, conscientious objection communicates a disagreement about a particular law or policy: however, the message conveyed is different.

In fact, in conscientious objection, individuals demand *exemption* from a legal obligation considered repugnant to their conscience. They are not saying (though, to some degree, might imply) that the law should be changed. They do not necessarily aim to have other people act like them. While an act of CD seeks for a change in the legal system, through the modification or cancellation of the law protested against, conscientious objection often lacks this goal. The latter does not necessarily invoke, for example, the convictions of fellow citizens within the community:

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<sup>13</sup> Hence, we should be wary of the idea that the Boston Tea Party was “the most famous single instance of CD in the American history”, as Carl Cohen wrote. In fact, the Boston Tea Party happened overnight, in the darkness, and the actors’ identity was disguised. It then failed to fulfil the requirement of publicity and, to that extent, it did not qualify as CD, at least in the sense of the term I am using here. See Cohen (1971), p. 37. See also Bedau (1972).

<sup>14</sup> On this point, see Bedau (1991), p. 51.

to this extent, it does not aim to contribute to the deliberative process in ‘the public forum’.<sup>15</sup>

Conscientious objectors do not necessarily appeal to reasons all members of the community can share: what is important to notice, for the present discussion, is that conscientious objection may lack the intention to *address the community* for a change in the legal system, which I will argue is at the core of CD.

Some critics point out that while CD proposes the education of the public and the realization of political-legal change, conscientious objection limits itself to private exemption, to a sort of “washing of the hands”.<sup>16</sup> The latter does not aim at changing the law: hence, it is not grounded on a political strategy, but on a personal attitude. From this perspective, conscientious refusal might fail to reveal a virtuous disposition in the agent, since it is questionable whether it constitutes a form of *participation* in the political life of the community.<sup>17</sup> What I will emphasize throughout this work is that an act of CD is an act carried out within ‘the public arena’, aiming to communicate a message that is based upon *common* ideals. This distinguishes it from acts of conscientious objection, which, as I have suggested, might confine the individual in an “ivory tower awaiting immunity”,<sup>18</sup> with no intention to engage in the deliberative discussion to change the legal system of their community.

### 3. Persuasion Vs. Coercion

I have mentioned above that CD is to be conceived as a communicative action by which the disobedients aim to send a message to their fellow citizens. As part of a communicative enterprise, CD represents a form of behaviour that aims for *persuasion* and, on the other hand, necessarily steers clear of *coercion*. While the former seeks “[to] lead a person to the performance of an act by

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<sup>15</sup> This is a central aspect, namely how an action based on disobedience of the law can represent a positive contribution to the deliberative debate. It will be the object of my analysis in chapter 4.

<sup>16</sup> Falcòn Y Tella (2004), p.77

<sup>17</sup> I acknowledge that I am being unfair to the conscientious objector. Surely, her plea for an exemption from a law she disagrees with is meant also to bear witness to the fact the law is unjust, and should be changed. Furthermore, it is certainly true that many anti-war activists choose *both* conscientious refusal (to avoid conscription) and CD (to denounce the injustice of a particular war) to express their convictions, as pointed out in Harel, A., (2002). What I am arguing is simply that conscientious objection does not *require* the agents’ intention to enter the public arena to bring about a change in legislation, an intention that, on the other hand, is constitutive of CD.

<sup>18</sup> Falcon Y Tella, (2004), *ibid.*

argument”,<sup>19</sup> the latter aims, to some extent, to “forcibly constrain or impel [a person] into doing something”.<sup>20</sup> In the case of ‘persuasion’, what is emphasized is the importance of bringing one to *share one’s own reasons* for acting in a certain way; ‘coercion’, on the other hand, does not require that people share the same reasons for action, for it involves the attempt to *impose* one’s own will upon that of others.

Introducing the notion of ‘persuasion’ is fundamental to understand the nature of CD as a ‘communicative action’. As we will see, the fundamental value of ‘persuasion’ lies in the respect for the status of the ‘addressee’ as an autonomous agent, i.e. someone who is able to act upon principles she has autonomously chosen. From this perspective, the importance of ‘persuasion’ in CD is directly related to the duty to respect others as autonomous agents, upon which I will focus in chapter 3. This, in turn, also reveals that, as opposed to persuasion, ‘coercion’ is incompatible with the very nature of CD. This has led many commentators, including Rawls, to stress that CD has to be non-violent, and that the use of force would be incompatible with its communicative nature. One way to explain why this should be so relies exactly on the importance of respecting others as autonomous agents, who have a right to choose, without being exposed to any threat, to which policy to give their support. Allowing violence to be employed in acts of CD might also allow for coercion, and this could, in turn, jeopardise the communicative aims and, therefore, be self-contradictory in an act of CD.

Against this view, I will show, in this chapter and more specifically in the next one, that not *any* kind of violence or force necessarily *disrespects* the status, as an autonomous agent, of the person who is being coerced. Thus, I will propose an argument defending the employment of a degree of violence or force in CD as part of a communicative, *persuasive* act.

The emphasis on persuasion appears clearly in Rawls’ definition of CD. I argued that that definition is useful, in that it highlights some of the key aspects of this form of illegal behaviour.

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<sup>19</sup> Simpson (2007), p. 2171

<sup>20</sup> Ibid, p. 445.

Particularly, it enables one to focus on the communicative nature of CD, and suggests one way to understand the label ‘civil’ (namely, in relation to the intention to *persuade* others). Nevertheless, Rawls’ argument encounters problems when spelled out in details, as the debate following his account of CD suggests. Rawls adds three requirements he considers necessary for an illegal act to constitute an instance of CD. These are a) that the act be done publicly, which includes giving advanced notice to the local authorities of the planned illegal act; b) that it do not involve the use of violent means; c) that the illegal act be carried out with a willingness to pay the penalties for the breach of the law.<sup>21</sup>

Let us analyse these requirements, which in Rawls’ account are meant to prevent CD from becoming a coercive strategy. Regarding point (a), in order to minimise the inconvenience caused to fellow citizens, the civil disobedients should give the authorities fair notice of their plans, by informing them of their intention to organise a protest *before* the latter is carried out.<sup>22</sup> Hence, for example, before occupying illegally a public space to protest against the war, the disobedients should let the local authorities know, so that the latter could be prepared for the disruption the protest would cause, and minimise its impact on others. This appears to be an extremely demanding requirement, since giving advanced notice of the intention to organise an illegal protest will often jeopardise the very act of disobedience. None of the three cases mentioned above would have taken place, had the activists informed the police beforehand about their plans. Rawls stresses *publicity*, because keeping one’s identity covert or acting secretly would conflict with the nature of CD as a communicative act. This is certainly important for CD, yet it is sufficient, for the action to be done publicly, that the disobedients reveal their identity after the act has been carried out.<sup>23</sup> It seems, therefore, reasonable to re-interpret requirement (a) more loosely than Rawls does, without denying

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<sup>21</sup> Rawls (1999), pp.319-323.

<sup>22</sup> *Ibid.*, p.321.

<sup>23</sup> See Smart (1991), p.206, Brownlee (2004), pp. 348-9. Revealing one’s identity implies revealing one’s own name, rather than simply claiming one’s membership to a group whose members remain, nonetheless, unknown. Thus, for example, individuals belonging to the ETA, in Spain, who phone the police after a bomb has gone off in the city centre, saying “We (the ETA) have done that”, are not acting ‘publicly’ (even less, of course, are they acting as civil disobedients).

its relevance for an act of CD. Some degree of ‘secrecy’ would not compromise the value of the act as CD.

I already said something about the role of non-violence in CD. In the next section, I will explain how, given the communicative nature of CD, some degree of violence or force may be allowed in it. After that, I will focus on requirement (c), concerning the willingness to accept the legal consequences of the breach of the law.

#### **4. CD and Permissible Violence**

For Rawls, “to engage in violent acts likely to injure and hurt is incompatible with CD”.<sup>24</sup> Non-violence is an important element of an act that aims to *persuade* and to eschew coercion. Violence is central to the distinction between ‘civil’ and ‘uncivil’ forms of protest. Clearly, a key difference between a civil and an uncivil act refers to the amount of violence they involve: this seems intuitive when comparing an act of CD with a terrorist attack. The latter is carried out through extremely violent means, with the aim of endangering other people’s lives. A terrorist attack, by definition, lacks any intention to *persuade*.

However, arguing that CD should be non-violent leaves many questions open, especially with regard to what constitutes ‘violence’. Rawls holds that “*any interference with the civil liberties of others*” obscures the quality of CD:<sup>25</sup> yet, there are two aspects to be taken into account when talking of non-violent actions.

First, the distinction between ‘violence’ and ‘non-violence’ is by no means clear, as is the fact that ‘legal’ actions cannot be harmful to others: as Raz has pointed out, a strike by ambulance drivers, although protected by the law, could certainly endanger people’s lives much more than an illegal protest in a square.<sup>26</sup> Second, it is also often difficult to draw a line separating persuasion from coercion. In fact, on a closer analysis, it may be difficult to point to an act of protest that is

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<sup>24</sup> Rawls (1999), p. 322

<sup>25</sup> Ibid.

<sup>26</sup> Raz (1979), p. 267.



*purely* persuasive. Consider, for example, the case of civil disobedients that occupy a public space, intending to persuade the government to re-examine a law or policy. This kind of protest seems to be in line with Rawls' account of CD: however, rather than a case of "pure persuasion", it may be possible to see it as 'coercive', in that it forces fellow citizens to heed the disobedients' message, willingly or not. Even those forms of CD that satisfy Rawls's conditions could contain some elements of coerciveness. This has led some theorists to argue that, at least in some cases, *persuasion involves coercion*.<sup>27</sup>

To clarify this point, let us consider Gandhi and Martin Luther King's strategies of non-cooperation, two passionate endorsements of the principle of non-violence. Both aimed at *persuading* the others of the necessity to change a policy: nevertheless, both Gandhi and King recognized that the inconvenience caused to the majority might have been a necessary means to focus their attention on a particular issue.<sup>28</sup> This will be a key point in my discussion, and I will develop it to a fuller extent in chapter 3, where I will account for these considerations while still defending the incompatibility between CD and coercion.

In light of these considerations, I think that the link between CD, non-violence and persuasion should not be over-emphasized. A better description of an act of CD, then, may be the one offered by Carter, who uses the label "a-violent" with reference to illegal protest, to signify that the latter, while it *tends to* avoid the employment of violent means, does not always rule them out.<sup>29</sup> Violence is not a constitutive element of CD (as opposed to other forms of dissent such as terrorism, guerrilla, revolution), but might be employed in CD nonetheless.

If we take this stance, as I will, we are nonetheless faced with the risk of a slippery-slope argument: the distance between allowing some violence, and allowing a lot of violence, in CD indicates the need for a rule that can help us draw a line between what is permissible and what is

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<sup>27</sup> Morreall (1976); Greenawalt (1989), p. 233.

<sup>28</sup> King's words seem to give support to this view: "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". See Bedau (1991), p. 71. Added emphasis.

<sup>29</sup> Carter (1973), p. 22.

not. Thus, even in the case where some degree of violence might be necessary for the communication to take place, we need to be able to assess what constitutes an excessive use of violence in CD.

Given the account of CD I have offered so far, it seems appropriate to argue that the use of violence likely to result in serious injury or death of other people would contravene the communicative nature of CD. Here, I refer to 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.<sup>30</sup>

According to what I have said above, CD is an attempt to communicate to one's fellow citizens a concern about a particular law or policy. In an act of communication, the utterer acts on the assumption that the audience is a rational agent, i.e. able to receive and understand the message. The addressee is expected, therefore, to receive the message and to issue a reply to it: from this perspective, the addressee is, to use the Kantian terminology, the *end* of the act of communication. If this is the case, then we can assess the use of violence in CD according to how it treats others. To do so, we can consider two hypothetical cases of anti-war protest.

In the first case, let us imagine that the protesters act violently to the extent they deliberately damage someone's property (e.g., the case of the anti-war protesters damaging military airplanes); in another case, the use of violence aims to cause direct physical harm to someone (e.g., protesters that kidnap and kill a soldier to protest against that same policy). In both cases, the protesters intend to communicate to their fellow citizens their concern about their country's war policy.

In the first type of case, a degree of violence is undoubtedly involved: the protesters cause a serious inconvenience to others, in order to have their message heard by the state. They violate someone's property rights, with the intention to induce in the members of society the belief that some military policy needs to be re-examined. In this case, to some extent they do *use* the persons

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<sup>30</sup> Abbott (2008), p. 46

whose rights they violate as a *means* to get to their end, given that the damage caused to their property is what might allow the act of protest to have resonance. Nevertheless, the fellow citizens who suffer violence are also the *end* of the action. The civil disobedients appeal to the others' rationality: they assume they are able to understand the reasons behind that violent action (i.e. the concern about a wrong policy). The protesters still look at the community as their interlocutor: they aim for *persuading* it, that is, they aim at the community *also as the end* of their illegal action.

This does not happen in the second type of case I have mentioned. In that case, the use of violence disregards the individual as a rational being: the protesters treat the person they kill merely as a means to force the state to listen to, and to accept, their 'message'. In no way would they be appealing to the rationality of the person they kill. This use of violence would treat the individual *merely as a means* to a further end, not as an end (i.e. as the addressee).

This application of Kant's Formula of Humanity can help understand why seriously injuring or killing other people contradicts the very nature of CD as a communicative act. It can then offer a yardstick for the permissibility of violence in CD. If we discard the value of human rationality by treating someone merely as a means for our ends, and not also a rational agent we have to persuade,<sup>31</sup> we also contradict the value of CD as a communicative action.

In the next chapter, I will return to this issue, to show how we should further distinguish between violence that aims to *persuade*, and that which aims to *coerce*, and I will argue that only the former can be part of an act of CD

## **5. Willingness to Accept Punishment**

The third requirement for an act of CD, according to Rawls, is that citizens who resort to this form of protest will be willing to accept the legal punishment for the breach of law that CD implies. Thus, the actors that engage in CD must not try to avoid the legal consequences of their

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<sup>31</sup> And by whom we can be persuaded as well. See below, chapter 6, on the criminal trial as the place for reciprocal persuasion between the state and the civil disobedients.

action, and undergo the punishment.<sup>32</sup> In Rawls' view, by doing so the disobedients express "disobedience to law within the limits of fidelity to law, although [CD] is at the outer edge thereof".<sup>33</sup> The argument for the acceptance of punishment runs as follows: those who resort to CD choose to violate a law, thus they commit an illegal action. Since abiding by the law is fundamental for the subsistence of the political organization, by accepting the punishment for the illegal act the civil disobedients demonstrate their respect for the law in itself, and the exceptional character of their law-breaking behaviour. This would give moral support to their action: although based on law-defiance, it would turn out to be an endorsement of the legal system. Were the disobedients trying to avoid punishment, they would be sending a different message: that the law can be breached, and/or that the state has no right to administer punishment over citizens who disobey.

Kirkpatrick suggests an interpretation of this requirement in light of Hart's idea of power-conferring rules.<sup>34</sup> According to her argument, the reason why civil disobedients are normally expected to accept the legal punishment is that they respect the rules stating who is in charge of interpreting, adjudicating, and enforcing the law. This is one of the elements that distinguish 'civil' from 'uncivil' disobedients: the latter ones tend to believe that "people preside over legal officials as well."<sup>35</sup> From this perspective, what makes the latter more 'lawless' than civil disobedients, is that civil disobedients typically do not interfere with power-conferring rules. Others, following Rawls' idea, point out how the acceptance of punishment, by showing respect for the law, can shift the burden of moral justification from the civil disobedients to the majority in power.<sup>36</sup>

However, these claims are not uncontroversial. The willingness to accept punishment as a necessary requirement for an act of CD is questionable. In particular, it is debatable whether this kind of behaviour does really show 'respect' for the law, or whether accepting punishment should just be seen as part of the strategy of the civil disobedients (i.e. as a way to gain support from fellow

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<sup>32</sup> Rawls (1999), p.322.

<sup>33</sup> Ibid.

<sup>34</sup> Kirkpatrick (2008), pp. 15-16. For Hart's notion of power-conferring rules, see Hart (1961), pp. 78-79.

<sup>35</sup> Kirkpatrick, *ibid.*

<sup>36</sup> Sabl (2001), p 321.

citizens).<sup>37</sup> In my account, the willingness to accept punishment plays a central role, and I will try to support those who, like Rawls, consider it a necessary element in CD. However, my argument will avoid the emphasis over the importance of respecting the law as such: rather, I will argue that the reason to be willing to accept the punishment lies in an obligation the civil disobedients have to their fellow citizens, an obligation that, I will argue, is based on fair-play. This means that in trying to escape the legal consequences of their deliberate act of disobedience, the civil disobedients would wrong *their fellow citizens*. On the other hand, by being ready to submit to the punishment that *might* follow, they display the dispositions of virtuous citizens. In chapter 5, I will therefore endorse the willingness to accept the punishment as a necessary condition for an act of CD.

## 6. Nearly-Just Societies and “Last resort”

Two further aspects emerge from Rawls’s definition of CD in relation to the issue of communication. By stressing how this kind of behaviour addresses the others aiming for a reply, the discussion of CD reveals that not *any* kind of political context is appropriate for CD: under some regimes, the communicative goal at the core of a conscientious act of disobedience could not be reached. This idea is expressed by Rawls’ remark about CD being suitable only in *nearly just societies*, which are “for the most part well-ordered, but in which some serious violations of justice nevertheless do occur.”<sup>38</sup>

For a communicative act to be successful, the communicator has to choose a form of address that is likely to succeed: for example, as we saw above, excessive violence would jeopardise the communicative aims of CD. However, it is also necessary that the audience, those with whom the communication has to be implemented, will be responsive to the message. This, on the one hand, implies that the audience has to be *capable* to understand the message: but equally important is the fact that the latter be *willing* to do so. That is to say, the success of an act of CD depends as much upon the majority in power (the addressee) as it does upon protesters (the utterer).

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<sup>37</sup> See, for example, Zinn (1991); Van Den Haag (1972), p.32-33.

<sup>38</sup> Rawls (1999), p.319. For his account of ‘well-ordered societies, see *ibid.*, pp. 4-5.

As we saw above, Rawls defines as nearly just a society that is “well-ordered” but in which there is the presence of “some degree” of injustice. Under such circumstances, the civil disobedients think that the majority in power may be diverting from the principles underlying the constitution, and yet that it might also be willing to reconsider its decisions, should citizens manifest concern about it. Thus, in a nearly just society citizens accept the majority in power as legitimate, and still believe in future cooperation with it: they aim to *persuade* the government of the necessity to change a law or policy. In a nearly just society, citizens normally hold that communication is still possible.

I should stop for a moment, to clarify that although I rely, to some extent, on Rawls’ idea of CD as appropriate only to nearly-just regimes, I do not endorse his view of a well-ordered society as based on a shared conception of justice. In fact, what motivates this thesis is the belief that it is because people do not share the same conception of what is just that CD represents a valuable instrument in a pluralist democracy. Although Rawls is right in stressing the role of the context for the choice whether to embark on CD, his idea that CD is appropriate only against the background of a shared conception of justice appears implausible.<sup>39</sup> I will have more to say on this point in chapter 4.

The idea of nearly just society is useful in pointing out the political context where CD may be appropriate. Under the Nazi regime, for example, CD might have barely produced any result: it would inevitably fail as a communicative act, due to the government’s unwillingness to accept the message sent by the civil disobedients.<sup>40</sup> Further, it would be very unlikely that citizens would acknowledge the possibility of future cooperation with a similar government. A totalitarian society might require, and justify, the appeal to more extreme forms of protest, like guerrilla warfare or revolution. Given the argument I am developing, that aims to show how an act of CD might display

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<sup>39</sup> For example, animal rights activists are not appealing to an existing shared conception of justice: they are asking that such conception be expanded so to include the right of animals. See Singer (1973), pp. 84-92.

<sup>40</sup> A more recent case is offered by the political situation in Burma, where peaceful protest was crushed by police violence. See Denby (2007).

civic virtues, it seems possible to argue that an act of CD performed under a regime that offers little or no hope for the success of the communicative enterprise would fail to display such virtues. Under such a regime, a virtuous citizen may choose more confrontational ways to protest, to the point that the choice to do CD might even be unwarranted. As I already mentioned, Rawls appears to be right in specifying that CD may not always be a suitable choice.

Once again, though, Rawls' idea of a nearly just society also seems too restrictive.<sup>41</sup> In fact, between the Nazi regime and an ideally just society there is a lot of middle ground: most political regimes are far from being 'just', yet cannot be labelled 'unjust' regimes either. Also, it is not clear why a seriously unjust society should discourage CD: in the case of two most famous examples of CD, those led by Gandhi and King, the political context was surely not akin to 'nearly just' ones. Nonetheless, citizens resorted to CD rather than to other forms of protest, and their choice eventually led to success. Rawls himself does not deny that a nearly just society may involve "serious" injustice, and that many citizens in it might be "immovable and apathetic",<sup>42</sup> willing to enforce the injustice with the use of illegitimate force. The problem seems to be that it would be hard to define as "nearly just" a society like this. For these reasons, it seems that we should not focus too much on how just or unjust the society has to be for an act of CD to be justified: even in a case where the possibilities of success would be quite low, due to some degree of reluctance, on the side of state's officials, to heed the protesters' message, an act of CD may nonetheless be warranted. Also, we should consider that protesting against the injustice of the state, while failing to persuade the leaders, may still succeed as a form of address to fellow citizens. Where the government is apathetic and corrupt, an act of CD could induce, in other citizens, the belief that

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<sup>41</sup> Andrew Sabl has suggested it is more appropriate to talk of 'piecewise just' societies, to indicate those in which justice is prevalent within a powerful group, yet is practised to a very small degree, if ever at all, in dealing with an excluded or oppressed group. See Sabl (2001), p. 312.

<sup>42</sup> Rawls (1999), p. 330-31

‘something has to be done’: and this might put more and more pressure on the government to ‘be receptive’ to the disobedients’ plea.<sup>43</sup>

A final remark to clarify the main traits of an act of CD refers to its being employed as a ‘last resort’.<sup>44</sup> Citizens should embark upon CD only after all possible legal alternatives to it have been attempted. Breaching the law in order to communicate is not the only strategy available to good citizens: the use of illegal measures should always be considered an extreme action, hence CD should be carried out after legal means of protest have failed. This means that, for example, citizens should first seek to organise legal (i.e. authorised) acts, i.e. publishing appeals on newspapers, handing leaflets in the streets, writing to their MPs, etc., and then, if these strategies fail, resort to illegal protest. This would then be in line with the idea of respecting the legal system as a whole: it would display the subjects’ reluctance to violate the law in the first place. After representatives of the majority have shown themselves indifferent to the demands of the minority, or cannot satisfy them, the resort to CD may be justified. It is only after legal alternatives have been tried without results, i.e. without receiving any reply, that an act of CD can display virtuous traits of character in the agents. Hence, CD might not be morally praiseworthy if carried out too early.

However, it is worth mentioning that the idea of ‘last resort’, though important in principle for a civil disobedient, often cannot be acted upon. Pro-life activists, for example, seek to prevent abortions being carried out: the only way of acting available to them might be to occupy illegally a clinic to stop abortions (which they see as a form of killing of innocent lives). Similarly, the only way, for anti-war protesters, to communicate their opposition to a war about to start, might be to damage military weapons, so to defuse them. There are also cases where the “law requires an act that the individual cannot in conscience perform, and one has to perform the act before pursuit of

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<sup>43</sup> This may also be a good example of cases in which some degree of ‘coercion’, in response to the state’s reluctance to heed the message, would be compatible with the aims of CD.

<sup>44</sup> Rawls, *ibid*, p. 327.



lawful alternatives is possible”.<sup>45</sup> It seems that, when considering the appeal to illegal tactics as ‘last resort’, the *imminence* of the threat to be averted plays an important role for their justification.<sup>46</sup> It has been suggested, further, that the *irreversibility* of the harm to be prevented might justify the appeal to extra-legal form of protests in spite of legal measures still being available.<sup>47</sup> That is to say, it is also the imminence and the severity of the wrong to be denounced through the protest that justify using illegal means, even when there are legal measures still available. It is also worth noting in passing that, in most cases, there are always further legal means available (yet another letter to the MP, yet another article on a newspaper, etc.). In light of these facts, it seems preferable to relax the requirement that legal alternatives should have been *exhausted*, and argue that an act of CD might be justifiable *if the legal alternatives have received due consideration*.

## 7. The Communicative Nature of CD

So far, I have been considering the definition of CD offered by Rawls, highlighting points of it that seems to be problematic. To summarise, Rawls’ view seems too narrow in requiring advance notice of the plan to do CD; its emphasis on non-violence, as necessary for an act of CD, is particularly in need of further specification, which can reveal that some degree of violence might be allowed as part of the act of CD. Similarly, Rawls’ emphasis on a ‘shared conception of justice’ is implausible, and might rule out many cases that we would normally consider CD; and the emphasis on nearly just societies, and ‘last resort’, also fails to account for cases of CD carried out under seriously unjust regimes, and without having *exhausted* all legal alternatives. Nonetheless, Rawls rightly points out, in my view, the willingness to accept punishment as necessary for CD: I will

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<sup>45</sup> Greenawalt (1989), p. 229.

<sup>46</sup> The UK legal system allows for the imminence of the threat to be prevented as a possible legal justification (the so-called *necessity defence*).

<sup>47</sup> This is an argument brought forward particularly by environmental activists. For an interesting application of ‘irreversibility’ and direct action, see Humphrey (2006).

return to that requirement in chapter 5, where I will also say more regarding my argument for a moral obligation to obey the law.

I want to return, now, to the idea of CD as a communicative action, which as I already specified, is the kernel of my argument in this thesis. I pointed out above that communication implies an utterer, an audience, and a message the former wants to convey to the latter.<sup>48</sup> Thus, in CD the law is violated as part of the attempt, made by some citizens (usually in a minority), to communicate a message to other members of the society (usually the majority). By ‘audience’ in this case, it is meant both the state (*vertical* communication, from the civil society to the state) and fellow citizens (*horizontal* communication).<sup>49</sup>

Given this communicative aim, it is central to the meaning of CD that the decision to violate the law has a symbolic value: for this reason, I will argue, the act of disobedience should be intended as a form of *speech act*.<sup>50</sup> By breaching the law, the civil disobedients seek to communicate their *concern* about a particular law or policy.

The law-breaking behaviour at the core of CD does not indicate a mere refusal to comply with a law that is deemed, broadly speaking, wrong. There is a symbolic value behind the breach of the law. This implies that, behind the decision to act in a certain way, there is the *intention* to convey a certain message and produce a certain effect. In order to develop my argument about the ‘disposition’ of a civil disobedient towards the law, I seek to focus on the ‘intentions’ behind a communicative act. This, I hope, can allow for a full grasp of the significance of CD. To do this, I will refer to the work of Grice on ‘natural’ vs. ‘non-natural’ meaning, and I will argue that CD is a form of communication that intends to convey a message in the ‘non-natural’ sense.

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<sup>48</sup> I use the expression ‘utterer’ since it encompasses both linguistic and non linguistic communicative acts.

<sup>49</sup> See Smith (2004), p. 363.

<sup>50</sup> Searle (1969).

## 8. CD as an Intentional Communicative Action

Grice distinguishes two ways in which something (*x*) can ‘mean’ something else (*p*).<sup>51</sup> He labels them ‘natural’ and ‘non natural’ meanings. A natural meaning occurs in the case in which *x* means that *p*, and ‘*x* means that *p*’ entails *p*.<sup>52</sup> For example, the sentence ‘Those spots **mean** measles’ can be paraphrased by the sentence ‘The fact that she has those spots **means** that she has measles’: the fact that those spots mean measles *entails* she has measles. Hence, we cannot say ‘Those spots mean measles but she hasn’t got measles’.<sup>53</sup> Similarly, according to Grice, we cannot infer from the first sentence anything about what is meant by those spots. Nor can we argue anything to the effect that someone meant so-and-so by those spots. From this perspective, therefore, *x* means ‘naturally’ that *p*.

A non-natural meaning is found in a case where *x* means that *p*, but ‘*x* means that *p*’ does not entail *p*.<sup>54</sup> This is the case of a sentence like ‘Those three rings on the bell of the bus **mean** that the bus is full’. There is no entailment between *x* (the bell ringing three times) meaning *p* (the bus being full) and *p*. The bell could have been rung three times without the bus being full (for example, the bus driver might have made a mistake in judging the bus full). Thus, this sentence cannot be paraphrased by ‘The fact that the bell has been rung three times means that the bus is full’. However, in this case we can **infer**, from the sentence, what is meant by those rings on the bell. Also, we can argue from it that someone (the bus driver) means by those rings that the bus is full: that is to say, the bus driver *intends*, by those rings, to convey the message ‘the bus is full’. Non-natural meanings are therefore characterised by someone’s **intention** to communicate something through an utterance. Following Grice’s analysis, it appears that there is more than just one intention behind the goal of effective communication.

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<sup>51</sup> See Grice (1989), pp.213-223. The examples I discuss in this section are those he offers in his book.

<sup>52</sup> Grice (1989), p.213

<sup>53</sup> Ibid.

<sup>54</sup> Ibid., p.214

First, as pointed out already, the speaker intends to produce an effect on the hearer (that is, to generate in the hearer a belief *p*) by the utterance. I will call this **intention (1)**.<sup>55</sup> The bus driver ringing the bell three times intends to induce in the passengers the belief that the bus is full. Similarly, in the case of CD, the protesters intend to persuade the rest of the community (i.e. to induce in them the belief) that a law or policy might be wrong and require further deliberation. This intention reveals another important aspect of this kind of communication: it is not enough to say that the utterer seeks to convey a message to an audience. The communicative act has to be performed with the intention to elicit a reply from the audience by the utterance. Here lies the key difference between ‘expressing’ and ‘communicating’:<sup>56</sup> the former act can be successfully accomplished as a solitary endeavour. One can express one’s own anger about an injustice in an empty room where no one can see her; frustration can be expressed by crying desperately on top of a mountain –again with no need of an ‘audience’. On the contrary, it is part of the act of communication that the message be received *and acknowledged* by the person addressed: this is the main effect that the utterer intends to bring about in the audience. I will refer to this intention as **intention (1)**. In the specific case of CD, the effect on the addressee would be the acquisition of the belief that a law or policy is wrong, and that action should be taken to address the issue.

Once this primary intention behind a communicative act is identified, it is possible to go more deeply into the analysis of intentionality. In fact, it appears that there is more that lies at the core of a communicative enterprise. This is very important for the kind of CD that I have in mind, namely one that displays a virtuous disposition towards the law (in spite of its law-breaking nature). In addition to the primary intention to produce an effect on the hearer, an intentional act of communication should comprise *the speaker’s intention that the hearer recognise that intention*.<sup>57</sup>

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<sup>55</sup> I follow the analysis of Grice’s argument proposed in Smart (1991).

<sup>56</sup> See above, fn. 5.

<sup>57</sup> See Grice, *op. cit.*, p. 216.

Call this **intention (2)**.<sup>58</sup> The speaker intends that the hearer understand the communicative aim of the speaker's act. Grice's example is helpful: I could secretly leave B's handkerchief near the scene of a murder to induce the police to believe that B is the murderer. Here, I (may) have no intention that the police recognise my intention to convince them that B is the murderer. This would make my action unsuitable to convey a non-natural meaning.

Smart offers an illuminating comparison between CD and the example of the handkerchief mentioned above. According to him, "[t]he relation between the handkerchief-planter and the detective is not that of 'utterer' and audience, but that of manipulator and intended spectator".<sup>59</sup> Smart seeks to show that the utterer/audience relation is different from the utterer/spectator one. The spectator is 'addressed' in a different way than the audience is. This difference corresponds to a desire to *engage* with the audience, which is absent in the case of the 'mere' spectator. Smart points out that "ordinary speech acts and other kinds of communication with non-natural meaning, including acts of CD", involve the utterer/audience relationship.<sup>60</sup> This is central for an understanding of CD as a communicative action, for it reveals that at the core of an act of CD there is also what I indicated as intention (2), namely the intention that others understand what motivates the law-breaking behaviour.

We can see this on a closer analysis. Citizens who resort to CD decide to openly defy a legal enactment: for example, they climb on top of a coal fired power station. This illegal act constitutes their 'utterance'. They do this because they *intend* to persuade other citizens (the audience) of the risks behind a particular policy, for example one concerning the disposal of nuclear wastes nearby a highly urbanised centre. Let us say that the civil disobedients want to induce in other citizens the belief  $p =$  'energy from coal is extremely dangerous for the environment, and should be limited'. For this act to constitute an instance of genuine CD, however, it is not sufficient that the message

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<sup>58</sup> See Smart, op. cit.

<sup>59</sup> Ibid, p. 194.

<sup>60</sup> Ibid., p. 195.

will be conveyed and that the hearer will receive it. The civil disobedients also want that *their own* reasons for breaching the law be understood: this is their intention (2). They want to make clear to their fellow citizens why they have resorted to violating the law; this shows how a civil disobedient is someone who is moved by an intention not just to bring about social change, but also to offer *reasons* to explain her behaviour.

This brings to light another important feature of CD, which is the ‘conscientiousness’ of the decision to breach the law. ‘Conscientiousness’ implies that the civil disobedients have a sincere and serious belief that a law or policy requires re-examination by the government, and that the possible wrongness of such law or policy allows for a law-breaking action, in order to communicate such a belief.<sup>61</sup> The sincerity of such a belief is demonstrated by the fact that the agent refers to common principles, i.e. principles the addressee of the message can accept (e.g. *justice*, in Rawls’ theory; *individual autonomy*, in the view I will present in chapter 3), and not out of self interest. It is also important to note that, for a belief to be sincere and serious, it does not need to be true: it might be that the civil disobedients misinterpret the situation, and wrongly see a serious flaw in the law where there is none. Still, their decision to engage in CD may be conscientious, although they might be wrong in seeing a particular law as unjust.<sup>62</sup>

This may also help to understand why, in my opinion, a virtue-ethical account of CD, one that focuses also on the *character* of the disobeying agent, would be preferable to a consequentialist one. From the point of view of consequentialism, what matters to the justification of the illegal act is the goodness of the outcome that it would bring about. As long as the agent *intends* to cause good consequences (i.e. the abolition of an unjust law) the act of disobedience may be (at least) morally permissible. However, once we focus upon the *communicative* nature of CD, it appears that there is more to be taken into account. ‘Manipulating’ the majority to bring about social change would be wrong: ‘persuading’ them would be the correct way to treat them. The emphasis on Grice’s second

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<sup>61</sup> See Brownlee (2004), pp. 340-43

<sup>62</sup> See Lefkowitz (2007) for a defence of a ‘right to do wrong’ when resorting to CD.

intention emphasises this concern with ‘the audience’ or, to use Rawls’s expression, the *addressee*. Persuasion can be achieved through a process of reason-giving that engages, reciprocally, the ‘utterer’ with the ‘audience’, the speaker with the hearer, in a communicative enterprise. Those who choose CD are concerned with showing that they are not plain outlaws, or rather that they are no outlaws at all: they want to persuade the rest of society that they are not lacking respect for the law.<sup>63</sup> The importance of offering reasons for the law-breaking behaviour, that is, the importance of *accountability* for one’s illegal action, will also play a central role in chapter 6, where I will consider the significance for a civil disobedient of appearing at the trial after an act of CD.

Following Grice, I have argued that at the core of a communicative action, or a speech act with non-natural meaning, there are an intention (1) to produce an effect on the audience, and an intention (2) that the audience recognise the utterer’s first intention. According to Grice, there is a further necessary condition for the kind of communicative action under scrutiny. A speech act with non-natural meaning requires also an **intention (3)**: the utterer intends that the effect on the audience should be produced *because of* the audience’s recognition of intention (1).

Compare the following two cases: (1) I show Mr. X a photograph of Mr. Y displaying undue familiarity to Mrs. X; (2) I draw a picture of Mr. Y behaving in this manner and show it to Mr. X (...). What is the difference between the two cases? Surely that in case (1) Mr. X’s recognition of my intention to make him believe that there is something between Mr. Y and Mrs. X is (more or less) irrelevant to the production of this effect by the photograph. Mr. X would be led by the photograph at least to suspect of Mrs. X even if, instead of showing it to him, I had left it in his room by accident. (...) But it would make a difference to the effect of my picture on Mr. X whether or not he takes me to be intending to inform him (make him believe or something) about Mrs. X, and not to be just doodling or trying to produce a work of art.<sup>64</sup>

This kind of intention is important, in my view, because it highlights something special about the relationship between the addresser and the addressee. It points out that the former intends

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<sup>63</sup> See chapter 1, above, for a discussion of the obligation to *respect* the law.

<sup>64</sup> Grice, *ibid.*, p. 218.

the effect on the latter to rely on the latter's recognition of the former's intention to communicate. For example: I may try to persuade a friend that what she is doing is wrong and she should change her conduct. In doing so, I might use a language that, in pointing out the facts in a crude way, might hurt her. I might intend to hurt her, perhaps because I know that the only way to 'open her eyes' is, to some extent, to upset her. But my *intention* is by no means to upset her: my intention is to make her understand my point. I want to persuade her to change her behaviour: further, I want her to understand that the reason why I am saying something that upsets her is that I want to persuade her that her behaviour is wrong. While I regret telling her something that hurts, I also intend that she understands why I am telling her something that upsets her: that is to say, I want her to see my concern with her conduct. On seeing this, I expect she will (hopefully) also understand why she should change conduct (intention (3) mentioned above). Grice's conversational theory captures this important aspect.

Does this third intention also apply to CD? I believe it does. Those who adopt CD intend, as I pointed out above, to induce in the majority the belief that a law or policy requires further deliberation. They act in violation of a law (quite often, not the one they are contesting),<sup>65</sup> but they *do not intend* to deny the rule of the law (as, in the example just mentioned, I do not *intend* to upset my friend). Their intention (3) is that, when (if) the majority in power realise what the civil disobedients mean by their illegal action, they will form the belief that a particular law or policy requires further deliberation.<sup>66</sup> Thus, on seeing those activists risking their life climbing the smoke cranes of the power station, fellow citizens would also realise the seriousness of the issue at stake, and would therefore get to reconsider the opportunity of supporting coal-fired energy.

All these aspects of CD will be object of further analysis in the next chapters of this work.

For the moment, I hope I have pointed out why it is fundamental, for an understanding of the

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<sup>65</sup> See the case of 'indirect CD' that I mention below in this section.

<sup>66</sup> This does not imply that the majority will think the disobedients are right and the majority is wrong. The latter might, upon reflection, get to the conclusion that the law does not need to be re-examined after all. This may still be enough for the communicative aims of CD to be achieved (though very few protesters would be satisfied with a similar outcome).



practice of CD, to concentrate on its inherent communicative nature. CD is an *intentional* act of communication. This distinguishes it from cases of *incidental* or contingent communication, in which the utterer may convey a message, and induce in the audience a particular belief, without intending or properly realising to be doing so. An example of the latter may be an individual's sudden blushing during a conversation: this may communicate the subject's embarrassment, regardless of the subject's intention to reveal her feelings.<sup>67</sup> Although this might still be considered, to some extent, a case of communication, the lack of intentionality sets it apart from the kind of communicative actions CD belongs to.

In these first two chapters, I have defended a conception of strong democracy, broadly based on virtue ethics, and have indicated that an act of CD can display the virtues of 'good' citizenship required by the life in a democratic society. The present chapter has pointed out several aspects related to the practice of CD, which I will analyse further in the next four chapters of this thesis. The issues of coercion and communication, together with a discussion of the value of autonomy, will be the focus of chapter 3. I will offer further ground to my argument that some degree of force or violence in CD might be allowed: I will do this by defending the compatibility between violent CD and the duty to respect others as autonomous agents. In chapter 4, I will consider how an act of CD can contribute to the democratic deliberation, and display a reasonable disposition in the civil disobedients. In chapter 5, I will defend the view that there is a *pro tanto* moral requirement, for a citizen who embarks on CD, to be willing to accept the legal consequences of her law-breaking behaviour. In chapter 6, I will argue that this requirement does not mean that, when civil disobedients appear at the trial, they have to plead guilty. I will claim that it is part of their communicative goal that they should be willing, when at the trial, to offer reasons explaining why their illegal act should not be treated as criminal and, therefore, should not be punished.

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<sup>67</sup> Brownlee (2004), p. 344.

## CHAPTER 3

### Violence And Coercion In Civil Disobedience

#### 1. The Problem of Violence in CD

When talking about CD, Rawls specifies that “while it may warn and admonish, it is not itself a threat”.<sup>1</sup> I pointed out in the previous chapter that Rawls’ view is too narrow, for it excludes from the realm of CD actions that also involve force and violence. According to the view I then presented, a degree of violence may be permissible in an act of CD, provided it does not contradict CD’s communicative nature.<sup>2</sup> In this chapter, I aim to expand my discussion of the concept of *coercion*, to qualify its relation to CD. My intention is to clarify how violent CD may constitute a ‘virtuous act’, that is, an act that displays virtuous traits in the agent, particularly with reference to the requirement to respect fellow citizens as autonomous agents.<sup>3</sup>

By *coercion*, I refer broadly to cases where an individual “threatens to visit some evil or unwanted consequence on another unless that other does or refrains from doing some act in accordance with the coercer’s demands”.<sup>4</sup> I will argue that some forms of violent CD can be ‘virtuous’ for they display a disposition, in the agent, to respect individual autonomy, which I will also discuss in detail in this chapter. My claim will be that, although civil disobedients can aim only at *persuading* their fellow citizens, this does not rule out a degree of violence. That is to say, a civil disobedient’s attempt to impose her will upon the activities of others, using some force, does not necessarily violate the commitment to individual autonomy. More specifically, I will argue that, under some circumstances, it is partly by employing strategies that violate others’ freedom (e.g. blockades, disruptions) that civil disobedients may show their respect for their fellow citizens as autonomous agents.

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<sup>1</sup> Rawls (1999), p.327.

<sup>2</sup> See chapter 2, above.

<sup>3</sup> This relates to my intention, in chapter 1, to analyse CD from a broadly virtue ethical account. Hence, I am not here considering the (certainly plausible) consequentialist argument according to which CD might be justified as the lesser evil against a seriously unjust law.

<sup>4</sup> Leiser (2008), p. 31.

The problem to be discussed concerns the way, and the degree to which an act of CD can influence the debate about some law or policy. If CD, as I suggested in the previous chapter, can involve a degree of violence, then there is a risk of allowing serious interferences with others' autonomy. This refers to the fact that a *threat might be an act of communication* too: pointing a gun at someone's head could be seen as a way to 'send a message and elicit a reply' from that person. Of course, what is crucial in this kind of "communication", which also makes it unsuitable for CD, is that the addressee is *forced* into eliciting a particular *reply* to the message. This is the gist of 'threatening': there is no intention to *persuade* the addressee. If this is the case, then, there is a problem concerning how to allow violence in CD without the risk of compromising its persuasive aims.

This chapter focuses on this issue: I explain in more detail why CD does not threaten other citizens, even in cases where some degree of violence is employed. Allowing for violent CD does not entail also justifying the use of threats as part of an act of CD. This is a key point, for if we want to defend CD as a behaviour displaying a civic attitude in the citizens resorting to it, we cannot at the same time hold that it brings about social change via threats: on this point, Rawls' analysis of CD, discussed in the previous chapter, is certainly right. Hence, I will analyse how violence does not necessarily conflict with the persuasive aims of CD. In the next chapter, then, I will consider more specifically the concept of *persuasive* CD.

## **2. Democracy and Self-legislation**

In order to understand the problem of violent CD within a democratic community, I will be referring to one particular aspect of the relation between a democratic system, on the one hand, and the individual as an autonomous agent, on the other. My discussion in this chapter, and in the next ones, will focus specifically on how CD can be compatible with a democratic system, and with a duty to respect fellow citizens' autonomy.

The claim that democracy is "the government *of* the people, *by* the people, *for* the people" is a familiar one. Utopian as it may sound, it contains the fundamental idea that a democratic

government is what best allows for a level of *self-legislation* or *self-rule*. This latter notion is probably even more obscure to spell out: there is no need, however, to interpret it as suggesting that in a democracy “while uniting himself with all, [one] may still obey himself alone”.<sup>5</sup> At least on its face, this appears highly idealistic, and certainly does not match our own experience as citizens of democratic countries, given that in many cases we are required to accept decisions we disagree with. It seems, therefore, more plausible to explain the relation between *democracy* and *autonomy-as-self-legislation* by arguing that in a democracy, although the outcome of the deliberation could often be different from the one the individual desires, the individual’s preference will have an influence on the final decision.<sup>6</sup> From this perspective, we can locate the value of a democratic system not in the fact that each individual is a “self-legislator”, in the Rousseauian sense, but in the fact that each *takes part* in the process of self legislation.<sup>7</sup> This is how a deliberative democracy enhances individual autonomy. We will see in more detail in the next chapter how this ideal of deliberation should be spelled out, and what role CD can play within it. In this chapter, my focus will be on how to reconcile the appeal to some forms of violence in CD, with a commitment to individual autonomy as self legislation, in the sense just mentioned. The issue is to show how using measures that exert a degree of *force* over fellow citizens can be compatible with an approach that treats individuals not merely as objects, but also as subjects with a right to participate in defining the laws binding them.<sup>8</sup> That is to say, my goal is to clarify how the use of force might play a positive role within a deliberative democracy.

In order to do this, I will begin by focusing on an important distinction between acts of *coercion* and acts of *compulsion*. After that, I will present a conception of autonomy built on the idea of *self-legislation* mentioned above, stressing the importance of the agent’s ability to make choices. For the purpose of my argument, I will highlight how *compulsion*, under some

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<sup>5</sup> Rousseau, in Cole (2008), p. 23.

<sup>6</sup> This point will be discussed in detail in chapter 4 below.

<sup>7</sup> As suggested by Rostboll (2008), pp. 104-5, 210.

<sup>8</sup> A discussion, and criticism, of the “objectifying attitude” involved in treating others as mere objects, will appear in chapter 4, below.

circumstances, can be compatible with a commitment to individual autonomy, and to democracy. I will argue that compulsion can play an important role in CD. On the other hand, *coercion* can pose serious problems in connection to the duty to respect autonomy, which I will discuss below. I will argue that (at least some) cases of compulsion, though they interfere with a person's ability to make free choices, do not infringe upon her autonomy but rather represent actions that aim to *promote* it. However, in well functioning, nearly just societies, the use of *coercion* to force people to endorse a particular policy is alien to CD, for it disrespects in an important way the status of people as autonomous agents. The claim I will defend is that civil disobedients can employ a degree of force, or even violence, to *compel* fellow citizens into a further deliberation. What they cannot do is *coerce* their fellows into choosing how to deliberate.<sup>9</sup>

### 3. Two Different Cases of CD

We saw in chapter 2 that an action of CD cannot involve physical injuries to others. In fact, doing this would be against the nature of CD as an act of *communication* or form of address.<sup>10</sup> It seems clear, however, that between actions that endanger people's lives, and others implying no force whatsoever, there is a lot of middle ground. As some of the examples mentioned in chapter 1 suggest, many cases of CD involve a degree of force, though no physical threats to others are involved. Acts of CD often force people to change their plans, or to suspend their activities for some time; others block people's access to their own private property, etc. According to the Rawlsian account, these actions cannot be justifiable as CD, since they appear to do more than simply 'warning or admonishing' others.

Coercion does not necessarily require violence: we saw in chapter 2 that the task of defining what makes an act "violent" is not an easy one, and that often an act can threaten others without being, strictly speaking, violent. So, in order to distinguish a *persuasive* from a *coercive* way to

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<sup>9</sup> "The right of autonomy allows people some room to make their own choices: it does not dictate what those choices should be." Hill (1991), p. 49

<sup>10</sup> This is not to say that injuring others is wrong *because* it is against the communicative nature of CD. There obviously are independent moral reasons to condemn this kind of behaviour.

address others, we should focus on the addressee's reaction: if she changes her behaviour because she has been convinced by the addresser's message, the address is persuasive; but if she changes because she wants to avoid some bad consequences, and continues to hold the addresser's view to be wrong, then she is being coerced, at least to some extent.<sup>11</sup>

It is certainly true that, often, civil disobedients *force* people to act or not to act in a certain way by, for example, blocking a public space, entering private property, disrupting public activity. Call this case (1). This is certainly a form of interference with others' choices, but I will argue that cases like (1) can often be reconciled with citizens' commitment to respecting autonomy, at least when, in spite of the use of force, the non-disobeying citizens are still able to make *their own* decisions as to which policy to support. That is to say, cases like (1) could qualify as instances of 'virtuous' CD.

There is, however, a more problematic way in which the act of protest might interfere with others' decisions: the protesters might also *coerce* fellow citizens into accepting their requests, for example by *threatening* them with further disruptions if they do not accept their request. In this case, the interference with others' behaviour is more serious, for it involves the attempt to force others to support, or to oppose, the particular law or policy the disobedients are protesting. Call this case (2). As I explain in more detail below, in case (2) the protesters also seek to constrain their fellows' right to *choose* which kind of policies to endorse. This is especially problematic for a justification of CD within deliberative democracies, for it clashes with the democratic procedure whereby everyone has a right to express her own view, and to defend it by appealing to the force of the better argument.<sup>12</sup> For CD to be a contribution to the deliberative process, it cannot *threaten* people into choosing to support a particular decision against their own will. Thus, I will claim that cases like (2) cannot be a case of 'virtuous CD'.

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<sup>11</sup> MacGuigan, M. R., "Obligation and Obedience", in Pennock & Chapman (1970), p. 53. MacGuigan does not share my view about permissible violence in CD.

<sup>12</sup> See the discussion in the next chapter.

In order to explain why this is so, I employ a distinction, proposed by Feinberg, between ‘compulsion’ and ‘coercion’, which sheds light on two distinct ways in which an agent can interfere with another’s behaviour.<sup>13</sup> After presenting this distinction, I will finally argue that an act of CD can justifiably employ a degree of *compulsion* (within limits), as in case (1), yet it cannot intend to use *coercion* against fellow citizens, as in case (2). If my argument succeeds, it can shed further light on why allowing some degree of violence in CD need not conflict with the duty to respect others as autonomous agents.

#### 4. Coercion and Compulsion

According to Feinberg, there are at two ways in which an agent can force another to act in a certain way.<sup>14</sup> One is by mere imposition of force, that is, through *compulsion*. Imagine A wants B to remain in the room where B is. A could tie B to a chair, to force B to remain in the room *against B’s will*. In this case, A succeeds in having B act as A wants, regardless of what B chooses to do. By acting as she did, A has closed other alternatives for B to choose: more precisely, all other alternatives to staying in the room are now impossible.<sup>15</sup> Under this perspective, ‘compulsion’ applies to cases where the will of the person whose behaviour is interfered with does not play any role.

A different way in which A may force B to act as A wants is by threatening B with some bad consequences if she does not act as A wants. So, for example, A might claim she will physically harm B if B leaves the room. This is, in Feinberg’s terminology, a case of *coercion*. Here, A does not make it impossible for B to choose other alternatives: rather, A reduces their ‘appeal’ by increasing their cost. The other options are still ‘closed’, though in a different sense: they have now become unreasonable for B. What distinguishes coercion from compulsion is the presence of *threats*:

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<sup>13</sup> See Feinberg (1986), ch. 23.

<sup>14</sup> Feinberg (1986), p. 189.

<sup>15</sup> *Ibid.*, p. 190. The word ‘impossible’, of course, does not mean ‘logically impossible’, but indicates only B’s physical impossibility to carry out her plan. Thus, in the example mentioned, I am assuming B is not strong enough to untie herself, or to drag herself out of the room in spite of being tied to the chair, cannot call for help, etc.

[u]nlike cases of physical compulsion, the use of threats backed up by credible evidence of the power to enforce them applies “pressure” to a person’s *will*: they are ways of making him choose to do what the coercer wishes. They force him to *act* and not merely to be moved or restricted in his bodily motions. In cases of coercion by threat, there is a sense in which the victim is left with a choice. He can comply, *or* he can suffer the probable consequences.<sup>16</sup>

Although Feinberg’s account of coercion is certainly correct, it is also important to account for the fact that a person’s will can be pressured without, strictly speaking, applying “threats”. So, for example, A might pressure B into doing X by offering her some money in return: supposing B is in a very harsh economic condition, A’s offer might well have the (intended) effect of blocking other options available to B, in the sense discussed above. These cases are called ‘coercive offers’, and encompass ways of interfering with someone’s decisions without threatening her.<sup>17</sup>

However, in this work I am not concerned with coercive offers: on the one hand, they simply do not seem to fit the case of CD, where the action normally causes inconvenience, rather than an offer to ‘help’. On the other hand, I am suspicious of the claim that this kind of offer represents a form of coercion. In my view, offers or proposals are *not* coercive, since they do not infringe upon the autonomy of the person:

Offers of inducements, incentives, rewards, bribes, consideration, remuneration, recompense, payment do not normally constitute threats and the person who accepts them is not normally coerced.<sup>18</sup>

To see why this is so, we should compare B’s situation before and after the threat/offer is issued. In the case in which A threatens B with harm, the latter faces the perspective of being made *worse off*. The case of a ‘coercive proposal’, on the other hand, usually lacks this component: by resisting A’s ‘offer’, B is not made worse off.<sup>19</sup> threats and offers influence B’s behaviour in

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<sup>16</sup> Ibid., p. 192.

<sup>17</sup> For an interesting discussion on the topic, see Haksar (1986).

<sup>18</sup> Nozick (1997), p.24.

<sup>19</sup> See Raz (1986), p.150. I am aware, nonetheless, that the line between “not accepting an offer”, and “being made worse off”, may sometimes be quite thin. For example, in the example mentioned above, it might well be the case that,



different ways. This suggests that offers of benefits, while perhaps seeking to exploit the circumstances of the person to whom the offer is made, do not infringe on B's right of autonomy, which I discuss below: although they may seek to pressure others into choosing a particular option, they do not *wrong* them as autonomous agents.<sup>20</sup> Of course, this does not mean that, through a coercive offer, A does not wrong B at all: yet, I would argue that the wrong done to her does not relate, at least directly, to her right to make autonomous choices.

To sum up the argument in this section: by 'coercion', I will here refer to actions that put pressure on the will of the person who is being coerced, by using threats. Aiming to offer justification for some cases of violent CD, I will distinguish cases involving 'compulsion' from others involving 'coercion'. I will draw a line between illegal acts that physically force others to act against their will, though without constraining their ability to choose which policy to support, and illegal acts that *threaten* others with the aim to force them to accept the disobedients' plea. I will claim that some cases belonging to the former group can play a positive role in a deliberative democracy, whereas those of the latter should be condemned for violating the duty to respect others as *autonomous* agents.

In the next section, I will say more about the conception of autonomy I am considering.

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were she not to accept A's offer, B might put her own life at risk because of hardship. However, this does not deny the possibility to draw a distinction, at least in principle, between threats and offers.

<sup>20</sup> I am aware that there is a lot more to say to defend this view. Christian Bay, for one, holds that "[a]nything that pushes or punishes the individual is a restraint, but so is also anything that hypothetically and probably *would* push or punish him" (Bay (1970), p.92). Nozick holds that "when someone does something because of offers it is his own choice, whereas when he does something because of threats, it is not his choice but someone else's" (Nozick (1997), p.38). Yet, he also discusses proposals that appear to be coercive, and threats that might make B better off (pp. 23-31). Hillel Steiner discusses what he calls "thoffers", e.g. "Kill this man and you'll receive \$100 – fail to kill him and I'll kill you". In this case, Steiner writes, "the compliance-consequence represents a situation which is (let us suppose) preferred to the norm, while the non-compliance-consequence represents a situation which is less preferred than the norm." See Steiner (1974), p.39. I prefer to avoid these complications here, and to settle on the claim that, *ceteris paribus*, *coercion* involves a *threat* and does not involve a promise of benefits. See also Bayles (1972), p.17.

## 5. The Right of Autonomy

The notion of ‘autonomy’ discussed in this work refers broadly to a person’s ability to be in control of her own life. In the account presented here, a person is “autonomous” to the extent she can shape the course of her life, that is, to the extent she can choose and pursue her own conception of the good life. More specifically, the conception of autonomy I am interested in connects to the idea of *choosing the kind of person one wants to be*. In this sense, autonomy is a *character ideal*:

the ideal of people charting their own course through life, fashioning their character by self-consciously choosing projects and taking up commitments from a wide range of eligible alternatives, and making something out of their lives according to their own understanding of what is valuable and worth doing.<sup>21</sup>

Being an autonomous agent means being in control of one’s own life, by adopting projects and commitments in accord with one’s own values.<sup>22</sup> The conception of autonomy defended here is directly related to the ability to make *choices*, and I will analyse in more detail the importance of *choice* to assess the status of an individual as an autonomous agent. By sketching autonomy in this way, we can already point out a basic requirement for an autonomous life, i.e. the possession of a basic set of rational skills necessary for making choices. In order to have an autonomous life, an agent has to be able to yield informed judgments about the course of her actions: given the strong link between autonomy and choice, when the agent lacks the capacity to choose, she is not deemed autonomous.<sup>23</sup>

In considering the life of an agent who is autonomous, then, I focus first on the capacity to make choices: under this perspective, a central element in this account of autonomy is the agent’s *capacity* to choose (and, as I will show immediately below, to *pursue*) her own conception of the good life. This account reflects, then, the Kantian idea of individuals as ends in themselves. Raz argues that individual autonomy represents the capacity to “engage with value” through the action

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<sup>21</sup> Wall (1998), p. 128

<sup>22</sup> “He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties.” Mill (1985), p. 123.

<sup>23</sup> See Feinberg (1989), p. 28-43.

of choosing.<sup>24</sup> This capacity is *of value in itself*: more specifically, the capacity to set one's own goals, to choose one's conception of the good life, to attribute value to some things over others, has a non-instrumental value:

[T]he very idea of something which is of value in itself is the idea of someone who can relate to value in the appropriate way. (...) Just as the fact that an object has intrinsic value marks a potential in it, the potential of being engaged with in the right way, so the status of being someone of value in oneself marks a potential in one, the potential to engage with value in the right way, and be thereby enriched or improved, etc. Therefore, valuers are of value in themselves.<sup>25</sup>

It is in virtue of this capacity to engage with value and to choose one's own ends that we respect each human being as an autonomous agent.<sup>26</sup> Thus, on the one hand, autonomy sets a descriptive standard for what is deemed distinctive of human beings – the capacity to make rational choices. At the same time, this also posits a normative standard about how individuals as autonomous agents ought to be treated:

[o]ne who is able to decide the direction of her life has to be respected for this ability. It is prima facie impermissible to interfere with an individual's right of autonomy where the individual is respectful of that right in others. Someone who is self-governing faces minimal interference in the formation and execution of her actions and choices, and it is proper that interferences be kept to a minimum.<sup>27</sup>

This is the *right of autonomy*, and in light of these considerations we can see what issues the concept of coercion generates. I already pointed out that an act of coercion is, roughly put, one whereby A seeks to impose decisions about the activities of B using threats. To this extent, a coercive act implies interfering with a person's ability to choose and pursue her own goals. Thus,

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<sup>24</sup> Raz (2001), chapter 4.

<sup>25</sup> Ibid., p.157.

<sup>26</sup> Respect for autonomy is due independently of how the capacity is used: "The standing is not jeopardised just because one does not engage with what is good for one, as one should. Such a failure is indeed significant. It warrants and even requires certain attitudes and actions towards such failures, and towards the people whose failure it is. They should feel disappointed, ashamed, etc., and others would react similarly. However, these reactions can only be appropriate when directed at people who are ends in themselves, and do not show that they have lost this status." Raz (2001), p.158.

<sup>27</sup> Oshana (2006), p. vii.

coercion infringes upon a person's right of autonomy: it represents a *pro tanto* failure to respect the latter as an autonomous agent. Acting coercively implies denying someone's right to shape her own life, and this reveals the wrongness of coercion:<sup>28</sup>

[c]oercion is hostile. It is often justified and necessary. But it treats people as hostages to their choices, and it requires a special sort of justification – one that shows that the pressure is a legitimate means of eliminating a particular outcome (...).<sup>29</sup>

Coercion violates people's autonomy because it makes them choose something they would not choose autonomously: it uses the person's will as a mere instrument for the coercer's goal.<sup>30</sup> Therefore, coercion requires a justification: it is not morally *neutral*.<sup>31</sup> It is *always* an infringement of someone's right to make autonomous choices. This is why the justification of *coercive* CD gives rise to serious problems, which I will address in the following discussion.

I should also specify that an action of coercion is *intentional*, for A *intends* that B will incur harm if the latter does not yield to the threat. That is why it constitutes a failure to *respect* individual autonomy. If I have to abandon my plan to go for a hike due to awful weather conditions, I am not being *coerced* into staying at home; similarly, if I accidentally leave my dog off-leash, and this prevents you from walking nearby my property, I am not *coercing* you into not walking nearby my property.<sup>32</sup> A *coerces* B only if she makes it clear to B that A intends harm to occur to B. However, even when A is *bluffing*, that is, when A is not going to bring about the threatened harm to B, A's action still violates the duty to respect B's autonomy.

The same applies to cases of *unsuccessful* coercion. In considering failures to *respect* other people's autonomy, it is not necessary that A *succeed* in coercing B to do/refrain from doing X, for the act to be coercive. Suppose, again, that the Mafia threatens the witness to kill his wife if he

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<sup>28</sup> On this point, see the exchange between Samuel D. Cook and Robert P. Wolff in Pennock & Chapman (1972), pp. 107-147.

<sup>29</sup> Lamond (2000), pp.61-62.

<sup>30</sup> See my discussion in chapter 2, above, where I referred to Kant's Formula of Humanity to justify the employment of some degree of violence in CD.

<sup>31</sup> "Interference with, or restriction of, another's action requires justification; unjustified interference or restriction is unjust, and so morally wrong." Gauss, G., "The Place of Autonomy within Liberalism", in Christman & Anderson (2005), p. 272

<sup>32</sup> Of course, I may still be held responsible on different accounts (e.g. negligence).

speaks at the trial: the witness decides not to yield to this threat, and does speak at the trial against the Mafia. To some, talk of coercion in this case might sound inappropriate, given that the coerced does not change his behaviour after the threat is issued: some theorists take *success* to be a necessary condition for coercion.<sup>33</sup> I reject this point: since I have defined coercion as the *attempt* to impose decisions upon others, there is no reason to see the attempt's failure as a reason to deny the act's coerciveness. Thus, I do not take *success* to be a necessary condition for an act to be coercive. A's failed attempt to coerce B violates B's status as autonomous agent: in the case of unsuccessful coercion, A still *treats* B merely as a means, and not also as an end in herself.

## 6. Autonomy as Condition

Considering autonomy as a capacity falls short of accounting for agents' *different intellectual abilities*, which play an important role in the choices people make. Persons whose capacities are just above the bare threshold of competence may be *de jure* self-legislators, yet *de facto* they might be far from being 'autonomous'. People with different endowments can be 'more' or 'less' autonomous, that is, more or less in control of their own lives: some are more prudent, self-reliant, or strong-willed than others. A *de jure* equality among agents, based on their right of autonomy, does not entail also a *de facto* equality as individuals in control of their own lives. From this perspective, autonomy

like other abilities, is not something we either do or do not have; it is something we may possess to a greater or lesser extent, just as the ability to speak English or play chess varies considerably among English speakers and chess players.<sup>34</sup>

Hence, in addition to a notion of autonomy as *capacity*, when judging an autonomous life we also focus on autonomy as *condition*, that is, on how the *capacity* translates into the actual choosing, into *de facto* self-government. The particular circumstances in which an agent happens to

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<sup>33</sup> For example Nozick (1997); Bayles (1972); McCloskey (1980).

<sup>34</sup> Dagger (1997), p.30

be, for example, have a serious impact over her *condition* as autonomous person. One can be mentally able to make autonomous choices, without being in the *condition* to choose: a person who is enslaved by another cannot act upon her choices, though she is fully equipped to formulate reasonable plans. Such a person would not actually govern herself, regardless of her capacities: as Aristotle pointed out, personal circumstances, no less than capabilities, are a requisite condition for a 'happy' life.<sup>35</sup>

So, if we return to the task of assessing whether an agent has an autonomous life, we need to focus not only on what capacities are required for autonomous choices, but also on how the capacities are exercised; that is, not only on the 'capacity' but also on the 'condition' of autonomy. The point to be stressed throughout this chapter is that an agent acts autonomously only when she is able to act upon her own will. Thus, in the account I am presenting, having an autonomous life means living the life that one chooses to live. Only when the agent possesses autonomy *both* as capacity and as condition, can we say that *she is in control of her life*. In the following discussion, I will argue that *coercion*, as distinguished from compulsion, infringes on the agent's exercise of her will, and might infringe on the individual *condition* of autonomy.

This has implications also on the way the equal right to autonomy is cashed out. Once we focus on autonomy as a *condition*, no just a *capacity*, the meaning of 'respecting individual autonomy' might expand so to include also positive duties. From this perspective, the duty to respect autonomy requires also taking action to create institutions and practices to *support* the individual realisation of an autonomous life. It thus reveals a *positive* side to it, demanding not mere non- interference, but also *contribution* to others' achievement of autonomy. If we value autonomy not just as a *capacity*, but as a *condition*, then the duty extends from protecting to also *promoting* the *exercise* of one's own capacities as autonomous agent. Where an agent is not in the condition to exercise her faculty, others have a duty to take some positive action, in conformity to their

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<sup>35</sup> *NE*, I, 10, 1100a76-10. Feinberg (1989), on the other hand, argues that also *unlucky* circumstances can *contribute* to de facto autonomy, for example when a person is in a situation such that she can depend only upon her/himself. By standing alone with no one else to help, she has to develop firm habits of self-reliance.

commitment to autonomy. Thus, in what follows I will defend the duty to respect autonomy as a requirement to protect *and to promote* it.

## 7. Autonomy and Community

Focusing on the notion of autonomy as *condition* reveals a richer account of the kind of obligations we owe to each other in virtue of our status as autonomous agents: in this account, *respect* for the status of an autonomous agent also requires *positive duties*, duties to bring about states of affairs enabling the agent to achieve what I will refer below as *authentic* self-legislating.

To understand why this is the case, it is sufficient to consider the connection between autonomy, on the one hand, and *independence*, on the other. According to one strongly individualistic notion of autonomy, one's choice qualifies as *autonomous* when the agent is free to choose with no influence from the external context.<sup>36</sup> This view, on the other hand, is the traditional target of communitarian criticisms concerning the implausible idea of an “unencumbered self” as a precondition of ‘individual autonomy’.<sup>37</sup>

We do not need here to engage in the debate between liberals and communitarians.<sup>38</sup> Suffice it to say that the idea of autonomy as complete independence appears implausible, and that there is no need to affirm that autonomy necessarily implies a strongly individualistic society, made up of subjects who aim for freedom from each others (what some have called a “policy of zoo-keeping”).<sup>39</sup> John Stuart Mill, in strenuously defending ‘individuality’, was well aware of the importance of ‘the others’ in the achievement of one’s own autonomy. He rejected the idea of a ‘detached’ individual by pointing out that

[t]he same strong susceptibilities, which make the personal impulses vivid and powerful, are also the source from whence are generated the most passionate love of virtue, and the sternest self-control. (...) A person whose desires and impulses are his own – are the

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<sup>36</sup> See for example, Wolff, who defines autonomy as “the refusal to be ruled”. Wolff (1970), p.18.

<sup>37</sup> See Sandel (1982), pp.55-59 and 152-154.

<sup>38</sup> See Mulhall & Swift (1997).

<sup>39</sup> Barber (2003), ch. 1.

expression of his own nature, as it has been developed and modified by his own culture-  
is said to have a character.<sup>40</sup>

One's own personality is shaped by the culture in which one lives: the surrounding context in which the individual grows plays a central role for her own development as an *autonomous* person. The ability to reflect upon what kind of person one is, and what kind of values she has inherited, qualifies an agent as one who possesses autonomy as *condition*. Reflecting upon the influences of one's own culture, and distinguishing those impulses that are expression of one's own nature, from those that are *merely* the result of external influences, is part of what it means to be an autonomous agent.

Autonomy, both as capacity and as a condition, is a relational concept. In order to make reasonable choices, we need to apply standards that are not themselves the product of our choices. We cannot have determined these standard *ex nihilo*: we have acquired them, at least in part, from others' examples and teachings. This shows how *we need other people* in order to realize our autonomy:

Being able to read is vital to the exercise of my autonomy, for example, but my continued ability to read is something I owe not only to my parents and teachers but also to various optometrists, opticians, writers, publishers, and providers of light, electrical and otherwise. (...) Without this cooperation, it would be virtually impossible to exercise one's autonomy, no matter how well developed it might have been.<sup>41</sup>

More specifically, autonomy requires both *distance from* and *proximity to* the world.<sup>42</sup> The condition of autonomy, as rational self-legislation, requires one to reflect upon and critically evaluate the standards and norms of one's own society: it is something that must be learned, and such learning requires a background of shared values against which autonomous choices may be

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<sup>40</sup> Mill (1985), p. 127.

<sup>41</sup> Dagger (1997), p.39.

<sup>42</sup> Mendus (1989), p.96-97.



made.<sup>43</sup> Autonomy as condition requires the agent to learn and develop her capacity within an environment, and against a background, supportive of that ideal. While it is true that autonomy implies achieving a degree of independence of choice, this is an ideal that can be approximated only from within a life shared with others.

Being in the condition of autonomy implies *critical reflection* on one's own desires, and the ability to revise or reject them in accordance with criteria, such as, for example, a background conception of the good determined, in part, by the context in which one has grown. This has important implications also on the way we show respect to each other as autonomous agents: I will argue below that the social nature of autonomy shows how each of us also has duties *to support* others in making autonomous choices.

## **8. Autonomy Vs. Freedom**

Let us return to the distinction between coercion and compulsion, and to my claim that, in the context of CD, only the latter may be compatible with the duty to respect autonomy. I will stipulate that coercion and compulsion infringe upon different realms of human agency, and that this generates different issues regarding their justification.

Nozick's analysis of coercion gives support to the distinction between compulsion and coercion presented above. According to him, only interferences that aim to *alter* the will of the coercee can be properly called 'coercive':

[i]f I lure you into an escape-proof room in New York and leave you imprisoned there, I do not coerce you into not going to Chicago though I make you unfree to do so.<sup>44</sup>

This suggests that when there is no choice, there is no coercion: properly speaking, the fact that someone's freedom to act is limited does not entail that her autonomy is being coerced, as Feinberg also pointed out. Although it is true that, in the case of compulsion, the absence of choice

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid., p.15. Similar remarks are made by Bayles, who however distinguishes an 'occurrent' from a 'dispositional' kind of coercion. See Bayles (1972), p.18.

is the result of *compulsion*, as we noticed already, compulsion blocks the agent's choices, while coercion seeks to 'hijack' the agent's will so that she 'chooses' to act as the coercer wants.

In order to understand the difference between coercion and compulsion, I propose, for the purposes of the present argument, to separate the concept of *freedom* from that of *autonomy*. This could be done by pointing out that the realm of human agency to which *freedom* applies is narrower than that pertaining to *autonomy*. On the other hand, the kind of choices to which autonomy refers is more pervasive and concerns the agent's choice and pursuit of her conception of the good life. To give a very brief example, I will stipulate that, if A prevents B from doing a certain action X, A infringes on B's freedom; if, on the other hand, A prevents B from choosing what kind of career to pursue, A violates B's autonomy.<sup>45</sup>

In order to understand how an act of CD may involve the use of force or violence without necessarily being an act of coercion, I will build on the assumptions that a) compulsion infringes on one's *freedom*, yet need not infringe also on a person's *autonomy*, and b) coercion harms one's ability to choose, in a way that might threaten her right of autonomy. Hence, when the civil disobedients organise a sit-in at the airport, with the intention to cause a disruption to the service, they infringe on people's *freedom* to act as they choose, in this case on their freedom to travel. But when their protest aims to force others to accept their request for fear of threats, they are violating other people's *autonomy*, that is, their capacity to choose, in an important sense. This makes this second kind of CD unjustifiable under a democratic regime.

The relation between coercion and autonomy requires further analysis. For sure, *not every act of coercion infringes on a person's autonomy* (in the sense I use the term 'autonomy'). When A threatens B with a gun to have B remain in the room, that is a case of *coercion*, under my description: yet I would not say that B's capacity of self-legislation, her capacity to choose what kind of person she wants to be, is infringed by that very act of coercion. There is something peculiarly different between coercing a person into doing X, or coercing a person into supporting a

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<sup>45</sup> This claim will be explained fully in the last section of this chapter.

particular policy, as in case (2) mentioned above. Of course, even the former, more local case of coercion impacts on the agent's will, though it might do this in a way that does not seriously affect the agent's autonomy, in the sense I am using the term. While every kind of coercion is wrong, or at least in need of a justification, I am concerned here only with the wrongness of coercion that infringes on the agent's autonomy as self-legislation.

I think this peculiar difference can be grasped by suggesting that while freedom applies to a particular point in time in an agent's life, autonomy is a predicate of a person's status over time.<sup>46</sup> The assessment of a person's freedom refers to a specific moment: e.g., an agent was free to do X at time  $t$ , while at time  $t+1$  she was not free to do that. Claims regarding an agent's *autonomy*, on the other hand, should be made with reference to the long term: judging one's *condition* of autonomy involves evaluating a whole way of living one's life. The emphasis on this more pervasive role played by autonomy in one's life expresses the connection to the agent's identification with her own projects, values, goals, desires. It can also shed light on why coercing someone into remaining in the room is different from coercing someone into supporting a certain policy. My claim is that the choice to support a certain government, reflected by the choice to support its policies, reflects to some extent the choice to be a particular kind of person. And that, therefore, by forcing someone to support a certain policy, we violate her right of autonomy to choose what kind of person to be. I will return to this central aspect below.

In stipulating this distinction between freedom and autonomy, I do not intend by any means to disregard freedom's value in one's life: however, for the purpose of the present argument I will hold that freedom is "only a necessary condition for autonomy", and that "autonomy involves *more* than just being free."<sup>47</sup> As a character ideal of persons who are in control of their lives, autonomy requires a certain degree of freedom for it to be achieved. Given the importance of being in the

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<sup>46</sup> I take this idea from Dworkin (1989), p.54-55.

<sup>47</sup> Young (1986), p. 8. On this point, see also Beehler, R. (2007), p. 136: "[y]ou are free to the extent that you are not (and will not be) prevented by others from doing what you choose to do. Thus, you are an autonomous person if you can exercise the capacities which constitute autonomy, when free: you are not an autonomous person if you cannot exercise these capacities (cannot *live* autonomously), even if free."

*condition* of autonomy, freedom is necessary –though, and this is central for the present argument, *not sufficient*- for an individual to act as an autonomous agent.<sup>48</sup> An agent who ‘freely’ imitates the tastes or opinions of the others might have not achieved autonomy as *condition*.<sup>49</sup> The latter involves making

a more comprehensive or *dispositional* claim about the overall course of a person’s life. In this second and richer sense, the self-directedness of one’s life is exemplified by the fact that, in the main, it is ordered according to a plan or *conception which fully expresses one’s own will*.<sup>50</sup>

It is also certainly true that often compulsion can aim at a person’s autonomy as well. In many cases, *compulsion may be an instrument of coercion*. An example is deterrence punishment: a person’s freedom is limited through imprisonment, with the aim to deter her, and others, from choosing to act in a certain way in the future. Knowing that A would lock up B every time B contradicts A, B may become more reluctant to contradict A in the future.<sup>51</sup> In this case, compulsion would aim also at the agent’s *will*. However, it is also true that the two kinds of interferences affect one’s conduct in different ways. This is further indicated by the fact that one could *choose* to resist an attempt of coercion, yet not one of compulsion. The latter violates the agent’s claim to freedom from external constraints; coercion, on the other hand, does not oblige the agent to act against her will, but it aims to bend B’s will to the achievement of A’s goals.

To take stock, briefly, of what has been said so far: my discussion concerns the obligations citizens owe to each other as autonomous agents. Given that individuals have a duty to respect autonomy, any form of action that contravenes such duty is in need of justification. I distinguished two ways in which individuals can interfere with each other’s choices, and suggested that they may impact on different realms of human agency. For the sake of my argument, I identified these two

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<sup>48</sup> Haworth (1986) p. 166-7.

<sup>49</sup> On this, see Charles Taylor: “A man who is driven by spite to jeopardize his most important relationships, in spite of himself, as it were, or who is prevented by unreasoning fear from taking up the career he truly wants, is not really made more free if one lifts the external obstacles to his venting his spite or acting on his fear. Or at best he is liberated into a very impoverished freedom”. See Taylor (2003), p.160.

<sup>50</sup> Young (1986), p. 8. Added emphasis.

<sup>51</sup> This suggests that, in some cases, compulsion might cause coercion.

separate realms with ‘freedom’ and ‘autonomy’ respectively. I then argued that acts of compulsion aim at constraining individual freedom, while acts of coercion constrain people’s will and, in certain cases, their *autonomy*.

While I have acknowledged that also acts of *compulsion* can infringe on a person’s *autonomy*, I now intend to show the opposite, namely, that compulsion might *promote* the autonomy of the person(s) whose choices are interfered with. This can help reconcile acts of violent *CD involving compulsion* with the liberal commitment to individual autonomy, and show that *CD*, even when employing a degree of violence, can display virtuous traits in the disobeying citizens.

## 9. CD and Justifiable Interferences

In this section, I seek to show that autonomy as condition requires a degree of self-identification, and that this may justify some forms of interferences with one’s choices. Then, I show how this idea suggests how violent *CD* can be compatible with a commitment to the duty to respect individual autonomy, a claim that I develop more fully in later sections of this chapter.

I have suggested that individuals who are in the *condition* of autonomy are able to “fashion their character by self-consciously choosing projects and taking up commitments from a wide range of eligible alternatives”.<sup>52</sup> This highlights an important element of *self-identification* in the condition of autonomy, whereby the agent is able to see her projects as her own, and not as being imposed upon her by someone else. Autonomy as condition thus involves a certain degree of identification with one’s own desires and projects. Focusing on the latter notion reveals a further element in the assessment of an agent’s condition of autonomy.

To explain why this might be so, I refer to the notion of ‘second-order desires’, first developed by Harry Frankfurt and then by Gerald Dworkin.<sup>53</sup> This sheds light on what it is for an agent to act ‘upon her own desires’. For example, someone who has a desire to do something might

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<sup>52</sup> See above, fn. n.21.

<sup>53</sup> Frankfurt (1987); Dworkin (1988), (1989).

also have, at the same time, the desire that she have not that desire. One could also desire that one's own motivation to act were different:

a person might desire to learn to ski. He might believe there is no further motivation or he might believe that what causes the desire is the wish to test his courage in a mildly dangerous sport. Suppose he is now led to see (correctly) that he desires to ski because he is envious of his brother who has always excelled in sports. Having recognized the source of his desire he can now either wish he were not motivated in this way or reaffirm the desire. If the latter, then he is acting authentically in that he identifies himself as the kind of person who wants to be motivated by his envy.<sup>54</sup>

Given that, in the account discussed here, autonomy implies a degree of *self-identification*, i.e. it implies seeing one's plans and projects as one's own, then autonomy requires that the agent identify not only with her desires, but *also with the motivations behind those desires*. The absence of this second-order level of identification with the influences behind one's own desire might compromise the value of one's motivation as one's own. An autonomous person sees herself as the kind of person who wishes to be moved in that particular way: in addition to saying "I want to X", an autonomous person is one who says "I want to want to X".<sup>55</sup> It follows, then, that if one resents being motivated in certain ways, i.e. would like to be a person motivated by different influences, then the motivation, though causally effective, might not be viewed as her own.<sup>56</sup>

From this perspective, autonomy appears to have a strong connection with the notion of *authenticity*, that is, with the agent's identification with her own second-order desires. Authenticity is, therefore, one main trait of the behaviour of an autonomous agent. Dworkin highlights that authenticity also requires a degree of *procedural independence*, whereby the second-order identification mentioned above is not the product of manipulation by others.<sup>57</sup> This draws attention to the fact that even the self-identification with one's own desires may not be *authentic*. If one

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<sup>54</sup> Dworkin (1989), p.59.

<sup>55</sup> Olick (2001), p. 86

<sup>56</sup> A drug addict who *desires to be* an addict, to be just the kind of person that craves drugs, may not be able to change his desire. However, since he would identify with his own motivation, he would be, in Dworkin's view, an autonomous agent.

<sup>57</sup> Dworkin (1988), pp. 18-20.

chooses a military career because she has been brainwashed into thinking that that is a good life, her choice would not be made in a procedurally independent way: it would not be an authentic choice. The way in which one's motivation is formulated matters too. Therefore, a person is autonomous

if he identifies with his desires, goals and values, and such identification is not itself influenced in ways that make the process of identification in some way alien to the individual.<sup>58</sup>

Focusing on procedural independence moves the discussion in the direction of the problem of coercion: not every way of influencing people's actions constitutes an interference with their autonomy. Some of these influences amount to *threats*, and face the criticisms I already mentioned above in relation to the right of autonomy. However, other interferences with people's choices may constitute attempts to *support* that person's autonomy. A may influence B's reflective and critical faculties aiming to *subvert* them: in different circumstances, A may do the same yet intending to *uphold* them. In some cases, interfering with a person's choices may be justified by the aim to *contribute to* that person's ability to self-legislate in an *authentic* way, i.e. to her achieving *autonomy as condition*.

I want to return now to the issue of CD, to see how the above discussion can provide grounds for justifying some forms of violent CD, and to anticipate my main point, which I will spell out fully in the last section of this chapter. Consider the case of the activists occupying the runway at Heathrow Airport, presented in chapter 2 above. By blocking airplane traffic, these activists *compelled* passengers to forgo their travelling plans on that day, or at least to face severe disruptions and inconveniences. By acting in this way, as passengers' disgruntled reaction probably testified, the protesters caused a clear infringement of other people's freedom. Nevertheless, people's *right of autonomy* was not threatened by this act of CD. Rather, according to the account of autonomy I sketched above, this act of CD *did show respect* for the autonomy of those it also kept stranded at the airport for hours.

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<sup>58</sup> Dworkin (1989), p.61.

What these civil disobedients were aiming for was to *promote* the ability of others to make choices, in this case the choice between giving or withdrawing their support from policies they find unreasonable. Their illegal act, undoubtedly an act of *compulsion*, sought to provide other citizens with information about the risk of further airport expansion in the face of increasing global warming, and of the growing evidence of the human role in it. It was, in this sense, an attempt to make others' choices *independent* (in Dworkin's sense of 'procedural independence') from the influence of pro-government media. This was an act of CD, in spite of the *violation* of others' freedom. We can imagine the civil disobedients asking their fellow citizens: "Look at these important facts you have not been told about the effect of building a third runway. Now, do you want to support a policy that would contribute to endangering the whole ecosystem?"<sup>59</sup> This need not be, of course, only a statement about 'facts': the aim is not merely to provide information about an event ("Aeroplane traffic contributes to global warming"), but also to affirm the substantive *values* behind those claim (for example by appeal to the intrinsic value of the environment, to the evil of an unconstrained pursuit of profit, etc.). Anticipating a point that will be central to chapter 4 below, we can say that these illegal actions aim to feed more elements into the deliberation about important matters of public concern.

I will return to this point in the conclusion of this chapter, to say more about how an act of CD, which employs force by *compulsion*, may not only conform to a negative duty to protect individual autonomy, but also satisfy a positive requirement to contribute to the latter's promotion.

## **10. Autonomy And The Duty To Promote It**

Before proceeding, let me recap what I have discussed so far. The target of this chapter is to reject the view that acts of *violent* CD cannot be justified under a democratic regime that values individual autonomy: according to this view, acts of CD that involve *coercion* are incompatible with democracy. I have offered some clarificatory remarks about what I take to represent a coercive act, drawing attention to the important distinction, for the present argument, between 'coercion' and

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<sup>59</sup> Garman (2010)



‘compulsion’. The main difference lies on the fact that these two forms of interferences with others’ choices target different areas of human agency: the former affects mainly one’s *freedom*, the latter mainly one’s autonomy. What I want to do now is to explain my claim that some forms of CD involving *compulsion* can be compatible with a positive commitment to promote autonomy.

The discussion of *authenticity*, and of the cooperative nature of autonomy, suggested that interfering with one’s behaviour does not necessarily amount to threatening one’s autonomy. Achieving the ‘condition’ of an autonomous agent requires a certain degree of interaction with others: autonomy cannot be realised in complete isolation. Now we can see how these considerations support the claim that violent CD may respect others’ autonomy and, therefore, be compatible with the values supporting a liberal regime.

I pointed out that agents have also positive duties to promote others’ autonomy. This can be spelled out as a duty to support others’ autonomous choice-making. What does this imply *in practice*? One of the constitutive elements of the autonomous life, a life characterised by *authentic* choices (in Dworkin’s sense specified above) is the availability of a sufficiently broad range of options from which to choose.<sup>60</sup> Given the direct connection between autonomy and choices, if individuals have a duty to promote the autonomy of others (which forms part of their duty to respect autonomy), then they have a duty to contribute to the availability of an adequate range of options from which others can choose.<sup>61</sup>

To be autonomous, a person must not only be given a choice, but she must be given an *adequate range* of choices. As I pointed out above, the possession of a *capacity* does not entail the achievement of the *condition* of autonomy: provided an individual has the necessary level of competence for making choices, she also needs to have some options available for exercising such competence. That is why someone who is an unwilling slave to another may have the capacity, but not the condition of autonomy. As Hurka has pointed out, the amount of options one has available

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<sup>60</sup> Raz (1986), p. 375; Haworth (1986), ch. 8-9.

<sup>61</sup> I am not claiming that this exhausts an agent’s autonomy-based duties. See below.

to herself makes her choice more or less meaningful.<sup>62</sup> Suppose that I am faced with options A and B, and I choose A over B. Now compare this case with one where I can choose between A, B, C, D, ..., L, that is, between ten different options. In both cases, I choose A over the other options available to me, and I might well have done that in an *authentic* way, in the sense specified above. But there is a crucial difference between the two cases: my choosing A out of ten options shows a higher degree of responsibility, for it is the result of a reflection over a much larger range of possibilities. By choosing A in the second case, I have also chosen not-B, not-C, ..., not-L. On the other hand, in the former case my choosing not-C, not D, ..., not-L is not the result of my action, but of the situation in which I happen to be:

[t]he autonomous agent, by virtue of her autonomy, more fully realizes this ideal [of responsible choosing]. When she makes choices, she has two effects: realizing some options and blocking others. She has a more extensive causal efficacy than someone who lacks options (...). By letting her determine what she does not do as well as what she does, her autonomy makes her more widely active and more practically efficacious.<sup>63</sup>

Choosing A out of ten options says more about what kind of individual one is, compared with the case of two options only. To every “choosing to” there correspond a number of “choosing *not* to”, so that “rather than deciding to create oneself, one is choosing to reject some of what one is in the light of other commitments or values.”<sup>64</sup> In claiming that the range of options has to be ‘adequate’, however, the emphasis is less on the *quantity* and more on the *quality* of the options.<sup>65</sup> Furthermore, ‘variety’ of choices in the strict sense is not enough: a choice between varieties of morally repugnant actions does not make one’s life more ‘autonomous’. One who, for example, is faced with a choice between being a teacher or being a killer, does not have options to choose from:

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<sup>62</sup> Hurka (1993), pp. 149-150.

<sup>63</sup> Ibid., p.150.

<sup>64</sup> Gaus (1999), p.130.

<sup>65</sup> “A choice between hundreds of identical and identically situated houses is no choice, compared with a choice between a town flat and a suburban house”. Raz (1986), p.375.

the choice between good and evil is no choice at all. To promote one's autonomy, the options to be provided ought to be *morally good* options.<sup>66</sup>

This sheds light on what might be pointed out as one positive duty that individuals owe to each other as autonomous agents. Being committed to respecting the status of an autonomous agent, i.e. of one who has a right to choose and pursue one's own ends and commitments, we also have some obligation to see to it that individuals have an adequate range of morally good options from which to choose. This is not to deny that we have duties concerning the promotion of autonomy as *capacity*: we have, for example, an autonomy-based obligation to support others' developing the skills necessary to make autonomous choices. Yet, if we are committed to treating others with respect, that is, to treat them and *care for* them as autonomous agents, it makes sense to claim that we also have duties to support others' *exercise* of their capacities to make autonomous choices.

## 11. Permissible Violence in CD

We return now to the original issue, that is, the permissibility of using force or violence as part of an act of CD. What I set out to explain, in this chapter, is how to reconcile the potential coerciveness of violent CD with the duty to respect others' autonomy as 'self-legislators', a duty at the core of the life in a democratic community. In spite of the *compulsion* it exercises over other citizens, by forcing them to act or not to act in a certain way, an act of CD does not aim to *coerce* them to endorse a particular policy. It remains, under this perspective, a persuasive act, one that respects the autonomy of those it addresses. Furthermore, and this is the central claim of this chapter, not only does violent CD not infringe on others' autonomy: it might be the case that, on a closer analysis, violent CD aims at promoting others' autonomy as *condition*.

Recall from chapter 2 that the choice to embark on CD relies on the acceptance of the rules of democracy, according to which a decision will be taken after deliberation. Someone who is a

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<sup>66</sup> This is not to say that someone who chooses the evil over the good is not acting autonomously. The point is that we do not have an obligation to provide her with the evil options: if there is a duty to respect autonomy also by promoting it, then it is plausible to argue that it attaches only to morally good options. This also suggests that autonomy has only a *conditional* value. Compare Raz (1986), p. 412: "Autonomously choosing the bad makes one's life *worse* than a comparable non-autonomous life. Providing, preserving or protecting bad options does not enable one to enjoy valuable autonomy".

civil disobedient may go as far as the duty to respect autonomy allows her: she acknowledges that each individual has the final word as to which policy she decides to support. The civil disobedients seek to draw attention to issues they think have not received sufficient consideration; however, it is part of their ‘civility’ that they know *when to stop*. I have discussed in the previous chapter the communicative nature of CD, as an act that calls for the addressee (the State and fellow citizens) to reply. Once the message has been acknowledged and replied to, the civil disobedients are faced with the choice of either ‘stepping back’ and accept the outcome of the new deliberation,<sup>67</sup> or, if they deem the issue vital and are not satisfied with the addressee’s reply, they might escalate to more confrontational forms of protest. In both cases, however, there is a point at which they will stop doing CD.

Furthermore, not only is violent CD respectful of others’ autonomy: what I have argued is that an act of CD that employs a degree of violence may also contribute to the fulfilment of a positive duty to promote autonomy, rather than being a hindrance to the latter. As an act of communication, CD aims to provide other deliberators with information that could play an important role in their choices.<sup>68</sup> Citizens who choose CD seek to bring about awareness of a particular issue, emphasizing elements that may have been ignored or secreted during the deliberation. What I am claiming is that under some circumstances, an act of CD may be seen as an attempt to *provide fellow citizens with morally good options* to choose from.

To understand how this could be the case, let us return to our protesters at Heathrow airport. Their message, *as civil disobedients*, was not “We do not want airplane traffic to be increased, and you guys will have to agree with us”. They were saying something more articulated: by drawing attention to the risk, for the environment, of increasing airplane traffic, their message was “Do you really want to be the kind of person that puts economic interest before environmental concerns?”

This brings us back to the idea of autonomy as the right to choose and pursue one’s own conception of the good life or, stated differently, to choose one’s own person: that is, the idea of

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<sup>67</sup> Haksar (2003); Smith (2004); Young (2001).

<sup>68</sup> Van der Zee (2009).

autonomy as self-identification. By confronting their fellow citizens, the civil disobedients are appealing to their status as rational and autonomous agents. In providing evidence of the environmental damage caused by airplane traffic, they make fellow citizens more responsible for their own choices. They are asking fellow citizens not simply “Do you want to support airport expansion?”, but “*Do you want to want to support airport expansion?*” They are appealing to the status of agents that identify their desires as their own.<sup>69</sup>

This means that the fellow citizens, who are *compelled* to remain stranded at the airport because of the protest, are not being constrained in the exercise of their right of self legislation, for they can still choose whether to join the disobedients’ plea or not.<sup>70</sup> Yet, after being told of the risk behind airport expansion, their choice will have a richer meaning: it is a choice made against a set of options that now also includes “caring for the environment”. And in “choosing to” support the government’s policy to increase airplane traffic, the non-disobeying citizens are now also “choosing no to” put the environment first. At this point, after meeting the civil disobedients, their choice says *more* about what kind of person they have chosen to be: namely, one who ranks economic advantage (if any) over environmental concerns, if they reject the disobedients’ plea. Or vice versa, if they decide to withdraw support from the government’s plan to build a third airport runway. In both cases, the autonomy of the non-disobeying citizens is not diminished, but is, if any, promoted by the action of CD.

Taking this stance clarifies the difference between coercing someone to stay into a room and coercing someone to, for example, vote for a particular party. Some choices of ours do not say much about the kind of person that we are: my choice to leave this room, my choice to stand up, my choice to drink coffee today do not, under normal circumstances, say much about my conception of the good life. On the other hand, my choice to support a government says something also on the kind of person that I am: the kind of values I subscribe to, what conception of society I endorse.

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<sup>69</sup> See above, fn. 54

<sup>70</sup> This can be accounted for by arguing that an act of CD may employ a degree of force to secure *the fact* that people will heed the protesters’ message and engage in further deliberation about a particular law or policy, but not the *outcome* of that deliberation. See Markovits (2005), p. 1941.

This is a choice for which I bear responsibility, in that it shows my commitment to a certain conception of the good: and in committing myself, I am also committing “the whole of humanity”,<sup>71</sup> that is to say, I am doing what I think everyone should do. This is what makes me accountable for my behaviour, and this is why interfering with this kind of choices, by forcing me to choose otherwise, might seriously harm my status as an autonomous agent.

When focusing on this conception of autonomy, then, we see that CD, even when it *compels* fellow citizens to heed the disobedients’ message, does not disrespect people’s status as autonomous agents. Focusing on a richer account of autonomy as authentic self-legislation, or self-identification, I have claimed that acts of CD respect the autonomy of those who are being compelled by the illegal act of protest. While CD might constrain people’s freedom, it does not limit their autonomy. In fact, by providing morally good options from which to choose, it promotes people’s right to pursue their own conception of the good life or, which is the same, their right to choose what kind of person to be. CD, even when it involves a degree of force or violence, is an act that promotes others’ exercise of their autonomy, through which others “define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are.”<sup>72</sup>

## Conclusion

It is usually accepted that, for an illegal act of protest to constitute CD, it has to avoid any *coercive* aim in favour of *persuasive* ones. The reason for holding this view is that coercion, by posing a threat to fellow citizens, disrespects their status as autonomous agents and thus fails to live up to the commitment to individual autonomy. I have suggested that the debate around this issue should be redefined, by distinguishing *coercion* from *compulsion*, and I have argued that CD may involve the latter but not the former. The infringement of others’ *freedom* through compulsion may be taken as a means to fulfil the duty to respect (i.e. to protect and promote) autonomy. What a civil disobedient cannot do is to intentionally violate others’ right of *autonomy*, i.e. she ought not coerce

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<sup>71</sup> Sartre (1996), p. 57.

<sup>72</sup> Dworkin (1988), p. 20.

others into supporting a particular policy. As long as compulsion (whereby force is applied, to some degree, to others' *freedom*) is employed to *promote* the condition of autonomy, it does not diminish the *civil* value of the act of disobedience: in fact, it might increase it. Thus, some acts of violent CD can be deemed compatible with the values underlying democratic regimes. Allowing for a degree of violence is not conducive to denying CD the status of *persuasive* action that respects individual autonomy.

The next chapter will analyse in more detail how CD can contribute to the democratic deliberation, particularly in cases of reasonable disagreement among citizens with different conceptions of the good. The idea of autonomy as self-legislation, discussed in the present chapter, will remain central to the discussion in the rest of this work.

## CHAPTER 4

### Disagreement, Reasonableness, Respect

#### 1. Overview

In this chapter, I focus on what, in my view, characterizes a citizen as ‘reasonable’. The aim is to show how an act of CD can display ‘reasonableness’, as a civic virtue necessary for the life of a democratic community. I do this with particular reference to a central element in the life of a democratic system, namely the case of *disagreement*. In the previous chapter, I have offered an argument to explain *why*, in my view, citizens ought to treat each other with respect: that argument was based on a *right of autonomy* that each individual possesses, and that life in the political community is meant to protect and to *promote*. I am now concerned with analysing *how*, in cases of reasonable disagreement, that is to say, cases where different conceptions of the good are at stake, citizens can treat each other with the respect due to their status as autonomous agents. The duty to treat fellow citizens with respect will be connected to the study of the dispositions of ‘reasonable’ citizens, and in discussing the meaning of the term ‘reasonableness’, I will refer largely to Rawls’ treatment of it in *Political Liberalism*. I will, however, depart from the Rawlsian approach concerning how reasonable citizens should approach each other in cases of disagreement. In criticising Rawls’ answer to the problem of disagreement, I will discuss three approaches that have been offered to address this issue. Roughly put, the theories I will discuss aim at presenting ‘reasonableness’ as a disposition to either (a) avoid (b) endure or (c) engage with the disagreement. After offering an argument as to why approach (c) is superior to (a) and (b), I will return to the problem of CD, to show how, in spite of its illegal character, CD can represent the behaviour of ‘reasonable’ citizens.

Here, I will not be concerned with the relationship between the citizens and the law: that will be the object of the last two chapters of this thesis. At the core of my discussion in the present chapter is the analysis of a particular civic virtue, namely *reasonableness*, which regulates the way



citizens address each other within the deliberative arena. In presenting my argument about how an act of CD may show a reasonable disposition in the agent who disobeys, I begin with the distinction, offered by Rawls, between what he defines the ‘Reasonable’ and the ‘Rational’. Connecting it to Scanlon’s account of moral motivation, I intend to show that what grounds the importance of being *reasonable* citizens is that it constitutes part of the aforementioned duty to respect others as autonomous agents. There is, therefore, a direct connection between being reasonable and *respecting* one’s own fellow citizens. I analyse this point further, then, by considering the idea of *reciprocity* in a deliberative democracy.

In presenting approach (a) mentioned above, I show how the Rawlsian model of reasonableness prescribes an attitude of ‘restraint’ and avoidance in defending one’s own view against those of others. The way in which citizens show respect for each other when faced with disagreement is, according to this view, to avoid making claims others do not accept. As against this view, I show how the alternative approach (b) hold that citizens show mutual respect not through ‘conversational restraint’ about their own different comprehensive doctrines but, on the contrary, through openness and *sincerity* when facing ‘the burdens of judgment’. This alternative view, to which I refer as ‘agonistic liberalism’, takes *conflict* among incommensurable conceptions of the good as an inherent element of political life. From this perspective, the idea of ‘reasonableness’ it brings forward does not hinge on the *substance* of ‘what we say’, i.e. what kind of opinions we defend, but rather on the *procedure through which* we say what we say. The agonistic view of democracy relies on a separation between *substantive* and *procedural* justice which, I conclude, also warrants its failure. I argue that both Rawlsian and agonistic liberalism fail to grasp the essence of reasonableness, and for this reason, I consider a deliberative approach (c), built on Habermas’ ethics of discourse. This, in my view, can preserve some of the strengths of the previous two approaches, while also yielding a more plausible idea of what constitutes the behaviour of ‘reasonable’ citizens faced with important disagreements as to how to organise their community. In

doing this, I return to the issue of illegal protest through CD and show how, in spite of the breach of law and the possible use of force, it can display a ‘reasonable’ disposition in the citizens resorting to it. This will offer support to my claim that an act of CD can reveal a virtuous disposition in the disobeying citizen, and might therefore be judged as a morally praiseworthy behaviour in a democratic society.

## **2. The Meaning of ‘Reasonableness’<sup>1</sup>**

In *Political Liberalism*, Rawls offers an account of what it means to be a reasonable citizen by comparing the concept of ‘being *rational*’ and that of ‘being *reasonable*’. He describes ‘the Rational’ and ‘the Reasonable’ as ‘moral powers’ that individuals possess as citizens.<sup>2</sup> In his account, the “Rational” amounts to the power of the individual agent to judge and deliberate in seeking ends and interests which are peculiarly her own. The Rational, from this point of view, constitutes the *citizen’s power to define and pursue her own conception of the good*. It concerns the agent’s selection of her own ends and interests, and of the principles that she applies in seeking to satisfy those ends and interests. A ‘rational’ agent is able to organise her ends coherently and to select the most effective means to reach them. Rawls specifies that a ‘rational agent’ need not necessarily possess also “the particular form of moral sensibility that underlies the desire to engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse”.<sup>3</sup> His idea is that being ‘rational’ does not offer any guarantee that the agent will keep her commitment to projects shared with other people, should circumstances change in a way that is not to her own advantage. This is why, as “citizens”, i.e. members of a political community, individuals also possess and exercise a second kind of moral power, which provides that “moral sensibility to others” Rawls thinks the ‘Rational’ cannot guarantee.

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<sup>1</sup> In this section, I draw from arguments presented in Boettcher (2004).

<sup>2</sup> Rawls (1993), p. 48.

<sup>3</sup> Ibid., p.51. However, it is not necessarily the case that a rational agent is always self-interested: “their interests are not always interests to benefit themselves”, *ibid.*

This second moral power is the ‘Reasonable’, namely *the power to possess and act on an effective sense of justice*. Within Rawls’ own conception of justice as fairness, the reasoning of the individual agents and/or parties represents the Rational; the Reasonable, on the other hand, is characterised by the acknowledgement of various constraints within which the agent’s goal-oriented reasoning is conducted. For the sake of the political system, *the Reasonable needs to have priority over the Rational*: the parties’ rational deliberation is constrained by the concern for the fairness of their eventual choice. As members of a democratic community, reasonable citizens are able to abandon a self-centred perspective in order to *respect* other citizens’ pursuit of their conceptions of the good life.

Against this background, therefore, ‘reasonableness’ is the *disposition* of an individual who is willing to respect fair terms of cooperation with fellow citizens. To be reasonable, Rawls writes, is to be ‘judicious’ and ready to listen to the reasons offered by others.<sup>4</sup> While ‘rationality’ requires an agent to take the interests of others into consideration, only to the extent that these may affect the agent’s chances to realise her own interests, ‘reasonableness’ implies not merely the exercise of intelligent judgment, but also a willingness to respect *fair* terms of cooperation.<sup>5</sup>

Knowing that people are rational, we do not know the ends they will pursue, only that they will pursue them intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others’ well-being.<sup>6</sup>

A reasonable citizen is inclined to propose terms that she thinks others could accept, and to abide by those terms, provided others are willing to do so as well. Reasonableness is, then, a disposition to treat others according to fair terms of cooperation. It is a ‘disposition’, since reasonableness is not merely a capacity the citizen possesses, but is a trait of her character that motivates her to act in a certain way. This allows us to interpret reasonableness as a civic virtue, to

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<sup>4</sup> Herman (2000), p. 164

<sup>5</sup> See Sibley (1953), which Rawls also mentions in (1993), p. 49, fn.1.

<sup>6</sup> Rawls (1993), p.48.

the extent that it is “part of a political ideal of democratic citizenship”, that is to say, part of what defines an individual as a member of a democracy.<sup>7</sup> In light of these initial considerations, and of what follows, I intend to analyse the issue of how citizens display their reasonableness in cases of deliberative disagreement.

Reasonable persons take others to be politically free and equal, and deserving of fair terms of social cooperation. In attributing freedom, equality and the basic moral powers to others, a reasonable citizen thereby takes on a series of commitments. She commits herself to beliefs and actions compatible with a respect for the others’ basic moral powers.<sup>8</sup>

To be reasonable is to accept the inevitability of pluralism, partly because of a reasonable person’s desire to cooperate with others on terms that all can reasonably accept.<sup>9</sup> Reasonable persons aim for living with others according to principles others can accept and endorse; also, they want to be able to justify laws and policies to people holding different reasonable doctrines through ‘public’ reasons, i.e. reasons that other reasonable persons could accept. To be reasonable, therefore, is to be willing to address others of different persuasion in terms of ‘public reasons’.<sup>10</sup>

### **3. Scanlon on Moral Motivation**

I pointed out that, at the core of the disposition of a reasonable citizen, there is a willingness to propose, and to abide by, fair terms of cooperation, provided others are willing to do so as well. However, it is not yet clear where lies the importance of being reasonable, and in this section I intend to discuss this point in connection to the duty to respect others as autonomous agents, discussed in chapter 3. In this section, I look at the meaning of the willingness to offer reasons others “could not reasonably reject”. Scanlon’s account of moral motivation provides the standpoint to identify the importance of being reasonable in connection to the respect due to fellow citizens’

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<sup>7</sup> Ibid., p. 62.

<sup>8</sup> Boettcher (2004), p. 606

<sup>9</sup> This is what makes this behaviour ‘virtuous’, according to Cheshire Calhoun, who argues that being ‘civil’ requires more than being merely ‘tolerant’: the former implies a further intention to *communicate* an attitude of respect towards the other, which is absent in the latter. See Calhoun (2000), p. 262.

<sup>10</sup> See Freeman (2000), p. 400-401.

right of autonomy.<sup>11</sup> Focusing on Scanlon's account reveals an important aspect of the way reasonable individuals ought to address each other.

When I reflect on *the reason that the wrongness of an action seems to supply not to do it*, the best description of this reason I can come up with *has to do with the relation to others* that such acts would put me in: the sense that others could reasonably object to what I do (whether or not they would actually do so).<sup>12</sup>

One specific aspect that makes an action morally wrong is the fact that other people could "reasonably object" to the principle underlying it. What makes an action wrong is that "it would be disallowed by any set of principles, for the regulation of general behaviour, which no one could reasonably reject".<sup>13</sup> Under this light, for example, physically abusing another person would be based on a principle that others would not reasonably accept: this would signal one aspect of the wrongness of such behaviour.<sup>14</sup> Such analysis explains also, for Scanlon, why we are concerned with the study of morality: one reason not to act wrongly is that each of us should be motivated to offer reasons for one's own actions that other, similarly motivated, individuals could not reasonably reject.<sup>15</sup>

In this notion of 'similar motivation', we find the same emphasis on treating others as equal, which is central to Rawls' view. There is something upsetting, Scanlon argues, in someone who fails to see the force of moral reasons. For example, one might think that art deserves people's appreciation, and feel discontent towards someone who is not sensitive to the beauty of a painting or a sculpture; but that is not the same feeling she might have against someone who fails to see her reasons for deeming a particular act wrong. The person who does not care about art, one may say, is "missing something", since there is a category of value she fails to appreciate, and her life is

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<sup>11</sup> Scanlon (1998), chapter 4.

<sup>12</sup> Ibid., p.155, my emphasis.

<sup>13</sup> Ibid., p.154

<sup>14</sup> I am ignoring any complication to the case, such as whether the other person gives her consent, whether one acts in self-defence, etc.

<sup>15</sup> It is interesting that Scanlon at this point compares this view with Mill's utilitarianism, and suggests they share the same appeal to "the desire to be in unity with our fellow creatures". Ibid.

somewhat impoverished by this lack. However, and this is Scanlon's point, the failure to show concern with morality opens up more serious difficulties:

[t]his failure makes a more fundamental difference because what is in question is not a shared appreciation of some external value but rather the person's attitude towards us – specifically, a failure to see why the justifiability of his or her actions to us should be of any importance.<sup>16</sup>

There is a crucial gap separating “the amoralist”, that is, someone who does not care about considerations of right and wrong, from others who do and this accounts for the *importance* of morality in our life.<sup>17</sup> The emphasis on offering reasons for one's own actions, that other people could not reasonably reject, highlights the importance of individuals' *mutual* recognition as autonomous agents. When we act against morality, we (might) feel guilt, and for Scanlon that would involve a feeling of “estrangement, of having violated the requirements of a valuable relation with others”.<sup>18</sup> On the other hand, when we act only on principles others could not reasonably reject, and when we constrain the pursuit of our own conception of the good life accordingly, we show respect for others as *autonomous* agents: that is, as agents able to pursue their own conception of the good, and subject to justifiable limitations of their conduct only in ways they themselves would limit it.<sup>19</sup> Grounding our actions on reasons that others could not reasonably reject is one way to show our respect for their autonomy: it also grounds our expectation to be treated in the same way by them.

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<sup>16</sup> Ibid, p.159.

<sup>17</sup> On the “amoralist”, see Williams (1993), pp. 3-13.

<sup>18</sup> Scanlon (1998), p.162.

<sup>19</sup> Thus, a similar motivation lies at the basis of both Rawls and Scanlon's contractualism: as Charles Larmore has pointed out, the meaning of the original position in *A Theory of Justice* was to show that principles of justice need be grounded on a *shared point of view*. This satisfies a requirement of “publicity”, according to which “the reasons each person has to endorse the principles of justice are reasons she sees others to have to endorse them as well”. Furthermore, this shows a concern with *respecting* co-citizens as ends in themselves, since we act on reasons we are prepared to explain. See Larmore (2003), p. 371.

#### 4. Deliberative Disagreement and Mutual Respect

The points mentioned above were meant to offer an overview of the idea of reasonableness as a civic virtue, and of how it connects to the idea of respect for individual autonomy. According to what I pointed out, a citizen behaves in a way that shows ‘reasonableness’, if she is willing to address others, who are similarly motivated, according to principles they could not reasonably reject. This implies, among other things, an idea of reciprocity, whereby what grounds this willingness to cooperate is an expectation that the others would have a similar motivation.<sup>20</sup>

However, the discussion above is yet to suggest how this account of reasonableness can be cashed out in the case of substantive disagreement: that is to say, what interests me, in discussing the behaviour of ‘virtuous citizens’, is how someone can behave as a reasonable person when defending an opinion which conflicts with that of others: that is to say, in cases of “reasonable disagreement”.<sup>21</sup> In cases like these, which are those that make the business of living together problematic, even where citizens give priority to the “Reasonable” over the “Rational” (in the Rawlsian sense), the disagreement will not be solved. Consider, for example, the controversy over the legalization of abortion. Both pro-life and pro-choice advocates offer arguments based on different but plausible premises: the former, based on their assumption that the foetus is a legal person, argue that human life ought to be respected; the latter, rejecting that assumption, hold that women should have the right to decide whether or not to bear a child. Both these positions are ‘reasonable’, in that they are based on assumptions that others could not reasonably reject.<sup>22</sup>

This is also called “deliberative disagreement”, for citizens continue to differ about basic moral principles even though they seek a resolution that is mutually justifiable.<sup>23</sup> Some citizens oppose others who are not less committed to finding fair terms of cooperation, and who are offering reasons that cannot be shown to violate those terms. We are faced with a serious problem as to how

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<sup>20</sup> On ‘reciprocity’, see Gutmann & Thompson (1996), p. 55.

<sup>21</sup> See Rawls (1993), p. 55 ff.

<sup>22</sup> See the discussion of ‘the fact of reasonable pluralism’, in Rawls (1993), pp. 35-37.

<sup>23</sup> Gutmann & Thompson (1996), p.73.

this disagreement can be addressed in a way that respects the status of the subjects involved in the deliberation. At a glance, it seems that stressing the fact that they ought to be *reasonable* is not going to be of much help.

This will depend, however, on how we interpret the requirement of showing respect for others as autonomous agents. Although I agree with Rawls' account of reasonableness, I do not share his conclusions as to how this moral disposition regulates our behaviour in the case of public disagreement. In the next section, I will present the solution that Rawls, and others who followed his view, have offered to account for how citizens ought to treat each other with respect, in cases of substantive disagreement. Then I will analyse the opposite view, upheld by realists or 'agonistic' liberals, who are sceptical about the fact that politics is about achieving a stable agreement. According to this alternative view, we respect each other when we acknowledge our roles as adversaries in the public arena, and our right to have our voice heard. Although both accounts, I will claim, rely on some plausible assumptions, I opt for a third solution, offered by the ethics of discourse, and argue that, in cases of substantive disagreement, citizens respect each other by adopting what Habermas has called a 'performative attitude'.

## **5. Handling Disagreement: Reasonableness as 'Avoidance'**

According to Rawls, whereas citizens can agree on the basic political structure of their society, they are unlikely, or even unable, to reach such an agreement on issues relative to their different, and often irreconcilable, 'comprehensive doctrines'. Rawls defends state neutrality, whereby claims of legitimacy can be advanced with reference to "political conceptions", but not to what he calls 'comprehensive general doctrines'.<sup>24</sup> This is due to the fact that a political conception can be advanced as a freestanding view, one that is defended "apart from, or without reference to",

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<sup>24</sup> A 'general' doctrine applies to a wide group of individuals or even to all subjects universally. A 'comprehensive' doctrine is one that includes conceptions of what is of value in human life, ideals of personal character, as well as ideals of friendship and of familial and associational relationships. See Rawls (1993), p. 55.



any substantively wider background.<sup>25</sup> Given that the same political doctrine can be endorsed by different comprehensive views, it is possible to expect that individuals will reach some degree of agreement as for the political conception to be adopted. However, when it comes to comprehensive views, the claims they make will very likely be incompatible: comprehensive views aim to be valid for everyone, seeking to encompass most, of all, of the aspects of the life of the individual.<sup>26</sup> These conceptions are non-political: for example, many religious views seek to be comprehensive in this sense. They represent complete moral theories, about which, according to Rawls, we cannot expect to achieve an overarching agreement. This does not compromise the possibility of peaceful and stable communal life, because “a constitutional regime does not require an agreement on a comprehensive doctrine: the basis of its social unity lies elsewhere”.<sup>27</sup>

In fact, according to Rawls, in spite of their irreconcilable comprehensive views, *reasonable* citizens can still achieve a degree of agreement by appealing to *public reasons*, which are based on *political* conceptions of justice. For Rawls, citizens have a “*duty of civility*” to be able to explain to one another how the principles and policies they advocate and vote for can be supported by the political values of public reason.<sup>28</sup> The justification of this duty is grounded on Rawls’ *principle of legitimacy*:

our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.<sup>29</sup>

The suggestion is that neutrality is warranted by a duty to respect individuals’ different claims to the comprehensiveness of their views, upon which a political conception should have nothing to say.

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<sup>25</sup> Rawls (1993), p. 12.

<sup>26</sup> *Ibid.*, p.13.

<sup>27</sup> *Ibid.*, p.63.

<sup>28</sup> *Ibid.*, p. 217. Rawls specifies it is a *moral*, not a legal duty.

<sup>29</sup> *Ibid.* Note the similarity between Rawls’ duty of civility and Scanlon’s notion of wrongdoing discussed above.

My interest with this issue does not lie on whether Rawls' argument for state neutrality is correct or not, but on the normative implications of his view for an account of *respect* for fellow citizens. These implications are visible, for example, in the account of Larmore, who endorses Rawls in expounding this alleged link between neutrality and respect. Accepting Rawls' priority of the right over the good, Larmore acknowledges the fact that people will inevitably disagree about comprehensive doctrines. Nonetheless, as Rawls says, citizens can still aim for an agreement based on 'public reasons', i.e. reasons that everyone could in principle accept. For Larmore, this is achievable via a "retreat to neutral ground" in the face of disagreement. He justifies liberalism's appeal to political neutrality with reference to what, according to him, constitutes a universal norm of rational dialogue:

When two people disagree about some specific point, but wish to continue talking about the more general problem they wish to solve, each should prescind from the beliefs that the other rejects, (1) in order to construct an argument on the basis of his other beliefs that will convince the other of the truth of the disputed belief, or (2) in order to shift to another aspect of the problem, where the possibilities of agreement seem greater. *In the face of disagreement, those who wish to continue the conversation should retreat to neutral ground, with the hope either of resolving the dispute or of bypassing it.*<sup>30</sup>

So, now we have one *practical* suggestion regarding how to show respect in the face of disagreement, and how to fulfil our duty of civility mentioned above. If we aim to solve a deliberative disagreement, Larmore argues, we have to be ready to abandon the focus on those issues upon which we expect the disagreement to persist; rather, we need to focus on arguments that we could all reasonably accept. From the perspective of Rawlsian liberalism, this is the behaviour that shows *respect* for those with whom we are in disagreement: given the incommensurability of conflicting comprehensive views, that is, of people's different conceptions of the good, the way to respect others as autonomous agents is to avoid arguing over what cannot be agreed upon. What I

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<sup>30</sup> Larmore (1987), p.53. Added emphasis.

intend to analyse in more depth is the validity of Larmore's account of the *respectful* way to handle the deliberative disagreement:

[a] commitment to treating others with equal respect forms the ultimate reason why in the face of disagreement we should keep the conversation going, and to do that, *of course*, we must retreat to neutral ground.<sup>31</sup>

In the rest of this chapter, I intend to criticise this conception of respect.

## 6. The Agonistic View of Democracy

Rawls' political liberalism relies on the belief in the possibility of an agreement, although limited to 'the political', among all rational and reasonable individuals. This may occur in spite of citizens' deeper disagreements over their different, and often irreconcilable, comprehensive moral doctrines. However, as I will show below, Rawls' optimism about the possibility of reaching an overlapping consensus, even merely about 'the political', has been the object of various attacks. These hinge on whether his assumption is really warranted, that is, whether it is the case that citizens could reach an overlapping consensus on the basic principles of justice, and accept that substantive arrangement X should be preferred to arrangements W, Y and Z. Some have pointed out that, in cases of disagreement, the best we could hope for is to "always keep the discussion open in light of our *competing* accounts of justice".<sup>32</sup> Taking this different approach could have implications also for the idea of respect as 'retreat to neutrality'.

For example, Waldron argues that the fact we may eventually reach a collective decision about a legal enactment, does not show that the disagreement has dissolved. We finally arrive at an "agreement" about a political issue because of the sheer necessity of a generally accepted framework for cooperation, but that is far from representing the end of the debate. A common view "has to be forged in the heat of our disagreements, not predicated on the assumption of a cool

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<sup>31</sup> Ibid., p.67. Added emphasis.

<sup>32</sup> Van den Brink (2005), p. 248.

consensus that exists only as an ideal”.<sup>33</sup> This means that the “agreement” obtained is often merely practical, and not justified on the assumption that citizens, if they were fully reasonable and rational, would necessarily reach a substantive agreement on principles, rules, policies and so on.

[A]greed upon common courses of action are often rather necessitated by the need for clarity, consistency and the sheer need for an authorised normative framework for cooperation, than by any deep agreement based in the ideal conceptions of justice and cooperation among those members.<sup>34</sup>

This is what is known as an ‘agonistic’ conception of liberal democracy.<sup>35</sup> It sees democratic life as a ‘contest’ (*agon*), a competition among different, and often opposite, conceptions of the good, where the aim for a final agreement is replaced by a more modest attempt to find a suitable *compromise* that can satisfy, to some extent, most of the participants.<sup>36</sup> From this point of view, citizens still operate in a context that takes ‘the right’ as being prior to ‘the good’: yet, the hope to reach a consensus, even the ‘thin’ consensus Rawls believes possible, among citizens who uphold incommensurable views, has been abandoned.

In this different theoretical context, ‘reasonableness’ still represents an important trait of the citizen’s character. In fact, in this *agonistic* view of democracy, citizens’ inner dispositions acquire even more relevance. A diversity of reasonable opinions about issues of substantive justice need not pose necessarily a threat to political cooperation. Cooperation in the face of disagreement is a key element of a political system in which citizens know that any political settlement will seldom be ‘optimal’: most of the times, and perhaps in the best cases, such settlement will be a ‘good enough’ arrangement, according to the individual’s ideal conception of justice. When citizens find themselves faced with a particular constitutional arrangement they disagree with, they may not give

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<sup>33</sup> Waldron (1998), p.106

<sup>34</sup> Van de Brink, op. cit., p.250.

<sup>35</sup> This view is more commonly known as ‘political realism’, according to a tradition that goes back to Macchiavelli. I prefer to use here the label ‘agonistic’, in this context, to emphasize the ‘adversarial’ approach to politics, which then I compare to the deliberative one below. On political realism, see Williams (2005), pp. 1-17.

<sup>36</sup> See Gray (2007), pp. 96-130.

it their wholehearted consent. Nonetheless, and this is where Scanlon's concept of moral motivation returns, if they seriously endorse the value of their own ideal conception, and grant that others will do the same with their own, then they need to keep the field open for further discussion. They do this with the aim to reach a better 'compromise'.

In the agonistic conception of politics, 'conflict' plays a role that goes beyond that of a *means* to achieve political order. More specifically, conflict is not seen as an obstacle that will be overcome once an agreement is achieved: through the lenses of agonistic liberalism, conflict itself represents a constitutive aspect of politics. The agonistic conception of citizenship calls for a (never-ending) confrontation between members of the political community, aiming to achieve the best possible compromise between incommensurable principles, values, and interests.<sup>37</sup> Any political decision, from this perspective, is 'contestable': it is within citizens' *moral* rights to contest any empirical political arrangement.<sup>38</sup> Rather than retreating to neutrality, then, it is "especially by disagreeing, by breaking open set frameworks and routines *for the sake of the integrity of the civic association*, [that] the citizen asserts her political autonomy."<sup>39</sup>

## **7. An Agonistic Account of Respect**

Taking this different stance on the issue of disagreement has strong implications for the conception of the notion of *mutual respect*. In Rawls' view, citizens have a duty to offer reasons that others can in principle accept, that is to say, public reasons. This is justified, I argued, by the importance of respecting each member's capacity to make autonomous choices and of being respected in the same way. I have shown how, for liberals like Larmore, the duty of civility is based on the desire to keep the discussion going: according to him, it is *out of respect* for the others that we should set aside those issues about which we know we will permanently differ.<sup>40</sup>

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<sup>37</sup> On this notion of agonistic *compromise* see Bellamy (1999), esp. ch. 4.

<sup>38</sup> On this disjunctive formulation of the right to political participation, see Lefkowitz (2007).

<sup>39</sup> Van den Brink (2005), p. 256.

<sup>40</sup> See also, on this point, Ackerman: "we should simply say *nothing at all* about this disagreement, and put the moral ideas that divide us off the conversational agenda of the liberal state". Ackerman (1989), p. 16.

However, in light of the assumptions brought forward by an agonistic view of democracy, one might question whether this really is a *respectful* way to go about disagreement. A first doubt refers to the effective value of a discussion that avoids the point on which disagreement hinges, and focuses only on those views we can all share: what we may think is really worth discussing is *why* we disagree, and how the disagreement, however unavoidable, could be addressed. What we expect from a confrontation with people whose conception of the good differs from our own should be more than a mere “overlap” of our purely political conceptions (whether or not that is possible at all): rather, we should aim for an understanding of that difference, and for bridging the gap between “the others” and “us”. The emphasis on a retreat to neutrality might fail to grasp an important element of the way in which we should approach the disagreement:

I must prescind from what divides me from my opponent (...). I must appeal only to reasons that are within the domain of public reason. I must, as my opponent, be publicly reasonable. [However], [t]his requires that we show mutual *disrespect* to one another (...). The reasons that are mine for believing that abortion should be legalised, as with my opponent’s for believing the contrary, are ones we have, respectively, conscientiously and openly come to embrace. They are ones we could honestly and sincerely affirm to each other. They are authentically ours. Yet we cannot display them to one another.<sup>41</sup>

I think it is plausible to argue along these lines, and to question the idea that *respect* requires *avoiding* the disagreement. Refraining from expressing one’s own genuine (reasonable) views about issues of *substantive* justice, in pursuit of an agreement on ‘the political’, does not necessarily show ‘respect’ for our partners in the discussion. Even without accepting, as agonistic liberals do, the inevitability and persistence of disagreement, and the fact that an overlapping consensus about objective political principles may be impossible, we may have reasons to prefer an alternative account of *respect* that abandons the Rawlsian requirements. Under the perspective of an agonistic democracy, respect for others as autonomous agents emphasizes *sincerity*: by explaining to fellow

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<sup>41</sup> Archard (2001), p. 220.

citizens why she thinks that arrangement X is to be preferred to arrangement W, which others prefer, a citizen shows respect for them as ‘adversaries’ in the discussion.<sup>42</sup> Similarly, as I will argue below, *she could, and should, rightly complain about not being properly respected as an autonomous agent, were others unwilling to offer her (acceptable) reasons in defence of their own view.*<sup>43</sup> It is through this kind of “reason-giving” that we may arrive at a *compromise* about what may be a “good enough” (yet still revisable) settlement on issues of substantive justice.

According to the agonistic view of liberalism, political disagreement, i.e. disagreement about the best political arrangement, is not avoidable. More specifically, it cannot be avoided, because politics just *is* about conflicting views. Agonistic liberals are sceptical of the possibility of a final “consensus” on issues of substantive justice. The reason why we (might) all eventually consent to some political arrangement is not that we agree that it is the best one: rather, it is that we all *need* a political arrangement for *social coordination*. That is to say, what unites us, even in the face of disagreement also over the political, is the desire for some form of collective political arrangement, the latter being, nonetheless, always *provisional and revisable*. This is the only form of ‘overlapping consensus’ we may hope to reach; what we all agree about is not the *substance* of the arrangement, but the *procedure* through which the arrangement is chosen while remaining open to future changes.

Thus, we may all accept that democracy is the best procedure to settle political questions, since it gives all citizens, as far as it is possible, fair representation. This means we can give our wholehearted support to the ‘rules of democracy’, without holding the same view about the particular *outcome* democracy produces. The latter may simply be ‘good enough’, or the lesser evil among the solutions available to us: what is important is that every voice in the deliberative arena receives recognition. From this different standpoint, the “conversational norm” is not “retreat to

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<sup>42</sup> Mouffe clarifies how, under an agonistic conception of citizenship, citizens with opposing views see each other not as “enemies”, but as “adversaries”: “while in conflict, they see themselves as belonging to the same political association, as sharing a common symbolic space within which the conflict takes place”. See Mouffe (2005), p. 20.

<sup>43</sup> To this extent, this would be a form of respect based on ‘reciprocity’.

neutral ground”, but “audi alteram partem”, namely a requirement that *all* the participants in the conversation be entitled to express their voice and receive due consideration from the others.<sup>44</sup>

There seem to be two main problems with Rawls’ view: on the one hand, as I have tried to show, it advances an unsatisfactory idea of respect, based on the avoidance of the disagreement. Against this view, I argued that it seems more plausible that we should express our own conflicting views *especially* in the presence of deliberative disagreement. Mutual respect is displayed by heeding the other participants’ opinions in the deliberation. Our duty of civility might then be reinterpreted in light of this different perspective:

The most important criterion for living up to requirements of the use of public reason is that citizens – irrespective of their conceptions of the good- be disposed to engage in *reciprocal* democratic deliberations that will result in good enough democratic decisions, not that they will in the end come to favour this or that opinion or arrangement that issue from public deliberation.<sup>45</sup>

A second issue arising from Rawls’ conception of ‘respect’ is that it downplays the relevance of the deliberative process itself. As I discussed in chapter 1 above, democracy is a demanding regime that calls for citizens’ active and responsible participation: however, by asserting the avoidance of conflict, rather than the engagement with it, as part of a civic and reasonable behaviour, this view risks weakening the impact that democracy can have on citizens’ life and development as autonomous agents. Against this view, a different idea of *reasonableness* should be preferred, one that does not over-emphasise the *kind* of opinions we bring into the democratic debate. Under this different understanding, a *reasonable* citizen is one who, like Rawls says, is willing to find fair terms of cooperation with others: however, her reasonableness is displayed *especially when* different, and often conflicting, conceptions of the good life are at stake. Being reasonable involves taking part in the deliberative process in ways that show *respect* for others: a

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<sup>44</sup> Hampshire (1999), p.21.

<sup>45</sup> Van den Brink (2005), p. 260.



citizen might be *unreasonable* if she does not acknowledge that others have a right to state her own views, even comprehensive ones. From this standpoint, *disrespect* refers to the way the opinion is defended, rather than to the content of the opinion itself. We offer each other fair terms of cooperation when we lead the discussion according to the *procedure* we have consented to, with the awareness that a cooperative effort, nonetheless, will not eliminate the substantive disagreement dividing us.

Thus, Rawls' political liberalism offers an unsatisfying account of how citizens can address reasonable disagreement in a way that is respectful of the others' autonomy. This is due, I suggested, to his defence of *neutrality* to sidestep the issues over which the conflict hinges. I have pointed out that it seems counterintuitive to argue that a 'retreat to neutral ground' can ground a genuine idea of respect. The acknowledgement of the status of the agent as a rational and autonomous being brings into the discussion exactly those issues on which disagreement hinges. *Sincerity*, rather than *neutrality*, appears to be closer to the proper respect citizens of a liberal democracy owe to each other. This is the view endorsed, for example, by agonistic liberalism, which questions the possibility of an overlapping consensus and sees conflict as a constitutive element of politics.

However, the solution offered by an agonistic account of political life, namely that a stable agreement on substantive issues cannot be achieved, may appear unsatisfactory as well. I want to highlight two main flaws in the argument proposed by agonistic liberals: the first refers to the distinction between *procedural* and *substantive* justice, which I discuss immediately below. The second concerns the *disposition towards fellow citizens* that agonistic liberalism fosters in the individual: it will appear clear after my presentation of what I defined as option (c) to the problem of disagreement, namely, a deliberative approach based on the ethics of discourse. As I pointed out, agonistic liberalism shifts the emphasis from substantive to procedural justice. By taking conflict as

a constitutive aspect of political life, it holds that an agreement might be achieved only with regard to the procedure for addressing the unavoidable tensions among different individual conceptions of the good life. Given the facts of reasonable pluralism, there should be no expectation that citizens will agree on what is the best arrangement for their society: however, since they accept the democratic procedure as the best method for a ‘temporary’ settlement of the discussion, they may accept the outcome of the democratic process as *procedurally* just.<sup>46</sup>

One main difficulty with this argument is that the distinction between substantive and procedural justice may not be as clear-cut as it appears to be. The agonistic view of liberalism hinges upon the separation of substantive from procedural issues, accepting the possibility of agreement only with reference to the second ones. However, it seems obvious that the ‘two kinds of justice’ share a common ground: the concept of procedural justice appears to rely on a substantive notion, namely on the importance of granting everyone’s view some degree of equal consideration in choosing a political settlement. The rationale for the ‘audi alteram partem’ principle is based on the acknowledgment of each participant’s right to express her view. Procedural justice, therefore, does not fall outside the realm of substantive judgments: an agreement upon the former relies on an acceptance of a substantive notion of individual equality. Thus,

[d]emocratic adversaries share a common symbolic space only if their common reference to the core values of liberty and equality is indeed understood by all parties as *common* reference. This presupposes a minimal discursive overlap between the adversarial positions in the sense of an at least partially shared and therefore debatable understanding of the meaning of these values.<sup>47</sup>

This means that, even when the best we can hope for is to achieve a compromise among different substantive views, the reason for us to do so can still be grounded on substantive claims, namely the acknowledgment of the value of equal respect for each individual as an autonomous

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<sup>46</sup> See Hampshire (1999).

<sup>47</sup> Rummens (2009), p. 383. This point is echoed by Rawls: “Only against a background of a just basic structure, including a just political constitution and a just arrangement of economic and social institutions, can one say that the requisite just procedure exists.” Rawls (1999), p. 76.

agent. It appears, then, that although the Rawlsian account of reasonableness does not grasp the full extent of this mutual respect (by advocating ‘restraint’ over ‘sincerity’), the alternative offered by agonistic liberalism is not satisfactory either. The latter seems right in shifting the focus of respect away from the retreat to neutral ground that Rawlsian liberalism suggests: nevertheless, in emphasising the importance of procedural justice, it overlooks the fact that democratic procedures themselves are based on some agreement about *substantive* assumptions. More specifically, the reason to accept a procedure as ‘just’ is a substantive one: it is because we all value equality that we can all accept the democratic procedure as being preferable to all others. We may accept, then, the possibility of an overlapping consensus over a minimum core of substantive principles, while (against the Rawlsian notion of avoidance) also sympathising with an idea of politics where conflict is compatible with mutual respect and citizens’ reasonableness. However, that (thin) degree of consensus over substantive justice also reveals that *substantive agreements are, at least in principle, possible*. There is ground, therefore, to avoid both Rawlsian and agonistic liberalism, in favour of a position that holds agreement among conflicting views to be achievable. More specifically: between the idea that our opinions will overlap, though to a slight degree, and the denial of any such overlap, there may be a third option, namely that our opinions will *change* during the discussion and, to some extent, move closer to each other. This option is offered by a deliberative approach to politics, to which I now turn. As I mentioned above, the following discussion will also reveal the second main flaw in agonistic liberalism, namely that fact that it fosters the wrong kind of civic attitude among citizens.

## 8. A Third Possibility: The Deliberative Approach of Discourse Ethics

In the next sections, I will consider some of the main tenets of Habermas' ethics of discourse. My aim will be to point out some of the central elements of his approach, clarifying why I take it as better suited, than the previous two accounts discussed above, for addressing the issue of reasonable disagreement. I will then return to CD, to show how it can fit with this deliberative model, and play an important role in addressing the disagreement in ways that show respect for others as autonomous agents.

The central contribution of Habermas to the debate over the issue of disagreement lies in his emphasis on the search for norms all participants could agree to in a rational discussion.<sup>48</sup> This approach is based on the important idea that the validity of a norm is not defined by the individual subject alone: rather, it has to undergo examination through a rational discourse involving all the moral subjects the norm could affect. Against the concept of an isolated moral consciousness, able to reach universally valid norms through solitary reflection, Habermas' approach focuses on the idea of a rational agreement among those who may be subject to the particular norm. It is on these premises that Habermas formulates his Principle of Universalization,<sup>49</sup> from which he then derives the Principle of Discourse (D) that grounds his discursive test:

Every valid norm would meet with the approval of all concerned if they could take part in a practical discourse.<sup>50</sup>

Central to this theory is not "the relation of a solitary subject to something in the objective world that can be represented and manipulated, but the intersubjective relation that speaking and

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<sup>48</sup> Mc Carthy (1994), p. 45.

<sup>49</sup> "[E]very valid norm has to fulfil the following condition: (U) *All* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation". Habermas (1990), p. 65.

<sup>50</sup> *Ibid*, p.121.

acting subjects take up when they come to an understanding with one another about something.”<sup>51</sup> From these premises, Habermas’ approach to the issue of agreement points in a third direction, by highlighting how “[c]oming to an understanding is not an empirical event that causes de facto agreement; it is a process of mutually convincing one another in which the actions of participants are coordinated on the basis of motivation by reason. “Coming to an understanding” refers to communication aimed at achieving a valid agreement.”<sup>52</sup> Given their Kantian background, the Habermasian and Rawlsian projects share the goal of finding a procedure that is (a) impartial and (b) a valid test for competing principles of justice. It is true for Habermas, as it is for Rawls, that a norm is valid only if grounded on shared convictions: yet, in Habermas’ view, the latter can only be achieved *collectively*, through a process of mutual confrontation. At the same time, this view rejects also agonistic liberalism’s scepticism about the possibility of the agreement: in cases of disagreement about the validity of a particular norm, that disagreement should be addressed not through Rawls’ idea of ‘avoidance’ (Larmore’s idea of a ‘retreat to neutral ground’), nor by accepting it as an ineluctable element of our political life. According to this third approach, engaging with others in a communicative interaction can be the way to solve the disagreement. To reach an agreement, subjects need to *become* persuaded of something: persuasion has to be achieved *collectively*. For a norm to be valid, it has to be reasonably *accepted* by the subjects, not imposed upon them.<sup>53</sup> Interaction becomes then central to the attempt to solve the disagreement. Habermas intends to preserve the Kantian claim to universal validity: this is why he focuses on norms whose justifiability can be defended from an impartial point of view. He highlights one main problem, however, with some forms of atomism, relative to the way they interpret the relation of the subject to the external world: Habermas calls this the *objectivating attitude*, with reference to

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<sup>51</sup> Habermas (1997), p.392.

<sup>52</sup> Ibid.

<sup>53</sup> O’Neill (1997), p.132.

Strawson's notion in *Freedom and Resentment*.<sup>54</sup> The problem with this attitude is that it might cut off the *interpersonal* dimension of our everyday experience:

We look with an objective eye on the compulsive behaviour of the neurotic or the tiresome behaviour of the very young child, thinking in terms of treatment or training. But we can sometimes look with something like the same eye on the behaviour of the normal and the mature. We have this resource and can sometimes use it: as a refuge, say, from the strains of involvement; or as an aid to policy; or simply out of intellectual curiosity. Being human, we cannot, in the normal case, do this for long, or altogether.<sup>55</sup>

Habermas uses this passage to draw attention to the mistakes of a morality built on individualistic premises. Strawson's example is meant to highlight how the indignation directed against the violation of a norm must in the last analysis be grounded on a cognitive basis. The person who blames the perpetrator for an offence believes the latter to be able to justify himself by, for example, rejecting as unjustified the normative expectations to which the resentful party is appealing: hence, to tell someone that she *ought* to do something means that she *has (good) reasons* for doing it.<sup>56</sup> The objectivating attitude ignores this dimension of human interaction: treating the other with an objectivating attitude means seeing the other as, in fact, an *object*, that can be used or manipulated for a certain end, regardless of her own reasons. In the perspective of Scanlon's account of moral motivation mentioned above, we could say that we treat others as *mere* objects if we fail to justify our behaviour to them by appeal to reasons they could not reasonably reject.

Emphasising this interpersonal dimension of morality, Habermas aims to focus on the role language plays in human interactions. The goal of discourse ethics is to *reconstruct* the moral point of view from which questions of rightness can be impartially evaluated, and this requires an analysis of the conditions for uncoerced and undistorted interaction among competent language users. Habermas' distinction between *strategic* and *communicative* action, and his claim that the

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<sup>54</sup> Strawson (1974).

<sup>55</sup> Ibid. ,p. 9.

<sup>56</sup> Habermas (1990), p. 49.

latter is the original mode of language use, constitutes the core of the ethics of discourse.<sup>57</sup> The terms ‘strategic’ and ‘communicative’ are meant to highlight two kinds of speaker’s attitudes within a discussion. This distinction can help us address the problem of disagreement by appealing to the speaker’s willingness to cooperate in the discourse.

Habermas claims that communicative action constitutes the original form of language use, prior to strategic action.<sup>58</sup> In order to use language to succeed in a *strategic* way, subjects must already have developed the rule-consciousness necessary for strategic action, and this implies a previous action oriented at reaching understanding. We can approach the hearer with an objectivating attitude, aiming to exploit him as an object for our goals, only if we are already competent language users: however, we develop that kind of competence via communicative action, through which we get to understand what a means-end approach is. At the core of this deliberative theory is, therefore, the claim that in order to avoid the risks of distorted communication, subjects need to aim for mutual understanding, which implies adopting a different *attitude*.

I have pointed out already what it means to say that the speaker can approach the hearer with an *objectivating* attitude: in this case, “the agent seeks to *influence* the behaviour of the hearer by means of the threat of sanctions or the prospect of gratification in order to *cause* the interaction to continue as the first actor desires”.<sup>59</sup> In such a situation, the agreement that is reached (if any) through the discussion is a mere *de facto* one, in that it is merely imposed upon, rather than accepted by, the hearer. In the case of strategic action, the speaker aims to use the hearer to the achievement of the speaker’s own goal. The speaker’s main concern is not with reaching mutual understanding, but achieving a goal: one could, for example, seek to convince a person to act in a certain way by appealing to her fears or desires. The aim in this case would be to influence the hearer’s conduct (see Grice’s theory in chapter 2), yet merely out of self-interest. An *objectivating*

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<sup>57</sup> O’ Neill (1997), p. 112.

<sup>58</sup> Ibid., p. 111.

<sup>59</sup> Habermas (1990), p.58.

attitude would be displayed by the disregard for the hearer's free and uncoerced acceptance of the speaker's utterance: she might cooperate with the speaker, by accepting her utterance, because of what she can get out of the bargain, and not because she finds the speaker's goal inherently worthy. The cases of coercion discussed in the previous chapters exemplify exactly this kind of situations, and what makes them objectionable: where the 'hearer' accepts a particular course of action without fully endorsing it, mainly because of the presence of a threat, she is being treated as an object, and this fails in an important way to treat her as an autonomous agent.

In the case of communicative action, agents eschew approaching each other with an objectivating attitude, in favour of a *performative* one. They seek to coordinate their actions to achieve a goal (joint or individual) based on a shared acknowledgment that the goal is reasonable. Hence, while, in the strategic case, the agents succeed to the extent they achieve their individual goals, the successful communicative action is characterised by the actors' free and uncoerced agreement that their goal(s) are worthy of cooperation. This avoids the instrumental attitude in favour of the search for the other party's free endorsement:

an agreement cannot be imposed or brought about by manipulating one's partner in interaction, for something that *patently* owes its existence to *external* pressure cannot even be considered an agreement.<sup>60</sup>

The speakers approach each other with a performative attitude when they engage in what Habermas calls 'ideal role taking'.<sup>61</sup> In order to assume an impartial point of view for argumentation, any subject participating in the discourse is required to put herself in the position of all those who would be affected if a controversial norm were to be adopted. This is what grounds Habermas' Principle (D) stated above. For Habermas, ideal role taking is achieved during communicative action: by putting oneself in the position of the other person, one also can get a

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<sup>60</sup> Ibid., p.134.

<sup>61</sup> Habermas refers here to a procedure first outlined by G. H. Mead. See Habermas (1990), p. 182.



better grasp of her own view.<sup>62</sup> The process of understanding is *reciprocal*, so that each participant approaches the deliberative arena with a willingness to identify with the claims of the interlocutors in the pursuit of a rational agreement.

These considerations shed light on the fundamental point that an agreement can be reached through a process of *reciprocal* engagement with the view of the others. Habermas shares with Rawls the aim of finding a fair procedure allowing participants to reach a normative agreement: however, he holds that this requires the speakers to *engage* in social interactions, not to *retreat* to uncontroversial claims, as Rawls thought. Habermas' view, then, reaffirms the social dimension of individual autonomy which I discussed in chapter 3: it is only by engaging with others in a process of mutual understanding that an individual can exercise her capacity to be a self-legislator. Habermas' view strengthens the idea that we, as autonomous agents, choose what kind of person to be from within a social context, through a network of reciprocal social relations. This also means that 'the moral point of view' from which disagreement has to be approached is not that of an individual who retreats to neutrality; rather, the interaction that takes place in addressing the disagreement involves subjects with their own specific perspectives on the world.

Communicative action can be understood as a circular process in which the actor is two things in one: an *initiator* who masters situations through actions for which he is accountable and a *product* of the traditions surrounding him, of groups whose cohesion is based on solidarity to which he belongs, and of processes of socialization in which he is reared.<sup>63</sup>

Participants in communicative action are then "supported from behind (...) by a lifeworld that not only forms the *context* for the process of reaching understanding but also furnishes *resources* for it."<sup>64</sup> This affirms, then, that in addressing the disagreement, subjects can hope to overcome it only by approaching each other in a way that takes into account who they are, what (different) kinds

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<sup>62</sup> Goodin (2003).

<sup>63</sup> Habermas (1990), p. 135.

<sup>64</sup> Ibid.

of values they subscribe to, what (different) principles back their own choices. We can see how this point relates to the issue mentioned above with reference to Larmore 'conversational rule': for a discussion that respects others as rational agents, it is necessary to bring into the debate what is *peculiar of one's own view*. The ethics of discourse brings to light the importance of interaction for the attempt to solve the disagreement and, more importantly for the present discussion, it also reveals a different notion of how individuals show respect for each other in cases of substantive disagreement. This, I will suggest, is not based on a requirement to avoid the disagreement, nor by acknowledging the status of the others as 'adversaries' in the political competition, but by addressing the others as autonomous agents who can be *persuaded*.

## **9. Defending Deliberative Democracy**

The brief discussion of the ethics of discourse has important implications for a normative account of how citizens should address each other in cases of substantive disagreement. The core idea is that, as in the case of Rawls' view, citizens should address each other according to norms that could be accepted by all participants in the discussion. However, contrary to Rawls, this approach shares the 'agonistic' idea that respect is not displayed through a 'retreat to neutrality', but rather through a conversation where individuals bring their own 'lifeworld', that is to say, their own, and diverse, substantive claims. However, I should say more about whether the deliberative approach really represents an 'alternative' to the Rawlsian and the agonistic ones.

In fact, as I pointed out, one first issue that arose from Rawls' theory concerns the notion of overlapping consensus: given often-incommensurable differences among individual conceptions of the good, it is misleading to expect that subjects could abstract from the context in which they are situated, and then identify, from behind a veil of ignorance, a shared conception of justice. It is nonetheless true that Habermas' model appeals to a very similar notion of 'consensus', and this has

troubled many who are otherwise sympathetic to the deliberative approach.<sup>65</sup> If the main problem of Rawls' theory is that it postulates an implausible idea of 'consensus' among subjects, Habermas' deliberative model appears to fall prey to exactly the same objection, i.e. that the idea of a strong consensus in pluralistic societies is hardly tenable.

The point to be stressed in reply to this objection is, I think, that *achieving* the consensus is not essential, nor even necessary, to a deliberative conception of democracy. 'Consensus' should be taken as a regulative ideal, an orientation to which real-world arrangements could aspire, though never actually realise.<sup>66</sup> As already pointed out, what is central to a deliberative theory of democracy is an attitude 'towards' consensus, even if often accompanied by the awareness that the latter may not be achieved. Hence, an initial response in defence of deliberative democracy is to specify that consensus represents the regulative ideal, rather than the final goal, in the discourse.<sup>67</sup>

This reply, by itself, still falls short of explaining where the main strength of deliberative democracy is vis à vis Rawlsian and agonistic liberalism. Further criticisms of the deliberative model, in fact, hinge on the fact that, in the end, citizens still have to vote in order to arrive at a decision over the issue.<sup>68</sup> According to social choice theorists,<sup>69</sup> what does the work is still the aggregation of individual preferences, regardless of the mere positive attitude towards 'consensus'. Regardless of how well disposed citizens are towards each other, persistent disagreement will require them to cast a vote to decide how to solve the issue at hand. The deliberative emphasis on consensus might amount, at best, to wishful-thinking, while the crudest, 'realist' view of agonistic liberalism might appear to capture what really goes on in a political community. However, this

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<sup>65</sup> See Benhabib, S., "Communicative Ethics and Contemporary Controversies in Practical Philosophy", in Benhabib and Dallmayr (1990), pp. 330-370; Bohman (1995).

<sup>66</sup> Dryzek (2000), p. 48

<sup>67</sup> "The goal of deliberation is to arrive at consensus: even when this is not possible, and participants resort to voting, their result is a collective judgment rather than the aggregate of private preferences." Young (1995), p. 137.

<sup>68</sup> "No adequate model of democracy can fail to be "aggregative". There is no such thing as a "deliberative model of democracy". Saward, M., (1998), *The Terms of Democracy*, p. 64, quoted in Dryzek, (2000), p. 38.

<sup>69</sup> See, for example, Riker (1988).

criticism does, in my view, miss an important aspect of the way deliberation can influence voters' behaviour, which appears in the following example:

consider a hypothetical vote over three proposals about what to construct on a landmark city-centre site: a prison, a shopping centre, and a park. A third of the voters are environmentalists, and favour a park over a prison over a shopping centre. A third fear crime, and so favour a prison over a shopping centre over a park (...). A third care mainly about the material quality of their own lives, and so favour a shopping centre over a park over a prison. Mere voting could end up by determining that any one of these three options be chosen; it all depends on how the vote or votes are taken. The root of the problem here is that three dimensions of choice – environmental, safety and material convenience- are being forced into one vote. Deliberation could promote awareness of the three dimensions of collective choice at issue. Alternatives can then be sought on each of the dimensions, and the collectively preferred positions on each dimension aggregated into an overall choice.<sup>70</sup>

It is true that, often, the deliberative process will still require casting a vote for a decision to be reached: the discussion will rarely be sufficient, by itself, to solve the disagreement. Nonetheless, the deliberative approach hinges on the idea that one of the goals of the discussion is to test individual preferences, so that they might change by the time the deliberation has taken place. Participants' attitude in the deliberative discourse shifts, then, from the mere expression of one's own idea, towards the offer of a judgment or a verdict regarding the opinions that have been heard in the debate. In casting the vote, the subjects, as deliberators, express *their own* opinions about what policy best meets the various claims that have been advanced.<sup>71</sup> In doing so, as I explained in chapter 3, they assert their autonomy as citizens who can choose, without being coerced, which policy to endorse.

This shift also brings to light the key difference with the Rawlsian and with the agonistic approach. Participants in the deliberative enterprise do not see each other as mere competitors; nor

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<sup>70</sup> Dryzek (2000), p.41

<sup>71</sup> Miller (2003), p. 183.

do they approach the deliberation with the exclusive aim to get the best deal out of it. What should motivate participants in the deliberative process is the belief that individual views might be modified, or even removed, through the discourse. The deliberative approach relies on an agent's capacity to be affected by rational arguments, and therefore to set aside particular interests, in deference to the interest of the group.<sup>72</sup> This appeal to rational argument, as already mentioned, not only can bring about a change in individual preferences, but also, by "inducing reflection on preferences and requiring that they be defended publicly, eliminates preference orderings which cannot be so defended".<sup>73</sup> Such acknowledgment of the other's capacity to be affected by rational argument, to be responsive to reasons others can offer, shows 'respect' for the individual even in the presence of reasonable disagreement.

It should be noted that this position, on the one hand, reaffirms Rawls' idea of reasonableness: a democracy may not allow for views that cannot be reasonably accepted by all. A deliberative view still relies on Scanlon's account of moral motivation discussed above: subjects in the democratic arena seek to justify their views by offering reasons others could not reasonably reject, and they do this out of respect for each other's autonomy. On the other hand, though, the deliberative approach also seeks to reveal part of the weakness of Rawls' idea of reasonableness, having to do with its giving democratic discourse too weak a role. The possibility to *criticise* should be as important as the possibility to *justify* a claim: while Rawls is confident that the basic structure will guarantee society's stability, and that actions of CD are justifiable only to the extent they aim at rectifying a violation of the shared conception of justice, his view seems too restrictive.<sup>74</sup> Often, what social action does is to criticise an existing understanding of justice, and to persuade citizens to view fundamental issues under a different light.<sup>75</sup> Rawls' conception places undue restriction on the possibility of contesting a norm, in light of his strict distinction between the 'public' and the 'non

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<sup>72</sup> Ibid., p.184

<sup>73</sup> Dryzek (2000), p. 43.

<sup>74</sup> See Cohen & Arato (1992), p. 577. See also Singer (1973).

<sup>75</sup> McCarthy (1994), p. 51.

public' use of reason.<sup>76</sup> This puts individuals in the slightly odd situation of treating views publicly as reasonable, while deeming them, privately, as unreasonable or false.<sup>77</sup>

If we are really looking for what we have in common –whether as a prior condition or result- then we are not transforming our point of view. We only come to see ourselves mirrored in the others. If, on the other hand, we assume that communicative interaction means encountering differences of meaning, social position, or need that we do not share and identify with, we can better describe how that interaction transforms our preferences. (...)So there is something to be learned from other perspectives precisely because they are different and not reducible to a common good.<sup>78</sup>

Habermas' emphasis on rational discourse offers a more plausible account of the idea of mutual respect: citizens show *respect* for each other, not by avoiding what *they think* is reasonable but others do not, but by heeding the expression of others' views in reply to their own opinion. The reasonableness of one's view often cannot be tested *in foro interno*: it is only by confronting others, by stating her own view, that an individual can grasp the full extent of her own position. From this standpoint, the deliberative arena constitutes an important place to test and defend one's conception of the good in comparison with those of other participants.

It is then possible to reinterpret the notion of *performative attitude* in light of these considerations. Approaching the other with a performative attitude (as opposed to an objectivating one) means being *willing to persuade* and, at the same time, *to be persuaded*. The focus on *communicative action* opens up a further alternative, beyond the strenuous defence of one's view against the others' (agonistic liberalism), or the avoidance of substantive claims (Rawls). This alternative identifies one of the outcomes of democracy in the achievement of decisions that *all* parties involved may consider reasonable although, as opposed to Rawls, and akin to agonistic liberalism, the decision in itself does not necessarily express an objective standard of rightness or

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<sup>76</sup> Rawls (1993), pp. 213-220.

<sup>77</sup> McCarthy (1994), p. 60.

<sup>78</sup> Young (2005), p. 142. Added emphasis

justice. This allows for the possibility of ‘compromise’, as agonistic liberals think, but also recognizes, in contrast with the latter, the possibility of rational persuasion and preference changing.

Thus, Habermas’ insight into rational discourse also offers a further reply to agonistic liberalism. Conceiving of conflict as an element of political life does not lead necessarily to the conclusion that agreement is impossible. Mouffe denies Habermas’ view of democracy, arguing that the latter brings forward a misleading conception of politics. In her agonistic perspective, the irresolvable tension between *equality* and *freedom* signals that democracy is intrinsically characterised by “indeterminacy and undecidability”:<sup>79</sup> this explains why, for her, democratic discourse inevitably entails *antagonism* among different views.

In light of the above discussion, it seems possible to recast these sceptical assumptions with reference to Habermas’ distinction between *strategic* and *communicative* action. If it is certainly true that Habermas’ account may be overly optimistic regarding the possibility of achieving free and uncoerced consensus, it is also true that agonistic liberals may fall into the other excess, namely too much pessimism that rational agreement can ever be reached. Centring on the ‘agonistic’ aspect of democracy, in fact, ignores the possibility Habermas points out, namely that politics may be based, at least in principle, on *shared goals*. Mouffe falls prey to the same objectivating attitude that characterizes some form of atomistic liberalism akin to Rawls’: by approaching ‘the other’ as an ‘adversary’, Mouffe abandons any concern with the possibility that participants in democratic discussion may share the same goal, namely that of working towards an agreement justifiable from an impartial point of view. The agonistic view of democracy questions the very nature of such an impartial point of view. It acknowledges that individual agents are worthy of respect, stressing the importance of procedures in line with the ‘audi alteram partem’ principle: yet, it also casts scepticism over the possibility of a consensus on substantive issues, and over the role of mutual persuasion. Acknowledging that *we cannot persuade others* is, in this view, the way to show

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<sup>79</sup> Mouffe (1992), p. 13.

“respect”: we approach the deliberative arena hoping to get the best compromise against other incommensurable views. What makes us ‘equal’, under this perspective, is our same claim to ‘win’. To this extent, agonistic liberalism goes no further than Rawls, whose view at least holds a (very) limited agreement to be possible.

Against these two approaches, the idea of respect that emerges from the deliberative model hinges on the value of *cooperation* towards mutual understanding. The *performative attitude* with which deliberators approach each other constitutes a central element of the democratic life. Surely, there will be cases where there is little or no room at all for an agreement (as the persistent disputes over abortion, euthanasia, same-sex marriage, and the like suggest). Nonetheless, there is an important difference between the thought that deliberation can bring the opposing parties closer to each other, as Habermas suggests, and the idea of deliberation as a *contest* where participants aim to minimise the opponents’ attack. In giving up the faith in mutual understanding, agonistic liberals also lose faith in the value of a performative attitude. They thus focus only on the strategic aspect of communication, and in so doing commit, like Rawls, the mistake of ignoring the social dimension of individual autonomy. Agonistic liberals interpret the moral agent as a subject who can manipulate the world in which she lives: yet, they fail to recognise that that subject is also a socially constituted individual, able to identify goals shared in common with fellow agents. Rather than trying to win over her adversaries in a competition, then, an agent needs to see democratic life as the place where cooperation is still possible.

The deliberative ideal unveils a richer account of political life, one that, in the words of David Miller, encourages people “not merely to *express* their political opinions” (through various voting procedures), “but to *form* those opinions through debate in public settings”.<sup>80</sup> This richer account of political life is one that calls for citizens’ possession of certain traits of character, certain ‘civic virtues’, which I indicated in chapter 1 as necessary for a stable and flourishing community. In the

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<sup>80</sup> Miller (2003), p. 196



next section, I sum up the implications of what said so far to show how it can support my argument in defence of some forms of illegal behaviour within a democracy.

### **10. Three Accounts of Reasonable Behaviour**

We can now go back to the issue from which this discussion originated, that is, the problem CD poses within a democratic society. The original question of this chapter referred to how democratic citizens can deal with disagreement in a reasonable way, that is, a way that shows respect for each other as autonomous agents. Under this perspective, my aim has been to highlight what constitutes a ‘civil’ or ‘uncivil’ behaviour: we now need to see how this can feed into an account of civil ‘disobedience’.

I began the discussion in this chapter by noticing that, according to Rawls’ liberal model, disagreement may (and should) be *bypassed* by focusing on the basic principles of justice upon which there can be an overlapping consensus. From this perspective, a civil behaviour is one that ‘avoids’ making claims about comprehensive doctrines, and focuses on what citizens can all be reasonably expected to accept. Thus, the appeal to ‘public reason’ rules out of the deliberative arena claims about different conceptions of the good. As we noticed above, within the Rawlsian framework it might be ‘uncivil’ to insist on defending one’s own comprehensive view against those of others: to show respect for one’s fellow citizens, one has to try and avoid claims concerning different conceptions of the good life, and to focus on what all can reasonably accept.

The agonistic conception of politics, on the other hand, denies the plausibility of an overlapping consensus among citizens in pluralist societies: from this, it concludes that disagreement will always persist. Although there are differences that cannot be overcome, citizens ought to guarantee each other sufficient space for expressing their views, aiming for the best compromise. The point of taking part in political life is, then, to accept that others have as legitimate a claim as we do to defend their positions, and that disagreement will not be solved by an

appeal to neutrality: it would constitute a lack of respect for our fellow citizens if we were to avoid stating our own view. The goal of politics is to find temporary settlements among competing and incommensurable conceptions of the good. The values of respect and ‘civility’ constrain the way opinions are expressed and defended in the political arena, rather than their specific content. According to this view, it would then be ‘uncivil’ to ignore the position expressed by the ‘adversary’, or not to give it sufficient space in the discussion.

The deliberative approach, modelled on the theory of Habermas, brings about a third notion of ‘civil behaviour’ in cases of conflicts among different substantive claims. It preserves Rawls’ appeal to public reason, yet it interprets it in a dynamic way that relies on human interaction.<sup>81</sup> As with agonistic liberalism, the emphasis still centres on the importance of acknowledging the other’s substantive claim. However, the other is not seen as an opponent, or ‘adversary’, as in Mouffe’s account: within a deliberative democracy, citizens ought to be willing to modify, or even abandon, their own position when faced with a better argument. The deliberative enterprise emphasises ‘cooperation’ over ‘antagonism’: the civil way to deal with the disagreement hinges on the appeal to the value of rational *persuasion*. Citizens of a deliberative democracy are moved by the desire to *persuade* others, in the face of disagreement, of the validity of their own view, but also to recognise that the other’s view might eventually prevail if better suited to pass the discursive test. What would be ‘uncivil’, in this context, would then be to approach the others in a hostile and uncompromising way, with that objectifying attitude that, as we saw above, does not aim for an endorsement of our view by the others. The kind of openness that is at the core of ‘communicative action’ can, on the other hand, guarantee that citizens treat each other as “free and equal”. In cases of reasonable disagreement, most importantly, it is this willingness to persuade, and to be persuaded, which expresses the appropriate mutual ‘respect’ among autonomous agents.

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<sup>81</sup> Habermas (1995).

It is now important to specify how CD can fit into this deliberative account. One main issue refers to the fact that the appeal to rational persuasion and cooperation, that grounds this account, may condemn the use of illegal means of protest, particularly when these may cause serious inconvenience to fellow citizens. In order to show what makes the act of disobedience ‘civil’, we need to see how the latter can be reconciled with the principles of deliberative democracy, to show how it can contribute to, rather than hinder, the process of deliberation. Some of the main issues regarding the relation of CD with the democratic regime have been already covered in chapter 2 and, particularly, in chapter 3, where I have offered an account justifying the employment of some degree of violence in CD. Now I want to focus in more detail on how illegal acts of protest can be included, as legitimate forms of *communication*, within the deliberative process.

As Iris Marion Young has argued,<sup>82</sup> traditional accounts of deliberative democracy tend to portray the democratic citizen as quiet, reflective, capable of expressing himself in an orderly fashion arguing from premises to conclusion. This has the unpleasant consequence of penalising forms of communication that rely on different codes: for example, it may end up privileging a male speaking style over a female one, the latter being more exploratory or conciliatory, the former being more assertive and confrontational.<sup>83</sup> Similarly, people with a stronger educational background, which enables them to express their view in a clearer and more effective way, may enjoy the advantage of being more *persuasive* than those who come from less socially privileged contexts. In addition to this, the idea of the rational deliberator seems to commend calm, self-control and absence of emotions: from this standpoint, the feeding of one’s passions into the deliberative discourse, the use of more ‘theatrical’ means to give emphasis to one’s view, the causing of minor

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<sup>82</sup> Young (2000), chapter 2.

<sup>83</sup> Ibid.

disruptions to other participants are considered, in a word, ‘uncivil’. Political activism, under this perspective, seems unsuited to the rules of deliberative democracy.<sup>84</sup>

Two comments should be made concerning this point. First, I think it is safe to say that this criticism can only succeed if we adopt a very narrow notion of “deliberative discourse”. If what really matters is the attitude with which we approach the other (i.e. a ‘performative’ rather than ‘objectivating’ attitude, to use Habermas’ words), there appears to be no reason why we should rule out less ‘orthodox’ forms of communication from the deliberative arena. Hence, more colourful, theatrical, and to some degree disruptive forms of activism may well be compatible with the motivation to defend one’s own view while preserving the deliberative values of respect and persuasion. This leads to my second comment. It is certainly true that deliberation moved by the shared goal of reaching an understanding ought to avoid the use of coercive means.<sup>85</sup> However, we cannot rely entirely on an ideal theory of deliberation that abstracts from the contingencies of the particular context in which the discussion takes place. It seems plausible to argue for a direct relation between the justice of the political context in which the deliberation occurs, and the way to address the others in the discussion:<sup>86</sup> the further the society gets from the ideal of justice, the less stringent the appeal to ‘mere persuasion’ becomes. So, while in the deliberative theory of democracy the emphasis is on respect and persuasion, as opposed to oppression and coercion, surely it is too restrictive to deny categorically that more direct and confrontational approaches to the debate may sometimes be allowed. At the core of deliberative democracy is the willingness to cooperate with fellow citizens in the interest of reaching a mutual understanding: if this is the case, then the range of actions compatible with the performative attitude should include acts seeking to establish a fair and inclusive deliberation. It is exactly under this perspective that we can see civil disobedience as displaying a commitment to deliberative democracy: certainly, the performative attitude with which

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<sup>84</sup> For an account that also tries to highlight difference between this ‘traditional’ form of deliberative democracy, and more creative forms of activism, see Young (2001).

<sup>85</sup> Again, see my argument in chapter 3, above.

<sup>86</sup> See the discussion in chapter 2, about the role of civil disobedience in ‘nearly just societies’.

citizens approach the deliberative arena implies a degree of *proportionality*, whereby we cannot impose our views over those of others who are willing to cooperate with us in the discursive enterprise. Nonetheless,

[w]hen others are simply unwilling to engage in the give-and-take of persuasive communication, the deliberative democrat can, and should, use an array of non-persuasive means to change their attitudes. However, the choice of means should be scaled according to the extent to which political adversaries and opponents reject the procedural norms of deliberation and the substantive values that ground it.<sup>87</sup>

Often a commitment to deliberative democracy may require using more direct forms of communication. A citizen who is motivated by such commitment may therefore be justified in using CD, which implies the open violation of a law, as a way to participate in the debate: sometimes, this may be even *required* by the motivation to approach the others with a performative attitude in search for mutual understanding. That is to say, there is a point where it might be disrespectful of fellow citizens not to do CD. And this is where the civic virtues of the disobeying agent can be displayed, in relation to the Aristotelian idea of the ‘appropriate mean’ I discussed in chapter 1. This is particularly true of situations where the deliberative enterprise might be at risk of failing due to the circumstances of the particular context.<sup>88</sup> The appeal to illegal forms of protest should therefore be seen as ‘civil’, insofar as it relies on an acceptance of the deliberative values of persuasion and respect. Actions of CD that aim to criticise current notions of justice, challenging accepted views in favour of others that can be defended according to reasons that all can share, are without doubts compatible with a deliberative democracy. In fact, I think it is one of the main strengths of the deliberative approach that, by emphasising the relation between persuasion and mutual respect, it

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<sup>87</sup> Fung (2005), p. 403.

<sup>88</sup> Smith (2004).

can show why some acts of CD should be praised, as based on the desire to show respect for fellow citizens as autonomous agents.

Above all, this discussion shows that civil disobedients, when aiming for persuasion, behave as reasonable citizens, if their appeal to CD is based on a desire to offer reasons that others can reasonably accept. Furthermore, by remaining open to the arguments expressed by other citizens, they eschew an objectivating attitude, and see the others as subjects with an equal claim to persuade and to be persuaded. This behaviour, under some circumstances, displays a reasonable disposition in the civil disobedients and thus, especially in cases of reasonable disagreement, reveals the possession of civic virtues in the citizens who resort to CD. Following from the claim I made, in the previous chapter, that some forms of violence may be compatible with a commitment to the value of individual autonomy, I have tried to stress that, in cases of reasonable disagreement, CD might be the behaviour that abides by the principles of deliberative democracy.

In the next two chapters, I will move the focus of my analysis on the relationship between CD and the law. I will consider the vexed, though still central, issue of whether CD requires the acceptance of legal consequences for the law-breaking behaviour. In the last chapter, I will focus on the criminal trial as the deliberative arena where the exchange between the civil disobedients and the rest of community, based on the goal of achieving mutual understanding, can continue and reach its peak.

## CHAPTER 5

### The Willingness to Accept the Legal Consequences

#### 1. Overview

The next two chapters of this thesis centre on the relation between CD and the rule of law. The focus of my discussion will be the meaning of accepting punishment for an act of CD. Thus, I will be mainly concerned with whether an act of CD should include the agent's willing acceptance of legal punishment for the breach of the law.

In analysing this issue, I will consider two different ways of understanding the willingness to accept "the legal consequences". In this chapter, I will argue that a civil disobedient has a *pro tanto* requirement not to escape accountability for her law-breaking action: by resorting to an illegal act of protest, a civil disobedient has to be willing to face the risk of being punished. It is therefore part of an act of CD that the agents do not try to slip away from the arrest, that they be willing to cooperate with police's instructions, that they accept to appear in court if summoned, etc. In the next chapter, I will further claim that, notwithstanding this requirement, civil disobedients should aim at persuading their community that they do not deserve punishment, and should plead *not guilty* when appearing at the trial. Thus, my discussion, in this chapter, about the willingness to "accept" punishment, should be intended as referring to a broader willingness to "risk" being punished.<sup>1</sup>

As already mentioned in chapter 2, the willing acceptance of the legal consequences is one of the necessary conditions in Rawls' account of CD: a civil disobedient should not try to escape the legal punishment. This is meant to allow for a distinction between CD and plain law-breaking, the latter usually characterised by law-defiance and the attempt to avoid the consequences of the breach of law. An *unwillingness* to accept punishment, on the other hand, may lead the community to question the sincerity of the civil disobedients.<sup>2</sup> Thus, for example, when activists break into a

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<sup>1</sup> See below, chapter 6, for my distinction between "narrow" and "broad" acceptance of punishment.

<sup>2</sup> "When (...) we observe the heroics of defiance being followed by the dialectics of legal evasion, we question the sincerity of the action." Hook, S., "Social Protest and Civil Obedience", in Murphy (1971), p. 56.

coal-fired power station to protest against their Government's environmental policies, the meaning and value of their act may change according to whether, after the illegal action, they escape and hide their identity, or wait for the police, accepting being arrested and then prosecuted. The aim of this chapter is to clarify why, in my view, the latter behaviour is central to an act of 'civil' disobedience: it is a *pro tanto* requirement of CD that the agents be willing to accept punishment for the law-breaking behaviour.

What is so special about the acceptance of punishment for CD? In the previous chapters, I described how CD relies on the respect for individual autonomy and on the desire to contribute to, rather than oppose, the deliberative process. However, that motivation was explained in terms of the communicative nature of CD, the importance of persuasive over coercive goals, and the avoidance of coercive violence. It is, therefore, still unclear why accepting punishment should constitute a further necessary condition for CD. Would the action lose its 'civil' value if the disobedients tried to escape legal sanctions by going into hiding after the illegal protest? My answer will be that, most of the time, it would. I begin by considering some of the traditional arguments to the conclusion that the willingness to accept punishment constitutes a *necessary* condition for an illegal act to be an instance of CD: these were already mentioned in chapter 2, and here I analyse them in more depth, dividing them into two groups, *instrumental* and *non-instrumental* ones.<sup>3</sup> Arguments of the first kind emphasize the efficacy of the act of disobedience: according to these views, the willingness to accept punishment is important for the support it gives to the protesters' case and to the achievement of social change. As I will show, one problem with these views is that they do not make any specific claim about the importance of respecting the law as such. *Non-instrumental* arguments, on the other hand, shift the emphasis *from* the success of the act of disobedience *to* the display of 'good traits of character', such as law-abidance and willingness to cooperate, in the

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<sup>3</sup> The two groups are not mutually exclusive. Arguments could be offered, in this sense, relying both on instrumental and non-instrumental grounds.



citizens who resort to CD. Non-instrumental arguments will play the main role in my account, as I will try to offer a justification of the acceptance of punishment for CD based on the same premises.

I will contend that the main arguments offered to defend submission to punishment in CD fall short of establishing the latter as *necessary* for an act of CD, for they remain contingent on the particular circumstances in which the act is performed. Nevertheless, I will defend a further non-instrumental argument in defence of the acceptance of punishment for CD, based on the fair-play theory of political obligation. I will argue that citizens have a moral obligation to obey the law, but that this obligation is not owed to the law as such, or to the state's officials: rather, the obligation to obey derives from an obligation to respect one's own fellow citizens as autonomous agents. It is an obligation citizens incur partly in a non-voluntary way, in virtue of their belonging to a community. Finally, I will return to the issue of punishment for CD, and argue that willingness to accept the legal sanction can be explained as *pro tanto* required by a duty of fairness.

## **2. Instrumental Arguments**

The paradigm cases of Gandhi and Martin Luther King represent two strong endorsements of the requirement of the necessity of accepting punishment for an act of CD. Gandhi, for one, clearly stated that going to jail sometimes represents the only way to persuade the community about the injustice at which CD takes aim.<sup>4</sup> A similar idea appears in the thought of King who, in his *Letter from Birmingham City Jail*, stated his intention to go to jail “to arouse the conscience of the community over its injustice”.<sup>5</sup> Both Gandhi's and King's choices, from this viewpoint, may be explained instrumentally: they accepted punishment in order to give more resonance to their cases, to increase public exposure and draw attention over their issue. This reveals a first, instrumental reason for accepting punishment after the breach of the law in CD: the protesters should undergo punishment in order to show their willingness to attain social change. The fact that many civil

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<sup>4</sup> “[E]xperience 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), p. 191.

<sup>5</sup> Bedau (1991), p.91.

disobedients aim to appear in court, in order to be able to speak up in front of the authorities of the state, supports this instrumental account.<sup>6</sup>

Along the same lines, accepting punishment would also be important for civil disobedients to avoid alienating the support of the law-abiding part of the population. Given that many actions of CD would infringe on other persons' liberties (e.g., by disrupting public transports, damaging private property, etc.), submitting to legal punishment for such actions could help reduce the resentment, and insecurity, that other people may feel in seeing their interests jeopardised. Acceptance of punishment would be one way for the civil disobedients to demonstrate the depth of their conviction, and to deny charges of hypocrisy or self-interest.

Andrew Sabl draws an analogy between CD and a gaming tournament:<sup>7</sup> both practices are open to everyone, so there is the need for some form of deterrence against “frivolous competitors” with little chance of competing well. One way to achieve this is by setting a high “entry fee”; in the case of the gaming tournament, the high cost of taking part in it would discourage those who are not well trained for competition; in the case of CD, the necessity to accept punishment would discourage those who are not motivated by sincere and serious beliefs. The requirement of being willing to accept punishment would thus play a role also as a deterrent against *unconscientious* CD.<sup>8</sup> Furthermore, Sabl continues, undergoing legal punishment would play another important instrumental role: it would put more pressure on the state, by shifting the *moral burden* of showing the same commitment to justice onto the majority in power.<sup>9</sup> Through the acceptance of legal punishment, the civil disobedients show the conscientiousness of their behaviour, and in so doing

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<sup>6</sup> “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), p. 379

<sup>7</sup> Sabl (2001), p. 323. The same suggestion is made in Greenawalt (1987), p.240

<sup>8</sup> See Wozzley (1976), p.331: “[N]ot having the right to complain about being punished for a breach, even a principled breach, of the law seems essential to being a civil disobedient. (...) [T]hat he was punished at all, having risked that he would be, or having, like Socrates, made sure that he would be, is something about which he has no business to complain; and, if he thinks he has, I should be inclined to reply that that shows that he does not know what being a civil disobedient is.

<sup>9</sup> Sabl, *Ibid.*

they pass onto the state the moral burden to show the same concern for justice, by heeding the disobedients' message and acting accordingly.<sup>10</sup>

The idea underlying these views is that submission to punishment after CD is valuable as being conducive to good results i.e. the success of the act of protest. Accepting the punishment may help the disobedients' action, accord them public support, promote their case, promulgate the ideals they are advocating, put pressure on the state, etc. Nevertheless, we should not overlook the fact that arguments of this kind fail to establish the willingness to accept punishment as a strictly necessary condition for CD, or that the absence of this disposition would necessarily diminish the moral value of the act of disobedience. In fact, it seems that, under different circumstances, *rejecting* punishment would be instrumentally valuable as well.

First, there might be cases where the punishment might be too harsh, with the state attempting to deter further acts of disobedience. For example, the decision of a court to bar the defendant from taking part in marches or other forms of social protest in the future could hardly be accepted by a civil disobedient.<sup>11</sup> Also, there might be cases where the success of the act of disobedience would rely on the possibility to carry out more illegal acts consecutively: here, to escape the arrest would be necessary in order to organise a further protest in a short time, hence it would be instrumentally better not to submit to punishment. In such cases, it seems that there can be instrumental reasons also *against* acceptance of punishment for CD: this casts doubts on the claim that accepting punishment would be a necessary *instrumental* condition for an act of CD.

### **3. Non Instrumental Arguments**

If there is a necessary link between CD and submission to punishment, it might be better explained on the basis of *non-instrumental* considerations. Here I want to focus on three main

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<sup>10</sup> Sabl (2001), p. 326. This latter case is more peculiarly one in which instrumental and non-instrumental considerations tend to overlap.

<sup>11</sup> See Brownlee (2007), fn. 17

views: a) that accepting punishment shows respect for the law, b) that it shows willingness to cooperate with State's officials, c) that it fulfils an obligation towards fellow citizens.

One way to interpret the necessity to accept punishment for CD, from a perspective that does not rest on instrumental considerations, is to highlight its role in displaying some form of deference to the law and its authority. In the words of King:

I submit that an individual who breaks a law that 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.<sup>12</sup>

According to this view, the importance of submitting to punishment lies in the fact that it shows protesters' respect for the institution of law: it acknowledges the fact that a legal directive was defied, and that undergoing the sanction prescribed by the legislator is a way to show 'fidelity to the law'.<sup>13</sup> Their behaviour shows deference to the law in itself: through the acceptance of punishment, the civil disobedients highlight the exceptional character of their illegal act, and show that they do not aim to encourage lawlessness by their conduct. Being willing to accept punishment, according to this view, represents the distinctive feature that separates CD from more uncompromising forms of protest. Hence, from this perspective, the willingness to accept punishment represents a *necessary* disposition for citizens resorting to CD.

We may wonder whether this argument may fall prey to a striking inconsistency. It relies, in fact, on the idea that a refusal to comply with the law may nonetheless express respect for law's authority. This point has been captured by Howard Zinn who, focusing on the case of Socrates in the *Crito*, asks "[w]hy is it all right to disobey the law in the first instance, but then, when you are sentenced to prison, start obeying it?"<sup>14</sup>

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<sup>12</sup> King, in Bedau (1991), p.91. See also my discussion, in chapter 2, about accepting the validity of 'power-conferring rules' in the legal system.

<sup>13</sup> See, on this point, Feinberg (1994), chapter 6.

<sup>14</sup> Zinn (1991), p 911. Herbert Storing shows a similar puzzlement about this point, claiming that "an open refusal to obey an unjust law [with the willingness to accept punishment for that] shows the highest respect for law in the same

It seems problematic, in fact, to reconcile Socrates' readiness to disobey the authority of the law by preaching about what he saw as the truth, with his later unwillingness to go against the laws when he was sentenced to death. This criticism seems legitimate, for it is not clear how the acceptance of punishment can bring an act of disobedience to the law close to an act of 'respect' for the law.<sup>15</sup> As we will see in the next chapter in more detail, this idea of 'disobeying but accepting punishment' may rest on an implausible idea of 'respect for an authority'. For this reason, the idea that being willing to undergo punishment is necessary for CD in order to show respect for the law (point (a) above) appears to be open to serious criticisms, and we should look for a better (if any) alternative.

A more plausible argument might be based on the notion of *cooperativeness* in CD. In Rawls' definition, the distinctive character of CD is that it represents a form of address. CD is the attempt of a group of citizens (usually in the minority) to *communicate* to the rest of the society their concern about a particular law or policy. As I explained in chapter 4, this is grounded on the *performative attitude* with which citizens in a deliberative democracy approach each other, aiming for rational persuasion. The civil disobedients do not simply refuse to comply with a law: they seek to establish a dialogue with fellow citizens aiming for mutual understanding. They aim for *cooperation* with the state, thinking it is (still) possible for them and state's officials to work together in the common interest:

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 (...).<sup>16</sup>

Against this background, accepting punishment for CD highlights the disobedients' willingness to cooperate with the authority in place and, once again, their desire to preserve the

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way that an open insult to a degraded woman, with a willingness to be slapped for the insult, shows the highest respect for womanhood". See Storing, H.J., "The case against Civil Disobedience", in Bedau (1991), p. 93

<sup>15</sup> Van Den Haag (1972), p. 33.

<sup>16</sup> Sabl (2001), p.319.

existing political regime. It is an acknowledgment of the state's power to sanction a breach of the law. By submitting to punishment, the protesters demonstrate they do not question the legitimacy of the state. Their action is, to this extent, forward-looking, for it seeks to open a communicative channel with the majority in power, concerning the acceptability of a particular policy.<sup>17</sup>

Contemporary discussions on citizenship theory put great emphasis on the importance of fostering traits of sociability and solidarity among fellow citizens.<sup>18</sup> Accepting the punishment for an act of CD, as a sign of the disobedients' willingness to cooperate, becomes valuable for its "connection with the idea that sociability is a helpful and healthy trait, and that it is a matter of putting up with others and getting along with them."<sup>19</sup> From this perspective, accepting punishment after the illegal act becomes necessary for CD for it is the only way to show that, in spite of the act of defiance, the protesters are committed to the value of social cooperation.

Yet, the question remains as to whether accepting punishment is the *only* way to show this willingness to cooperate. It seems quite possible to say that the latter may be displayed (especially under conditions of serious injustice) through alternative forms of action: for example, the disobedients might openly violate the law and, while avoiding arrest, declare themselves to be ready to meet a Member of Parliament in a public discussion. Or, they might make a public apology for what they have done, defending the symbolic value of the law-breaking act. It is not clear to what extent these actions would fail to display a degree of willingness to 'cooperate' with the authorities in place, nor why they could not be taken as 'civil' disobedience. In this case, as in the previous ones, we seem to have arrived, at best, at an argument that is contingent upon the circumstances in which the act of CD is performed.

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<sup>17</sup> For the idea of CD as a 'forward looking' action, see Sabl (2001), and Brownlee (2007).

<sup>18</sup> See, for example, Margalit (1996), who distinguishes between 'decent' societies, i.e. those whose institutions do not humiliate their subjects, and 'civilized' societies, those whose citizens do not humiliate each other.

<sup>19</sup> Edmundson (2007), p.8.

#### 4. Accepting Punishment as a Duty Towards Fellow Citizens

The emphasis on ‘cooperation’, however the latter is achieved, suggests that citizens resorting to CD may have an obligation towards the authorities in power (namely, an ‘obligation to cooperate’). According to the argument just mentioned, accepting the legal sanction would be the way (or at least *one* way) to fulfil such obligation. The underlying idea is that acceptance of punishment may express the fulfilment of an obligation towards the authority of the state. Now, as I have suggested, this way to establish the necessary connection between CD and the willingness to accept punishment fails: and I think it does so also because it relies on the wrong account of citizens’ political obligation. As it will appear clearer in later sections of this chapter, according to my view citizens’ primary obligation is towards each other: the obligation towards the law is subordinate to the obligation each individual has to respect others as autonomous agents. This means that if we ought to respect the law, it is because we ought to respect other people.<sup>20</sup> Thus, we should look at the role of accepting punishment from the same standpoint, and argue that if it constitutes a necessary condition for CD, that should be explained by reference to what citizens owe to each other, not to what they owe to state’s officials.

Once we adopt this different perspective, we may interpret the necessity of accepting punishment after the breach of law in CD as something owed to other citizens. For example, in many cases, actions of CD impose some serious inconvenience also on those citizens who are not taking part in the protest. A sit-in at a train station causes troubles for thousands of commuters: for many of them, delays often will translate into economic losses. Other economic losses might derive from damages against someone’s property. The consequences of an illegal protest that obstructs the journey of ambulances to a hospital might even be dramatic. In these situations, the decision to carry out an act of CD might cause serious inconveniences to people who are not taking part in the

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<sup>20</sup> See Higgins (2004), chapter 2.

protest.<sup>21</sup> Then, by accepting to be punished for the act of CD, the protesters may pay damages (to some extent) for the inconveniences caused to fellow citizens.<sup>22</sup> It might be possible to argue for a direct correlation between the degree of violence employed in the act of protest, and the appropriateness of accepting sanctions for the breach of law. As argued in chapter 3, some degree of violence may be allowed in CD, and this may ground a justification for accepting the punishment for the illegal action. Citizens who choose to act illegally with the aim to *communicate* their concern about a particular law or policy, and who do so through means that may cause serious inconveniences to other citizens, should be willing to undergo punishment as a way to apologize for the losses suffered by the latter.<sup>23</sup> Therefore, if there is any obligation to accept the punishment for an act of CD, this might be conceived as owed not to the authority in power, but to the fellow citizens whose interests might be harmed by the act of protest.

However, this view, like the previous ones, does not offer an adequate solution to the problem of the necessity of accepting punishment for CD. First, it would not apply to cases of CD that do not involve violence (e.g. wearing the headscarf to challenge a public ban on religious garments). It also does not say anything special about the necessity of accepting punishment itself: in fact, everyday experience of CD shows that, most of the time, activists do *symbolically* ‘pay damages’ for the choice to embark on CD, given that often the police’s response to their actions tends to be heavy-handed, and can represent an extra-cost the disobedients will have to pay for their choice to embark on CD.<sup>24</sup> Justifying the acceptance of punishment on grounds of ‘compensation’ appears then contingent on the circumstances, and fails to highlight what its peculiar contribution

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<sup>21</sup> But who, nonetheless, are partly the addressee of the message civil disobedients want to communicate.

<sup>22</sup> This view presents analogies with the theory of punishment discussed by Murphy, J. G., “Marxism and Retribution”, in Duff & Garland (1994), pp. 44-70.

<sup>23</sup> That is to say, punishment would be required for reasons of retributive justice, after the harm caused to fellow citizens through the act of protest.

<sup>24</sup> A price that often is disproportionately higher than the damage caused, as the infamous events at the Genoa G8 in 2001 remind us. See also, in 1997, the protest against the logging of ancient redwood trees in the Headwaters Forest, California, when protesters linked themselves together using self-releasing lock-down devices known as “black bears.” Although the protesters were not physically daunting and posed no immediate safety threat, the officers used pepper spray to arrest them. See Denson (1998).



should be to the defence of CD. It is still not clear what makes acceptance of punishment a necessary element for an act of CD.

We need a different account of why acceptance of punishment for CD can be connected to an obligation owed to fellow citizens. In the next section, I will suggest that the correct way to conceive of the willingness to accept punishment as a necessary element of an act of CD is to see the former as discharging a special form of the duty of fair play. This preserves the idea of an obligation owed to fellow citizens, and not to the law as such, nor to the state's officials directly: my aim is to explain why an individual who acts illegally to communicate a serious concern about a law or policy, and seeks to escape the legal consequences of that action, may then compromise the *civil* value of the act of disobedience.

## **5. The Moral Obligation to Obey the Law**

Throughout this work, I have been assuming that citizens have a moral obligation to obey the law. This, in my view, is the reason why we need an argument for the *justification* of CD. In fact, where there is no obligation to obey the law, there seems to be no special problem relative to the practice of CD. Raising the question “under which condition can CD be justified?” amounts to placing the burden of proof on the law-breakers to give good reasons in support of their behaviour.<sup>25</sup> In fact, it is my opinion that what makes CD a puzzling element of democratic life is the risk of its clashing with a moral obligation to obey the law: absent this obligation, the practice of CD loses any special value or status in civic life, to become merely a matter of prudential or strategic reasoning.<sup>26</sup> The question of the moral justification of CD is, therefore, a question about citizens' moral obligation vis à vis the law.

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<sup>25</sup> See Murphy (1971), p. 5.

<sup>26</sup> That is to say, if there is no obligation to obey the law, then the choice of doing CD can be criticised only when it endangers others' lives, or when it is less likely than other forms of protest to bring about social change, under the specific circumstances.

It is this kind of considerations that, in my opinion, underscores the acceptance of punishment as a necessary element of an act of CD. Denying that a civil disobedient may be required to submit to punishment after the act of disobedience, while still considering her action *morally* permissible,<sup>27</sup> may imply the denial of a requirement to obey the law.<sup>28</sup> Civil disobedients may accept punishment for prudential reasons, as noted above, but the moral value of their action would not be affected by their unwillingness to pay the legal consequences of their law-breaking behaviour. Therefore, I will argue that it is the presence of a moral obligation to obey the law that grounds the *moral* relevance of accepting punishment for an act of CD.

As the current debate in political philosophy demonstrates, however, the question whether there is even a *pro tanto* moral obligation to obey the law is still the object of fierce controversies among scholars.<sup>29</sup> In what follows, I will focus on the theory of fair-play: in spite of some serious objections it faces, I think this theory offers an account of the obligation to obey the law that captures important aspect of citizens' life within their communities. In relation to the central issue of this chapter, my goal will be to show how the fair-play theory can also provide an argument for the necessity of accepting punishment in CD.

## 6. The Principle of Fairness

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.<sup>30</sup>

The idea behind the principle of fairness is that when the cooperation between members of a group X produces some benefit, to the advantage not only of X's members, but also of other

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<sup>27</sup> This means that we may consider it *morally* OK for the disobedients to seek to escape punishment, but not that they should also not be held *legally* responsible for that. Furthermore, their action might be morally condemnable for other reasons (e.g. excessive violence).

<sup>28</sup> See, for example, Raz (1979), chapter 10.

<sup>29</sup> Simmons (1979), Horton (1992).

<sup>30</sup> Hart (1955) p. 185.

individuals outside of X, then group X has a right to ask those others to cooperate to support the joint venture. Correspondingly, the latter, in virtue of the benefit they have enjoyed, acquire an obligation to cooperate with the former. Thus, imagine that A, B and C decide to work together to dig a well: once the well is realised, they have access to clean drinking water. If D starts using the well too, thus enjoying the benefit of clean drinking water, A, B and C have a right to demand that D do something in the interest of the cooperative scheme (i.e. partaking in maintenance works, contributing financially, etc.). Given that it would be unfair for D to benefit from the work of others without contributing, by using the well D acquires an obligation to support the cooperative enterprise of A, B and C, from which D has benefited.<sup>31</sup> The principle of fairness can therefore explain cases where an individual incurs an obligation to contribute to the activities of a cooperative scheme.

Such a case is that of the citizen within the political community. In fact, citizens receive benefits through the cooperation of others: clean water, health service, education, housing, street police, etc., are all goods that a society provides to the individuals who live in it. More importantly, society can provide such benefits only because other citizens are willing to restrain their freedom according to some rules (i.e. the rule of law): since citizens are willing to contribute to the cooperative enterprise (paying taxes, complying with just legal enactments), the provision of these goods is possible. The principle of fairness highlights the necessity that benefits *and burdens* be distributed fairly among all the subjects: given that everyone is to be benefited by the cooperation of a sufficiently large group of citizens who comply with the law, then everyone is also to carry some of the burdens necessary for the provision of those benefits.

Thus, the fair-play theory of political obligation holds that everyone who enjoys the benefits of a cooperative scheme must contribute to the production of these benefits, even in cases when her contribution would not be necessary for their provision. This approach to the problem of political

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<sup>31</sup> Klosko (1992), p. 36.

obligation ties obedience to the law to an obligation citizens *owe to their fellows* within the political community. The latter have a right to the former's obedience because they, through their obedience, enable the former to enjoy the "benefits of the political order."<sup>32</sup> It is very important to note, however, that the receipt of benefits is not *sufficient* for an obligation of fairness to arise: it is also *necessary* that the cooperative scheme be a fair one. If I were to benefit from a scheme that exploits workers under conditions of slavery, I would not have a moral obligation to contribute to that 'cooperative' enterprise.<sup>33</sup>

For this account to be defended, we need first to clarify whether the political community can be conceived as a 'cooperative enterprise'. Klosko points out five necessary elements for the principle of fairness to apply. These are:

- 1) the existence of a joint venture or cooperative scheme
- 2) that cooperation in accordance with rules produces benefits for those who cooperate
- 3) that cooperation is burdensome for those who cooperate
- 4) that the cooperation of some (generally most) but not all individuals is required to produce the benefits, and so there is a distinction between those who do and those who do not cooperate
- 5) that those who do not cooperate also receive benefits from the cooperative scheme.<sup>34</sup>

In chapter 3, I defended a strong notion of *autonomy* as the exercise of the capacity to make choices. I highlighted how the value of autonomy lies in the possibility to make morally good choices, and the related importance, for an individual's well-being, of possessing a sufficiently broad range of 'morally good options' to choose from. I then pointed out that the connection between 'autonomy' and 'availability of (valuable) options from which to choose' reveals a

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<sup>32</sup> Dagger (1997), p.68.

<sup>33</sup> Horton (1992), p.92; Dagger, *ibid.*, pp. 68-69.

<sup>34</sup> Klosko (1992), p.34.

fundamental relation between the individual and his/her community. It is only within a society that one can achieve autonomy as a *condition*.

This standpoint on political life sheds light on the fact that life in a community does provide benefits to the individual (point (2) above). These benefits can be enjoyed only through others' voluntary submission to the rule of law.

This is not to say that these "others" do what they do *in order to* enable the autonomous person to exercise his or her autonomy: in a great many cases, "the others" will not even know the person or persons whom they help to act autonomously. Yet this is just what these "others" do when they pass, enforce or observe traffic laws (...). When "others" observe traffic laws or wait their turns in line, they expand our opportunities, even if this is not what they specifically intend to do. By expanding our opportunities in these and numerous other ways, they enhance our capacities to choose –that is, they make it possible for us to do, and therefore to *choose* to do, far more than we could without their help.<sup>35</sup>

To the extent that "others" have to constrain their actions in accordance to these rules, then point (3) is fulfilled as well. Given the social nature of autonomy, it is also the case that (1) holds, i.e. that a liberal community can persist in its functions only through the cooperation of its members. Given the size of nation states, it is also true that an individual's failure to cooperate would not jeopardise the provision of the benefit: if I was to secretly evade tax payments, I would continue to enjoy the autonomy-promoting function the state exercises (point (4) and (5) above).

## **7. The Wrongness of Law-Breaking**

We are now in a better position to account for the wrongness of illegal behaviour from the perspective of the theory of fair-play. As I suggested above, violating the law is not wrong *per se*: the reason why law-breaking is wrong is that it wrongs *other persons*. That is to say, the obligation

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<sup>35</sup> Dagger (1997), p.67.

to obey the law is an obligation that we owe not to the law as such, but to other individuals as autonomous persons. The wrongness of disobeying the law lies in the disregard for other people.<sup>36</sup>

Autonomy is a social good that can be achieved only through *cooperation* with others: thus, the political community represents the context to achieve a fully autonomous life. As we saw in chapter 3 and 4, there is a duty to respect others as autonomous agents, which calls for *reciprocity*: by mutually submitting to certain restrictions, agents show their disposition to treat each other with the respect due to their status as self-legislators. One cannot demand to be respected as an autonomous agent if one is not willing to display similar respect for others.

This explains the meaning of cooperation in political life. Members of a community are capable of self-restraint in the pursuit of their own conception of the good life, when they risk limiting others' equal claim to self-authorship.<sup>37</sup> *Reciprocity* refers exactly to this kind of mutual self-restraint. Within a political community, one way to display this form of restraint is to obey the law. We all are willing to pay a certain amount of our income to the state, to support the latter in providing us with efficient medical service, security, education, etc. I might be tempted to withdraw that payment and keep the money to purchase other things that suit my tastes: I realise that I would receive the same benefit mentioned above, in virtue of other people's sacrifice. On seeing that, I would interpret my failure to pay as *unfair to other people*. Although no one would be directly harmed by my failure to pay, one way my action would be wrong is that it would take an unfair advantage of other people's self-restraint. This is what it means to say that the moral obligation to obey the law should be explained as a duty of fairness towards fellow citizens. Given that autonomy is an (intrinsically valuable) social good that one can enjoy only while being a member of the

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<sup>36</sup> "We are obligated to obey the law to the extent that it is a formalization of the values of the common life. *But in no case can we say that our obligation to obey the regime or the law is primary, or that we have a prima facie obligation to obey them. We have a prima facie obligation to our fellows with whom we are engaged in mutual enterprise. (...)* Our obligation to the regime (...) is at once secondary and prudential". Zwiebach (1975), p. 75-76. See also Walzer (1970), p. 22.

<sup>37</sup> Remember Rawls' distinction between 'the Rational' and 'the Reasonable', discussed in chapter 4.

community, each person ought to do her fair share to show a similar degree of self-restraint, in obeying the law.

I should stop for a moment, to consider one main objection to arguments based on fairness, famously presented by Nozick and Simmons.<sup>38</sup> One is not deemed to have an obligation to cooperate with a scheme whose benefits one has not accepted, If the state is offering me benefits, which I did not want yet cannot avoid receiving (for example clean streets), then I acquire no obligations to cooperate with the provision of such benefit, in spite of my receiving it. This is a classic point of debate in the discussion on political obligation, particularly between Simmons and Klosko. My (very brief) reply is that this objection loses most of its power in the case at hand: the benefit offered by the state is autonomy, which has non-instrumental value and contributes crucially to the wellbeing of the individual. My assumption is that everyone has an interest in living autonomously: hence, no one would reject the benefits of communal life.<sup>39</sup> Addressing someone who thinks differently (i.e. who does not see the connection between autonomy and individual wellbeing) would require abandoning the context to which this whole dissertation is referring, i.e. that of a democratic society.

Given this notion of an obligation to obey the law based on fairness, some have argued that the rationale for administering punishment for disobedience to the law should rely on the same principle. That is to say, in conceiving of the political community as a cooperative enterprise, punishment is justified in relation to a breach of cooperation by those who defy the law. The wrongness of crime, according to this view, is that it constitutes a form of free riding, whereby the law breaker fails to submit to the requirements of political life (i.e. compliance with the law), yet still enjoys the benefits the cooperative enterprise grants her (protection and promotion of autonomy). Someone who disobeys the law fails to meet her obligations to fellow citizens, and thus

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<sup>38</sup> See Nozick (1974), pp. 90-95; Simmons (2001), pp. 27-42.

<sup>39</sup> Hence, I agree with Klosko's reply to Nozick's objection, according to which the cooperative scheme of society provides citizens with "presumptive benefits". See Klosko (1992), pp. 39-47.

deserves punishment. The criminal's main fault lies in the fact that, by her conduct, she upsets the balance of benefits and burdens that the community, as a cooperative enterprise, requires from each member.<sup>40</sup> The fact that each person who profits from others' obedience to the law is then under a moral obligation to reciprocate, by obeying the law in turn, justifies the infliction of sanctions on those who fail to reciprocate.

Assessing whether this account of wrong-doing, and of punishment, can stand the series of objections that have been levelled against it, is not within the aims of the present work. Some of these objections appear particularly troublesome for a fair play-based justification of punishment. However, I will not try to offer a reply to them.<sup>41</sup> My concern here is with whether the *moral* idea behind the principle of fairness, namely the importance of a mutuality of restrictions, can help build an argument for an agent's obligation to accept the legal consequences of the act of CD.

I should clarify, however, why I choose to focus on the principle of fairness, and why I consider it the most suitable candidate for an account of citizens' political obligation. There are three aspects of the fairness theory that I think capture some central elements of the life of the body politic: these are a) the idea of cooperation, b) the account of *special* obligations and c) an idea of obligation which is neither fully *voluntary* nor fully *non-voluntary*.

First, the fair-play theory stresses the fact that agents have a moral obligation to cooperate with a fair scheme whose benefits they enjoy. The idea of cooperation was central to my discussion of CD and deliberative democracy: the arguments in chapters 3 and 4 aimed to highlight that at the core of the choice to do CD is the desire to *contribute* to the deliberative enterprise, to cooperate in the shared effort towards an ideal *consensus*, to provide reasons others cannot reasonably reject to reach *mutual* understanding. Thus, the fair play theory hinges on aspects that, in my view, also constitute the ground of the choice to do CD.

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<sup>40</sup> See Dagger (2008); Sher, G., "Deserved Punishment Revisited", in Sher (1997).

<sup>41</sup> Antony Duff (2008) has highlighted the oddity of defining the wrongness of murder or rape as consisting in the fact that the criminal takes 'unfair advantage' of those who accept to carry the 'burden' of refraining from such crimes., See also Duff (1986), pp. 56-60. For an attempt to accommodate Duff's objections, see Stichter (2010).



Second, the principle of fairness provides the means to show why citizens have a *special obligation to the members of their community*. The duty to respect each individual as an autonomous person, which I discussed in chapter 2 above, stresses the *equal* claim each individual has to be respected as an autonomous agent. To this extent, this view is akin to a natural duty account: the duty to respect autonomy is a duty owed by all persons to all persons in virtue of being humans. According to the natural duty theory of political obligation, then, citizens have an obligation to support a government that protects and promotes the autonomy of its subjects. However, a serious objection arises at this point, concerning the relation between the citizen and the community:

[w]hile it follows that I have an obligation to support my government, it does not follow that there is anything *special* about this obligation. I am equally constrained by the same moral bond to support *every other* just government. Thus, the obligation in question would not bind me to any particular political authority (...).<sup>42</sup>

This is what Simmons calls ‘the particularity requirement’: even if it may be true that we have an obligation to support institutions that protect and promote autonomy, this is not enough to show why we have to comply with the legal directives of *this specific* government. The natural duty theory is doomed to face this objection, and this makes it an unsatisfying account of political obligation.<sup>43</sup>

The fair-play theory discussed above, on the other hand, preserves the idea of a duty to respect others as autonomous agents, while avoiding the objection of the particularity requirement. In fact, it can explain why we have reasons to prioritise obligations to our own community over those to other institutions in the world: as members of this specific group, we have an obligation of fairness to share in the costs of a cooperative scheme that benefits us directly. The argument does not need to go as far as supporting a strongly nationalist view: what is important in the present

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<sup>42</sup> Simmons (1979), p.31.

<sup>43</sup> For this and for other reasons, as Simmons (1979), chapter 9, points out.

discussion is that the fair-play theory offers an account of why citizens have a *pro tanto* obligation to obey the law of the state in which they live.

Finally, the theory of fair play can avoid the difficulties of other accounts which are either *voluntary* or *non voluntary*. At the core of the *voluntarist* argument is the idea that an obligation is legitimate only if those who are to be its subjects have consented to it. This position, which harks back to Locke's political theory, is employed (among others) by philosophical anarchists, who seek to reject state legitimacy by arguing that political obligations bind citizens only to the extent the latter have willingly accepted (i.e. consented to) them. Since, according to philosophical anarchists, most of the citizens have not given their consent to the state's authority, they are not bound to obey its laws. The state is illegitimate; citizens have no moral requirement to obey its laws.

An opposite view holds that obligations can be incurred *non-voluntarily*. This different approach, defended first by David Hume,<sup>44</sup> has one strong advocate in John Horton, who has engaged in a fierce exchange with Simmons to defend the idea of associative, non-voluntary obligations.<sup>45</sup> This view abandons the commitment to voluntariness, arguing that citizens bear obligations (among which, political ones) that arise simply from being members of a political community, and independently from a previous act of consent.

Both views seem to have their merits, and to face strong objections. Simmons is very explicit in stating that obligations can arise only from "positive, obligation-generating acts or relationships": however, he also seems to acknowledge that at least some of these obligations, however weak he may take them to be, that we have towards persons 'qua persons' are *non-voluntary*. As Horton points out, Simmons fiercely denies, on the one hand, the voluntariness of political obligations;<sup>46</sup> yet, on the other hand, he is willing to accept that there are "general, non-

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<sup>44</sup> "Of The Original Contract", reprinted in Cottingham (2004), pp. 493-498

<sup>45</sup> See Horton (2006); Simmons (2001), pp. 65-92. Other defences of the associative account of political obligations are Gilbert (2006); Scheffler (2001); Hardimon (1994); Dworkin (1986).

<sup>46</sup> Horton (2006), p.431.

voluntary duties that bind us simply because we are persons”<sup>47</sup>. This is not enough, of course, to argue that therefore political obligations are non-voluntary: yet, it reveals the implausibility of an exclusive commitment to the notion of voluntary obligations.

On the other hand, however, it seems that Horton’s defence of associative obligations leaves the door open for a degree of *voluntariness* since, as he writes, this kind of obligations has a “subjective” side to it, namely the fact that the individual has also to *identify* with his group for an obligation to arise.<sup>48</sup> Were the subject not to *endorse*, to some extent, the practices of the group of which she is deemed a member, then an associative obligation towards the members of that group may not arise. In this case, it seems that a full commitment to *non voluntariness* is also quite unlikely to succeed.

Highlighting these aspects of the exchange between Simmons and Horton, I intend to suggest that a plausible account of political obligation should incorporate both voluntary *and* non-voluntary aspects. This is why, in my view, the theory of fair play can offer a better alternative to account for one’s political obligation, since it can capture how both voluntary and non voluntary elements have a role in defining citizens’ obligation to obey the law. Simmons and Nozick link the implausibility of the theory of fair play to the fact that citizens cannot avoid the benefit society gives them: and if we cannot avoid receiving a benefit, then our acceptance of it seems irrelevant. One finds oneself within a system of obligations into which one has been simply “dropped”.<sup>49</sup> Yet, this seems to be an incorrect account of one’s life within the community. It is unproblematic to hold that an obligation of fair play occurs when an individual accepts the benefits “willingly and knowingly”:<sup>50</sup> but the same obligation could arise in cases where such acceptance does not occur. I think Dagger offers, again, the correct explanation of how this is possible:

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<sup>47</sup> Simmons (2001), p.95.

<sup>48</sup> Horton (2007), p.12

<sup>49</sup> Simmons (1979), p.137.

<sup>50</sup> Ibid, p.132.

(...) the political order *qua* cooperative enterprise is indeed something that most of us do not choose to join, but it is not something foreign to us. On the contrary, we are who we are in part because of the protection and opportunities the body politic provides us (...). Perhaps we merely receive these benefits when we are infants and youngsters, but as we grow older and gradually learn something about how our political community operates, most of us begin to take advantages of the opportunities the community offers to pursue our interests. (...) In doing these things -in *growing into* membership in the polity- we accept the benefits of the political order *qua* cooperative enterprise and undertake an obligation to obey its laws.<sup>51</sup>

Following this remark, I will hold that the theory of fair play represents an appealing candidate for an account of political obligation. In spite of there being some serious objections the theory has to account for, I think it comprises, better than its rivals, the central elements of the relation between the individual and the community. I therefore want to look at the practice of CD, and the role of the willingness to accept punishment, from the standpoint of the principle of fairness.

### **8. Civil Disobedience, Acceptance of Punishment and Fairness**

I have pointed out above that the theory of fair play has many attractive sides to it, but also that it remains open to some serious objections. Things seem to get even more problematic when trying to apply the theory of fair play to the issue at hand, namely the practice of CD. For this approach to work as applied to CD, the latter should fall within the category of actions that deserve punishment based on the idea of an ‘unfair advantage’. Thus, a citizen who embarks on CD should be regarded as ready to accept punishment in order to show awareness of the unfair advantage the illegal act has granted her. However, very few cases of CD seem to fit this description.

Consider the already mentioned acts of CD against the expansion of air traffic at Stansted Airport, UK. In order to draw attention to the issue of global warming, and its connection with aeroplane emissions, activists occupied the airport, thus preventing aeroplanes from taking

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<sup>51</sup> Dagger (1997), p. 76-77.

off/landing and causing a major disruption to passengers due to fly on that day. It seems implausible to say that they should be punished because they took an unfair advantage over their fellow citizens; certainly, they did not enjoy the “advantage” of occupying a public space, since it is not clear what advantage that would be, and most of all, why it would be ‘unfair’ to the others. It sounds weird to say that, as citizens, we have to carry the burden of being forbidden from blocking an airport. Similar arguments could be run for the protests against coal-fired power industries in Italy: what would be the ‘unfair advantage’ involved in climbing a chimney to unfold a banner criticising some environmental policies?

We should also consider that acts of CD carry some serious burdens for the citizens who resort to them: activists devote a serious amount of time and energy to preparing the action, sacrificing their own interests and leisure for the sake of the success of the protest. On the day the action takes place, they are aware of a series of risks they might incur, including violent police reactions and other dangers to their own persons.<sup>52</sup> This, at least, may prove that people who violate the law in CD may not be guilty of ‘upsetting the balance of benefits and burdens’, given that they seem to have already taken on some extra burdens in order to perform their protest.

There may be cases, especially with reference to *direct* CD, in which we may argue that one of the reasons why the civil disobedients should be willing to accept punishment is the failure to exercise that ‘self-restraint’ that life in the cooperative scheme of society requires.<sup>53</sup> We could say that one who objects to the criminalization of using marijuana, by smoking marijuana in public, is showing some degree of unfairness towards those who refrain from smoking marijuana because the law forbids it.<sup>54</sup> But in many other cases, it seems odd to say that the civil disobedients are being unfair to the members of their community if they do not submit to punishment, given that their

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<sup>52</sup> The recent killing of nine activists by Israeli soldiers, on the Mavi Marmara boat, on 31<sup>st</sup> May 2010, shows the risks activists sometimes have to face. Booth (2010).

<sup>53</sup> See chapter 2, above, for the distinction between direct and indirect CD.

<sup>54</sup> There are, of course, cases where by openly disobeying a law that others do not challenge for *fear* of punishment, the disobedients show a degree of courage. For example, this might happen in the case of an open violation of a restriction on freedom of speech.

action is motivated exactly by a concern with what they deem to be in the common interest. This reading of the fair play theory does not seem to work for the majority of cases of CD.

Yet, I think the connection between fairness and acceptance of punishment can be defended from a different point of view. For the theory of fair play to work in this case, it has to be true that the civil disobedients receive some benefit unjustifiably, that is, without cooperating with the scheme that provides them with such a benefit. What could this benefit be?

I want to suggest that, in acting illegally but avoiding the legal consequences, the civil disobedients act unfairly towards the other participants in the deliberative enterprise. In chapter 4, above, I analysed how the practice of CD should be seen as compatible with the ideal of a deliberative democracy: the civil disobedients are motivated by the same performative attitude that characterizes participants in rational, persuasive argumentation. Their resort to disobedience is a form of speech act, which intends to communicate with the rest of the society, and to keep the discussion open. Choosing to act illegally is the means for the disobedients to have their voice heard, and their message heeded by the community.

It is at this point that I think the unwillingness to pay the penalties might be ‘unfair’ to other citizens. On the one hand, the reason why the act of CD may be a successful act of communication lies in its *exceptionality*: it is because of the general obedience to legal enactments that an *illegal* protest acquires publicity. In a country where disobedience was widespread, and people’s attitudes to the authority of law were quite relaxed, the fact that the act of protest was ‘illegal’ may not add anything to its communicative strength. On the other hand, when individuals openly act against the letter of law within law-abiding communities, their acts are more likely to be perceived as ‘out of the ordinary’, and to elicit a response from society. What I am trying to say is that, for the act of CD to succeed, the disobedients need to be in a law-abiding community. If, therefore, they were to try to escape the legal sanctions linked to law-breaking, they would be free-riding on the fact that other

citizens have mutually restrained themselves in front of the law: and it is exactly this kind of self-restraint that can give symbolic value to their law-breaking behaviour.

For the same reason, I think that avoidance of punishment for CD would be unfair also on a particular group within the society: those who resort to *legal* protest. The deliberative enterprise, as already noticed, requires the agents to develop a 'performative attitude', whereby the others are seen not as 'objects', or mere rivals, but as rational agents with an equal claim to defend their own views by appealing to the force of the better argument. Those who act illegally to defend their view, do still get the benefit of taking part in the public arena: they can state their view and, provided they are not acting in an unjustifiably coercing way, they have a claim that the others reply in the same, persuasive manner. Yet, in many cases the appeal to illegal protest, for the reasons just discussed, may be a better instrument to give publicity to one's own view. This, I would argue, may constitute an unfair advantage over other participants in the deliberation, who would be willing to defend their views but only within the limits of the law. Their self-restraint may even benefit those who use illegal means, for it may put the latter ones in the position to have a bigger impact over public opinion. Accepting punishment after the illegal act, as an extra burden imposed over the disobedients, may balance things up: while enjoying the possibility of having a better chance to receive attention in the deliberative arena, the civil disobedients would also incur the additional burden of undergoing punishment, for having profited from others' self-restraint in front of the law.

Thus, an individual who acts illegally, to communicate with fellow citizens, but is not willing to accept punishment for using *illegal* means, may be violating some of her basic moral obligations qua citizen: this, in my view, stresses the fact that the willingness to pay legal sanctions constitutes a necessary requirement for CD, if the latter is to represent a contribution to the life of the political community.

If this argument is plausible, then it can show one non-instrumental reason to stress the link between an act of CD and the willingness to accept punishment. Once the moral obligation to obey

the law is described as a *horizontal* one, based on the principle of fairness and incurred, at least in part, non-voluntarily, then it is possible to point out that an act of CD, as a communicative action, can succeed only if other citizens are willing to restrain themselves in the interest of mutual cooperation. Accepting punishment, under this perspective, becomes a *pro tanto* requirement for citizens resorting to CD, because it shows their acknowledgment of the fact that others, through their compliance with the law, make it possible to use illegal protest as a potentially successful form of communication. Being willing to submit to punishment for CD can avoid the accusation of free riding, and reveal that the civil disobedients are not denying the importance of applying mutual self-restraint in the interest of cooperation. This reveals also their attitude of respect for fellow citizens, and the ‘virtuous’ dispositions the disobedients have towards their obligations *qua* citizens.

In the next, and last chapter, I will develop this consideration further, with reference to the behaviour of a virtuous civil disobedient who appears at the trial after breaching the law in CD.



## CHAPTER 6

### From the Streets to the Courtroom: CD and the Criminal Trial

#### 1. Overview

In this final chapter, I develop further the link between CD and *persuasion*, to defend the former as a kind of behaviour that, under some circumstances, displays a virtuous disposition in the agent who resorts to it. In doing so, I will challenge the idea that the willingness to accept punishment after an act of CD, discussed in the previous chapter, implies that the disobedients need also plead *guilty* when appearing at the criminal trial. In the view I will present, pleading not guilty at the criminal trial, i.e. arguing against one's own punishment for the act of CD, is sometimes the choice revealing the disobedient's attitude of respect for the law. Before defending this claim, however, I would like to offer a brief summary of the argument presented so far.

I set out, in chapter 1, to analyse the question of political obligation by focusing not only on what kind of external constraints call for citizens' compliance with the law, but also on the character traits deemed necessary for citizens to constitute a stable community. I adopted this perspective to examine the status of CD within a democratic society grounded on the value of individual autonomy. To that end, my discussion has focused on the claim that 'virtuous citizens', i.e. those who possess the character traits necessary for a stable society (which I referred to as 'civic virtues'), display with their behaviour an attitude of *respect for individual autonomy*. In chapter 3 and 4, I considered an account of reasonableness that stresses the importance of *persuasion* over *coercion*. Where different conceptions of the good are at stake, reasonable citizens engage with each other, trying to defend their own view by appealing exclusively to the force of the better argument. However, I also suggested that some forms of coercion may be compatible with a commitment to respecting individual autonomy. In chapter 5, then, I defended the notion that citizens of a reasonably just state have a moral obligation to obey the law. I claimed that such

obligation is best conceived of as deriving from the obligation to respect individual autonomy: due to the social nature of autonomy, communal life is necessary for an individual to achieve a substantial level of well being. Thus, I argued, there is a direct connection between respecting individual autonomy and cooperating with a well-functioning state. In connection with an idea of *reciprocity*, this argument led to identifying the wrongness of the illegal behaviour with the violation of a duty to cooperate with a just scheme that allows for the protection and promotion of individual autonomy. By acknowledging such moral obligations, citizens of a well-functioning democracy display an attitude of respect for the *law as the institution designed to protect and promote individual autonomy*.

We have seen how this conception of political obligation influences the theory of CD. In light of these considerations, in chapter 5 I argued that it is part of a ‘virtuous’ act of CD, that is, one that displays civic virtues in the agent who disobeys, that the civil disobedients be willing to accept the legal consequences of their law-breaking action. It is *pro tanto* wrong, for someone who breaches the law in CD, to try to escape punishment by, for example, going into hiding, running away before the police arrive, slipping away from mass arrest, etc. The outcome of the previous chapter was that, for an illegal action to constitute an instance of CD, it is necessary that the agent who breaches the law accept the punishment following the illegal conduct. The resort to a breach of the law as a form of *communication* generates a (*pro tanto*) moral obligation to accept the penalty.

This chapter focuses specifically on how this obligation to accept the penalty should be understood: that is to say, I want to analyse in more detail what is implied by the concept that a civil disobedient should accept the legal consequences of CD. Clarifying this aspect will reveal, I hope, a crucial feature of the disposition of a ‘virtuous’ civil disobedient towards the law: that the decision to challenge the prosecution in court may not show a lack of respect for the law, but rather the defendant’s concern with taking the law seriously.

In doing this, I will be *exclusively* interested, as in the previous chapter, in *the disposition of the civil disobedient* towards the law. That is to say, my discussion should not be seen as suggesting what kind of verdict the *judge* should issue in cases of CD. Although I will have something to say regarding what kind of legal appeals should be available to a civil disobedient, that need not lead to the conclusion that the judge should also accept them. The target of my analysis is to show how an attitude of respect for the law is displayed during a trial for CD by the defendant: I therefore leave aside here the (undoubtedly very important) question of how the state should treat a civil disobedient who pleads not guilty.<sup>1</sup>

## **2. The Civil Disobedient on Trial**

In this section, I offer a brief sketch of the problem I will analyse in the following pages. Recall, from chapter 2, that the main feature of CD, according to my view, lies in its *communicative nature*: the breach of the law that characterizes CD should be intended as a form of speech act, seeking to draw public attention to a particular law or policy. This, once again, hinges upon the protesters' aim to *persuade* the community that a particular law or policy deserves reconsideration. However, at this point one question becomes central: where does the attempt to *persuade* end? When is the action of CD-as-communication exhausted? Does it end with the arrest, after the 'inconvenience' to the public has been removed by the police? Or should we think that the communicative process enacted by the civil disobedients can continue *after* the arrest, e.g. when the disobedients appear at the criminal trial? The view I will defend in this chapter is that the communicative aims of the civil disobedients often carry *from the street to the court room*. Hence, I will claim that the trial constitutes a central part of an act of CD.

Appearing at the trial to answer the charge of wrongdoing, should not be seen as a mere 'side effect' of the choice to do CD: rather, it should be seen as an inherent part of the communicative aims underlying that choice. Highlighting this aspect is important, in order to

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<sup>1</sup> For a suggestion as to the kind of verdict a judge may issue, see Hall (2007).

address a conception of CD that forbids challenging the prosecution's charges during the trial. According to this conception, which I will discuss and criticise below, a civil disobedient should not deny the accusation of criminal wrongdoing. If there is, as I argued, a requirement for civil disobedients to accept the legal consequences of their illegal behaviour, it should follow that they should enter a *guilty plea* when faced with the charges. In adherence to a long-established conception of 'passive' resistance, a civil disobedient should appear at the trial, if at all, to bear witness to the injustice she is denouncing through the act of disobedience, without arguing against the prosecutor's charges, nor contesting the court's decision. This would support the idea that an act of CD should *rule out* the attempt to justify one's behaviour, i.e. to argue that the act should not be punished: according to this view, it would go beyond the aims of CD to try to convince the judge and the jury that the illegal act was not a *crime*. If there is a moral requirement to accept the punishment for CD, as we saw in the previous chapter, then it should not be permissible for a civil disobedient to claim that she should not be punished by, for example, pleading *not guilty*. Aiming to justify one's act of disobedience would contradict the requirement to accept punishment, and would go beyond the communicative aims of CD.

Against this position, I seek to endorse an analogy between the communicative nature of CD, on the one hand, and a conception of the criminal trial as a 'communicative enterprise' that aims for rational *persuasion* of the participants.<sup>2</sup> The criminal trial is the place where the communicative process between the state and the citizens can develop to a full extent: through a process of *reciprocal* reason-giving, the state calls the defendant to account for her allegedly illegal behaviour, and the defendant has a chance to explain the reasons for her conduct.

If we take this stance on the criminal trial, we can realise that it shares the same communicative nature as an act of CD. As for CD, what underlies the criminal trial is a demand for

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<sup>2</sup> This analogy was first proposed by Brownlee (2007), who however focuses on the institution of *punishment*, rather than on the criminal trial. Like Brownlee, I will build largely on Antony Duff's idea of responsibility as 'answerability', with particular reference to Duff (1986), and Duff *et al.* (2007).

rational *persuasion* among the agents taking part in it. In this final chapter, I aim to defend this aspect, and to argue that virtuous civil disobedients, i.e. those who display an attitude of respect for the law, have strong reasons to *defend* themselves, at the trial, against the charges of wrongdoing. These reasons arise out of the attitude of respect for the law and, ultimately, of the duty to respect fellow citizens as autonomous agents. It will appear that this does not contradict what I said in chapter 5, namely, that a civil disobedient has a pro tanto obligation to *accept* the legal consequences of her law-breaking behaviour. According to my view, it is pro tanto wrong for a civil disobedient to avoid *facing* such consequences: yet, her attempt to *persuade* others that she should not be punished would not contradict this principle. When such attempt fails, for example when the judge or jury issue a verdict of guilty in spite of the disobedient's not-guilty plea, she still has an obligation to accept the punishment following from that verdict.<sup>3</sup> In many cases, arguing against being punished is part of the communicative nature of CD and shows, as I will argue, an attitude of respect for the law.

I begin by discussing the conception of the trial as a 'communicative enterprise'. After that, I will discuss in more detail the notion according to which a civil disobedient should plead *guilty*. Against this notion, I will briefly mention how a *guilty* plea might betray the defendant's attempt to avoid the punishment. Then, I will show why pleading *not guilty* might better display the defendants' concern with respecting the law. Distinguishing between 'narrow' and 'broad' acceptance of punishment, I will argue that, by pleading 'not guilty' (i.e. claiming that their behaviour was not 'wrong') the civil disobedients demonstrate their commitment to the values underlying a democracy.

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<sup>3</sup> However, nothing would preclude a civil disobedient from launching a legal appeal against a verdict she strongly disagrees with.

### 3. The Communicative Nature of the Criminal Trial and of CD

In this and in the next section, I will show the connection between the institution of the criminal trial, on the one hand, and a concern with respecting citizens as autonomous agents. This will allow me, then, to highlight the shared *liberal* underpinning of the criminal trial and of CD.

Article 10 of the Universal Declaration of Human Rights states that everyone “is entitled in full equality to a *fair* and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.<sup>4</sup> It is useful, for the present discussion, to point out some elements that make a trial a ‘fair’ one. Hildebrandt highlights six aspects that are central to the idea of a fair trial. According to her summary, a fair trial requires 1) an impartial and independent judge, 2) a public trial, 3) a presumption of innocence, namely that the defendant will not be punished until proven guilty and that the onus is on the prosecutor to prove the guilt, 4) an equality of arms between prosecution and defence, 5) that the judgment will be based on evidence presented in court and 6) that the proceedings will be based on a right of confrontation.<sup>5</sup> What follows from claiming that there is a human right to a fair trial is that these elements represent constitutional guarantees that an individual, who appears at the trial, possesses and can enforce against the state.<sup>6</sup> We can see a connection here between this right to a fair trial and the “*audi alteram partem*” principle, discussed in chapter 4. According to the latter, every individual has a right ‘to be heard’, that is to say, to state her own opinion during the deliberation and to receive due consideration by the other participants. Allowing everyone to have their opinion heard by, for example, casting their vote before the decision is made, increases the possibility that the outcome will be the correct one.<sup>7</sup>

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<sup>4</sup> Different formulations of this right appear also in the European Convention on Human Rights, Article 6.1, and in the Sixth Amendment of the US Constitution.

<sup>5</sup> Hildebrandt (2006), p. 25.

<sup>6</sup> Duff *et al* (2007), p. 51.

<sup>7</sup> The locus for the instrumental justification of having the highest possible number of voters is the so-called Condorcet Jury Theorem. See Grofman & Feld (1988). For criticisms of this view, see Waldron (1999), ch. 3, section 2, and Downs (1957).

The *audi alteram partem* principle could be justified on a *procedural* basis, as necessary for a deliberation that could bring about a result acceptable by any reasonable participant: a decision could be achieved only after every individual whose interests are involved has had a chance to speak. Similarly, one way to look at the right to a fair trial bears on the *procedural* legitimacy of the criminal process: a judge could sentence a defendant only after each party in the dispute has had her chance to speak to defend her own position. As with the process of democratic deliberation, a criminal trial requires the contribution of all the parties whose interests are at stake in the decision. In the same way in which the outcome of a deliberation that denied some groups the right to speak may be contested, a verdict of ‘guilty’ may be questionable if achieved through a process that did not allow the defendant’s voice to be heard.

We could then say that the right to a fair trial, as a *procedural* rule, plays an important *instrumental* role for the accuracy of a guilty verdict.<sup>8</sup>

[a]ccurate verdicts can thus serve both the aim of subjecting those who commit offences to punishment, by identifying the guilty, and the aim (which is integral to the retributivist aim of punishing the guilty *for* their crimes) of fitting punishments to crimes, by identifying the particular crime that the defendant committed. Trials, on this simple view, aim at truth: the truth about whether a particular person, the defendant, committed the criminal offence specified in the charge. The value or importance of that truth is instrumental (...).<sup>9</sup>

Taking this stance on the function of the criminal trial has some merits: however, it overlooks another important aspect of the trial. What is at stake in defending the right to a *fair* trial is not simply the *procedural* defect of denying the defendant the opportunity to talk. The right to be heard is crucial not merely on an instrumental ground, according to which granting every participant the opportunity to speak at the trial would increase the chances of the verdict’s correctness. It is essential, for a full understanding of the meaning of the trial, to go beyond the

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<sup>8</sup> See Ashworth & Redmayne (2010), p. 22.

<sup>9</sup> Duff *et al* (2007), p. 62.

mere need to implement the trial's effectiveness in tracking guilt. From this perspective, 'finding the *truth*' should not be seen as the main function of the criminal trial.<sup>10</sup> In fact, there might be cases in which a verdict could be correct (i.e. sentencing the guilty and acquitting the not guilty), although the defendant was denied the right to be heard: in a similar case, we could still criticize such a verdict as *unfair*. We could point out that "a criminal who is convicted of an offence of which he is indeed guilty, but after a trial whose proceedings were unjust and improper (no fair hearing, use of false evidence) is *unjustly* convicted".<sup>11</sup> This is because when the judge gives a "guilty" verdict, she is not merely expressing a 'true belief' that the defendant acted wrongly: what she is saying is that she *knows* that the defendant is guilty.<sup>12</sup> This, in turn, sheds light on why the conviction of a guilty defendant, whose guilt has not been accurately proven, is a *mistaken* conviction: "for what a verdict of 'guilty' means is not simply that the defendant committed the offence, but that we, the fact-finders, know that he committed it".<sup>13</sup> Thus, for example, a trial in which the verdict is arrived at too quickly, short of offering evidence beyond reasonable doubts, may satisfy the former claim, but not the latter.

Knowledge, however, is not all that grounds the importance of the right to a fair trial. Acknowledging this right is not just a way to feed as much information as possible into the debate, so as to maximise the chances that the outcome will be 'correct' (in terms of 'tracking the guilt'). That acknowledgment bears on the value of showing *respect* for the defendant as an autonomous and responsible being, able to make her own choices and accountable for them in front of others. A 'fair' trial requires the active participation of the defendant, not merely because that is the best way to ensure that the final verdict will be correct and based on *knowledge*: the right to a fair trial reaffirms the status of the defendant as an autonomous agent, who is entitled to answer the charges

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<sup>10</sup> Duff *et al.*, (2007), p. 69, 82.

<sup>11</sup> Duff (1986), p.115. Added emphasis.

<sup>12</sup> "We can see the verdict as a claim to knowledge (...) and my claim to knowledge will be rejected, even if she is in fact guilty, if it is founded on inadequate evidence or reached by unreliable procedures." (ibid.).

<sup>13</sup> Duff *et al.* (2007), p.89.



that the prosecution (and the whole community on whose behalf the prosecution speaks) is moving against her.

#### 4. The Criminal Trial as Communication

According to the considerations mentioned above, the trial is not merely an instrument to ‘track guilt’, but is also an institution concerned with treating the defendant with the respect due to her as an autonomous agent. In this section, I intend to say more about the communicative nature of the criminal trial, that is, about why we should conceive of the trial as an institution whose goal is to *address* the defendant, and to treat her as a *responsible* citizen who plays an important role in the assessment of the prosecutor’s charge. I will then highlight the analogies of this account to the practice of CD.

In his influential work in the philosophy of punishment, Duff has focused on the concept of *blame*, which he describes as a way to call someone to *account for* alleged wrongdoing.<sup>14</sup> What he has argued is that ‘blame’ is not something that we merely do *to* an individual, e.g. to have her change her behaviour. Seeing ‘blame’ under this light can be highly misleading, according to Duff, for it emphasises the ‘goal’, namely the change in the behaviour of the blamed person, over the way in which this change is achieved. Blaming someone is a way to engage that person in a moral argument: it is, therefore, something that we do *with* the blamed person. When we blame someone, we tell her that we think she acted wrongly, and why we think so: in doing this, we *call her to respond* to our charge. Such response could be either an admission of guilt and acceptance of our criticism, or a denial of the charge and a defence of her own conduct.<sup>15</sup>

I may try to show him that his conduct was at odds with moral values which he himself accepts; or to persuade him of the significance and relevance of values by which he was previously unmoved. If he comes to accept my judgment on his past conduct, he must also agree that he should act differently in the future, if the occasion arises. Thus, in

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<sup>14</sup> See particularly Duff (1986) and (2001).

<sup>15</sup> Duff (1986), p. 48.

persuading him to accept my criticism of his past conduct I also persuade him to modify his future conduct.<sup>16</sup>

The element to emphasize in this account is that the latter fosters treating others as individuals who can be *persuaded*, through *rational* argument, of the reason why they are being blamed. We can see, in this conception of blame, an aspect that was central in the discussion of deliberative democracy in chapter 4, namely, the importance of approaching the other with a “performative attitude”. As we noticed, this is necessary to treat others with the respect due to them as autonomous agents, in order to avoid treating them as *objects* upon which we intend to act or that we intend to use for our goals. We blame someone, to bring her to acknowledge her wrongdoing and to finally accept that she deserves punishment. That is why, if we managed to change the conduct of the blamed person, but only because she may want to avoid some inconvenience, our blaming her would have failed. On the other hand, if we did not manage to persuade her to change her conduct, while making her respond seriously to our blaming, we would have reached significant success:

Suppose (...) that I fail to change his beliefs, attitudes or conduct: he listens and responds to my criticisms, but remains unpersuaded. (...) My criticism has now failed to achieve its proper aim of persuading him to accept it, as well as the pragmatic aim of modifying his conduct. But if he responds to it seriously, it has not been a complete failure in relation to its proper end; it has indeed achieved significant success – in engaging him in a moral examination of his conduct.<sup>17</sup>

In engaging the other person in this way, we treat her as a *responsible* agent: as one who can offer reasons to account for her behaviour to those who accuse her of wrongdoing. Being ‘responsible’, under this perspective, implies being ‘answerable’, being ready to answer for what one is responsible for.<sup>18</sup> What characterizes the criminal trial, under the communicative theory

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid, pp. 48-49.

<sup>18</sup> See Duff (2005) p. 88, and (2001), pp. 188-193.

discussed here, is this same purpose to call the defendant, as a fellow citizen, to answer to the charges moved against her. The purpose and meaning of the *trial* closely resemble that of *blaming*: underlying both, there is the respect for the accused/blamed person as a responsible agent, who is called to answer the accusation. Most importantly, both blaming and the criminal trial seek to lead the subject to understand the reasons why she is accused/blamed:<sup>19</sup> hence, one of the ‘proper ends’ of the criminal trial is to persuade the defendant, in cases of a verdict of ‘Guilty’, that what she did was wrong and deserves punishment. That is why, when this persuasion is not pursued, the value of the trial as a communicative enterprise is compromised.<sup>20</sup>

The right to a fair trial ultimately reflects a *right to be blamed*, that is to say, a right “to be treated, respected and cared for as a moral agent.”<sup>21</sup> When we blame someone for something, we seek to involve her in a discussion, with the aim of persuading her that what she did was *wrong*: we therefore acknowledge her status as a rational being that can be persuaded (though not forced) to see her behaviour as blameworthy.<sup>22</sup> We also acknowledge, as we will see below, that she has a right to reply to our accusation and to *persuade us* that we are wrong in blaming her. The point to stress is that calling one to account is a way to show respect for her.

Against this background, we can grasp what lies behind the claim that the criminal trial should aim for the defendant’s *assent* to the verdict.<sup>23</sup> Rather than simply imposing the verdict on the defendant, with the aim to change her future conduct, the prosecution and the judge should aim to persuade her of the reasons why she is guilty as charged. It is important to see the analogy between this conception of the trial and the notion of CD as a communicative act, discussed in

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<sup>19</sup> Duff (1986), p.129.

<sup>20</sup> The defendant has, however, also a *right to silence*. That is to say, the prosecution cannot extract coercively a statement from the defendant: the latter is called to answer, as a responsible citizen, for the alleged wrongdoing, but “as with any communicative process, it is open to [her] to refuse to answer that call” (Duff *et al.*, 2007, p.148). Note the contrast between this view and the account of CD I offered in chapter 3, where I argued that civil disobedients can employ a degree of violence to force their fellow citizens to heed their message. On the right to silence, see also Duff (1986), p.129-135. For criticisms, see Schwikkard (2008); Hocking & Manville (2001).

<sup>21</sup> Duff (1986), p. 70.

<sup>22</sup> See the parallel, here, with the idea of CD as appropriate only in a ‘nearly just society’, i.e. when the state is deemed a suitable partner in the communication, able and willing to listen to the protesters’ message, and to reply to it. Rawls (1999), p.319.

<sup>23</sup> Duff (1986), p. 116, and *et al.* (2007), pp. 127-130.

chapter 2 above. For a successful act of CD, it is *necessary* that the addressee of the message acknowledge the disobedients' request. To this extent, a case where the civil disobedients managed to convince the majority in power to change a seriously unjust law, yet that change occurred out of the majority's fear of further acts of disruption, would have failed as a form of communication. In spite of achieving the target of social change, this would have been an *unsuccessful case of CD*. On the other hand, if after serious debate within the community, e.g. on the media, in public spaces, *at the criminal trial*, the majority decided to reject the disobedients' call for reconsideration, the act of CD would have fulfilled its communicative aim.

As part of 'calling to account', the trial offers the defendant the chance to explain her alleged law-breaking behaviour, and to contest (or, eventually, accept) the charges moved by the prosecutor. This emphasis on the defendant's right to be heard, to be persuaded, and *to persuade*, shows that the communication at the trial runs 'in both directions'.<sup>24</sup> That is, it is not only the defendant who is called upon by the state to answer the charges: *the defendant also calls the state to account for the accusation*, requiring that the state answer for the accusation. The defendant has a right both to persuade and to be *persuaded* by the prosecutor.<sup>25</sup> If 'blaming' someone is a way to acknowledge the moral status of the person blamed,<sup>26</sup> it then implies acknowledging that person as a rational individual, capable to understand why she is being blamed and to act accordingly. Once again, according to this view, the reason why I may blame an individual is that I want her to understand that she has wronged me and to explain to me why she did so. Hence, I demand that she accounts for her behaviour.

What is at stake in this analysis of the criminal trial is the moral status of individuals as autonomous agents, which was presented in the previous chapters of this thesis as central to the organisation of a democratic community. We saw above that autonomy entitles the individual to

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<sup>24</sup> Duff *et al.*, (2007), p. 96.

<sup>25</sup> See also the connection with the discussion of the 'performative attitude' in chapter 4, above.

<sup>26</sup> Duff (1986), chapter 2.

choose and follow her own conception of the good: it proscribes coercing her into doing something she would not reasonably accept to do. Hence the emphasis on *persuasion*, as a practice through which agents approach each other, in the face of disagreement, in a way that shows respect for their status as autonomous individuals.

## 5. Responsibility and Liability

How can this process of persuasion be achieved *at the criminal trial*? For a guilty verdict to be issued, it is necessary not only that the prosecutor shows that the defendant committed the act of which she is accused: the prosecutor has also to prove that the act constitutes a *criminal wrong* that deserves punishment. This suggests that the fact that someone has in fact committed the act she is being charged with, is not sufficient to make that person *guilty*. One of the aims of the trial is to prove someone's *responsibility* for committing a crime. However, even when responsibility is proved, the assessment of guilt requires further establishing *criminal liability*.<sup>27</sup> Responsibility is necessary, not sufficient, to establish the defendant's guilt: a defendant could admit responsibility while, at the same time, denying that she is liable for that very act.<sup>28</sup> Hence, a defendant who is accused of having done X may admit that she did X: yet, she can challenge the court arguing that X was, under the particular circumstances in which she acted, not wrong. She could then offer a reply to the accusation, one that –she would argue- exculpates her and thus blocks “the transition from responsibility to liability”.<sup>29</sup>

The case of self-defence offers an example of this distinction: although the agent is *responsible* for the death of the victim, the fact that she was acting in self-defence may make her not *liable* to criminal punishment. Thus, the fact that she was criminally responsible for the death of the attacker, does not necessarily make her also *criminally liable* for murdering the attacker.

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<sup>27</sup> Duff (2005), p. 88.

<sup>28</sup> See Duff *et al.* (2007), pp.130-131. This is clearly the case, as we will see below, when defendants argue they were justified, or excused, in acting illegally.

<sup>29</sup> *Ibid.*, p.131. See also Gardner, who argues that an excuse (and a justification) “must be something that blocks the path from an adverse judgment about an action to a correspondingly adverse judgment about the person whose action it is”. Gardner (2007), p.122.

This applies also to the case of CD. Activists who appear in court often appeal to the defence of necessity, to argue that what they did was *justified* under the circumstances, and that, for that reason, they should not be punished.<sup>30</sup> An example of this is offered by the case of the “Pit stop Ploughshares”, five catholic activists who, in July 2005, were put on trial in Dublin: two years before, in February 2003, during the build-up to the military operation “Shock and Awe” on Iraqi soil, they had disarmed a US warplane parked for a pit-stop at Shannon airport. After attacking the nose cone and windows of the plane with hammers and paint, the protesters had remained there, praying, offering no resistance when arrested. At the trial, they admitted that they had forced their way into the hangar and had attacked the plane (thus acknowledging *responsibility* for violation of private property); yet, they claimed that their actions were legally justifiable, since they were trying to protect lives and property in Iraq. They therefore denied *liability* for that action.<sup>31</sup> The contention was that their act was not ‘wrong’ and was not against their obligation to the protection and promotion of individual autonomy (hence, their moral obligation to the law).<sup>32</sup>

What I intend to do in the remaining of this chapter is to consider what, according to some views, appears to be wrong with offering legal defences at the trial for CD. As I suggested already, some have argued that appealing to legal defences to *justify* one’s illegal conduct may not be compatible with the behaviour of a virtuous civil disobedient. In light of the above discussion, concerning the criminal trial as a ‘two-way process’ of communication between the state and the defendants, I will argue for the compatibility between pleading ‘not guilty’ and being a ‘virtuous civil disobedient’, that is, one who possesses and displays an attitude of respect for the law. Civil disobedients can go to the trial with the intention to *persuade* the court, and their fellow citizens, that their act of CD is still consistent with the commitment to the principles the legal system is designed to protect, and to promote.

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<sup>30</sup> For a (sceptical) discussion of the applicability of this kind of legal defence to CD, see Cavallaro (1993).

<sup>31</sup> Retrieved at: <http://www.indymedia.ie/article/77455>. The court accepted the defence of necessity and the activists were acquitted.

<sup>32</sup> By appealing to the defence of “justification”, the defendants claim they were *justified* in acting as they did. A different case is that of “excuse”, where they claim that they acted as charged but should be ‘excused’ nonetheless.

## 6. Appearing at the Trial

I now focus on the behaviour of a civil disobedient who appears at the criminal trial. My aim is to consider the kind of pleas available to her. By analysing these options, I seek to identify the different claims they imply regarding one's own liability. My discussion will focus only on defences which are pertinent to CD, in order to show how they might be employed to display the kind of attitude that should ground a 'virtuous' act of disobedience.

At the pre-trial arraignment, the defendant is identified by name, presented with the charge(s) of criminal wrongdoing, and expected to enter a plea.<sup>33</sup> In cases of CD, the charges usually refer to transgressions such as illegal trespassing and/or property damage. There seem to be, mainly, four options available to the civil disobedient at this stage: the judge, however, normally treats all of them as either a *guilty* or *not-guilty* plea. First, the civil disobedient could plead 'guilty': by doing so, she admits *both* responsibility ("Yes, I did trespass on military property") and liability ("Yes, I did commit a criminal action"). In that case, the judge might decide to sentence her, without further inquiry.<sup>34</sup> The civil disobedient, on the other hand, could decide to plead *not guilty*. As mentioned already, this could mean either of two things: a denial of responsibility, of having committed the action as alleged by the prosecutor; or an admission of responsibility, accompanied by a denial of liability ("Yes, I did X, but X does not represent a criminal action"). If the prosecution proves the commission of the offence (i.e. proves responsibility), the onus then lies on the defendant either to offer evidence of a defence (only then does the prosecution have the burden of disproving it), or even sometimes to prove the defence – though on the balance of probabilities rather than beyond reasonable doubt.

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<sup>33</sup> Duff *et al.* (2007), p.143.

<sup>34</sup> "[Y]et the judges, upon probable circumstances, that such confession may proceed from fear, menace or duress, or from weakness or ignorance, may refuse to record some confession and suffer the party to plead not guilty", 2 Hawk. 466, cited in Hampton (1982), p. 184.

There are two more options available to a defendant who is asked to plead for her alleged wrongdoing.<sup>35</sup> One of these options, available in the US but not in UK, is to plead *nolo contendere*, by which the defendant expresses her intention not to contest the charges: this plea differs from the guilty plea, in that the defendant does not openly admit her wrongdoing.<sup>36</sup> The judge, however, will normally take this plea as an admission of guilt, and proceed accordingly. Hence, civil disobedients might use it as a compromise between the guilty and the not guilty plea: while not challenging the accusation, at the same time they also do not admit their guilt. Alternatively, the defendant can decide to *stand mute* when asked to plead: this is part of the defendant's *right to silence*, and the judge normally treats it as a not guilty plea.<sup>37</sup>

For reasons that will emerge in what follows, I do not consider *nolo contendere* or standing mute as suitable for the kind of CD that I am interested in. Although I will have something to say briefly about these other pleas, my concern will be with the choice between pleading “guilty” or “not guilty”.

## 7. On Pleading Guilty

I now want to go more into the merits, or demerits, of these choices for a civil disobedient. We saw in chapter 2 that one main feature of CD is the acknowledgment of the underlying political system: what distinguishes CD from e.g. revolution or sabotage, is that agents who choose the former recognise that the state has legitimate authority over its subjects. This includes the acceptance of the state's right to administer punishment for breaching the law. Also, in CD the law is breached *deliberately*, that is to say, with no attempt to hide the fact that the act is an act of disobedience, nor to conceal the disobedients' identity. In light of these considerations, it may be argued that, when called to account for their law-breaking behaviour, sincere civil disobedients

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<sup>35</sup> “Activist Strategies for Court”, retrieved at <http://www.activistrights.org.au/resources/Activiststrategiesforcourt.pdf>

<sup>36</sup> A main effect of this is that the defendant would not be held liable in case also a civil suit was issued against her after the criminal trial. For example, by pleading *nolo contendere* to a charge of reckless driving, the defendant would not be liable to pay damages without further inquiry. On the other hand, if she pleads guilty, she also admits liability to pay for the damages caused by her driving.

<sup>37</sup> Elmer (2005), p. 208.



should plead guilty, admitting that they did violate a legal directive and are therefore, liable to be punished. Attempts to do otherwise, for example pleading *not guilty* and challenging the prosecution to prove the fact that the protesters breached a law, would be in stark contrast with the underlying assumptions at the core of the choice to do CD:

Three aspects of civil disobedience counsel that its practitioners should accept the legal consequences of their acts. First, civil disobedience pursues a civil society within the confines of the social contract. Second, it seeks social reform through persuasion. Third, it requires its practitioners, as moral political actors, to be morally consistent. Attempting to avert punishment (...) may undermine the justification for civil disobedience (...).<sup>38</sup>

The idea behind these considerations may be summarised by the following claim

*A) In a case of CD, it is always morally inconsistent for the defendant to plead not guilty when faced with the legal charges*

With reference to various elements emerging from the discussion in the previous chapters, and in the first part of this one, I intend to show that (A) is not necessarily true. Rather, I will argue that

*B) In a case of CD, there is a presumption that the defendant should plead not-guilty when faced with the legal charges*

Note that the claim in (B) is stronger than the idea that it is sometimes permissible to plead not-guilty in a case of CD. According to the view I defend below, we should presume that, as civil disobedients, defendants will plead not guilty: this need not rule out cases where the guilty plea might be more appropriate to the communicative aims of CD, under the circumstances.

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<sup>38</sup> Bauer & Eckerstrom (1987), p.1189.

Before explaining what justifies claim *B*, however, I want to analyse in more depth what arguments are offered in support of *A*. There are instrumental and non-instrumental reasons to hold that doing CD should imply pleading guilty.<sup>39</sup> Arguments of the first kind highlight, among other things, the fact that the disobedients' message would fail to reach the rest of the community if they denied their wrongdoing. By arguing that they should not be punished, that what they did was not *wrong*, the civil disobedients may compromise the conscientiousness of their act of CD. Perhaps it is by going 'all the way down' to the legal consequences of their act that the citizens show their commitment to the rule of law:<sup>40</sup> and doing so would demonstrate the conscientiousness of their behaviour, and gain the support of other groups within the community. As we saw in chapter 2, 'conscientiousness' refers to lack of self-interest: a conscientious act of disobedience is one done out of a concern with the common good. The attempt to eschew the legal punishment may betray this motivation, because the attempt to avoid paying the sanction for one's own behaviour may appear self-centred. Pleading *not guilty* would weaken the symbolic meaning of CD, as an act that questions the value of a particular law, while respecting one's own political obligation. Fellow citizens would doubt the sincerity of the disobedients, and this may seriously diminish the communicative efficacy of the act itself.<sup>41</sup>

There are also strong non-instrumental reasons supporting the guilty plea in CD. According to one view, seeking for a justification for CD would not display the appropriate disposition towards the law that citizens of a flourishing community should possess. In fact, a conscientious act of disobedience should acknowledge that a violation of the law, even when accomplished out of a

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<sup>39</sup> As with the distinction, in chapter 5 above, between instrumental and non-instrumental reasons to accept punishment for CD, the distinction discussed here should not be taken to be clear-cut.

<sup>40</sup> I say "perhaps", for I will argue that in fact, in many occasions, civilly disobeying the law and then pleading guilty after the action, might be *disrespectful* of law's authority and function. See below.

<sup>41</sup> "The only approach left [for the civil disobedient] will be the criminal law discussion under the plea of necessity which turns the civilly disobedient act into a personal moral act which might constitute a justification excluding the presence of a legal type or its unlawfulness (ie. excluding a legal wrong) or, more likely, a morally justifiable excuse which mitigates the penalty to be imposed. The public and political dimension of civil disobedience as engaging the constitutional debate is thus lost. The (...) civil disobeyer obtains a favourable response from the legal system (the law and the officials) but his or her action loses political impact because it is reconducted into a personal act." Bengoetxea & Ugartemendia (1997), p. 447.

concern for the common good, will be subject to punishment.<sup>42</sup> If one was to think otherwise, she would fail to show due consideration for the state's authority to compel obedience. This, in turn, would signal a deficiency in her character as a civil disobedient.

According to the view just mentioned, then, challenging the accusation of wrongdoing would contradict the disposition of a sincere civil disobedient towards the law. A sincere act of CD resorts to deliberate violation of a legal enactment, to raise concerns about a particular law or policy. Regardless of whether or not she succeeds in having the policy at hand reconsidered, the civil disobedient should make no claim regarding the inappropriateness of the state's decision to punish her for the law-breaking behaviour.

Thus, for example, Gandhi thought it was not the protesters' business to assess the legal status of their own act of CD: that was the task of the judiciary only.<sup>43</sup> Although there could be *moral* ground to justify what the protesters did, this should not lead to any argument for the existence of a *legal* justification for the act of CD. Denying this idea would overlook the fact that CD "is a method of protest that posits that while the obligation of conscience transcends all duty to the state, the criminal activity performed pursuant to that duty to conscience is not immune from punishment."<sup>44</sup> There should be neither room nor need, therefore, to argue in defence of CD: being punished should be seen as part of doing CD. Pleading 'not guilty', hence challenging the prosecutor to prove the disobedients' criminal liability, is not what CD aims for. Seeking a justification differs from the aims of CD.

From this standpoint, accepting punishment by pleading *guilty* should be central to the character of a civil disobedient. There is an idea of expressing "the highest respect for law" which

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<sup>42</sup> McEwen (1991), pp. 992-993.

<sup>43</sup> "I am here, therefore, to invite and submit cheerfully to the highest penalty that can be inflicted upon me for what in law is deliberate crime, and what appears to me to be the highest duty of a citizen. The only course open to you, the Judge and the assessors, is either to resign your post and thus disassociate yourselves from evil, if you feel that the law you are called upon to administer is an evil, and that in reality I am innocent, or to inflict on me the severest penalty, if you believe that the system and the law you are assisting to administer are good for the people of this country, and that my activity is, therefore, injurious to the common weal." Trial of Mahatma Gandhi, Ahmedabad, India, 18th March 1922. In Homer (1956), pp. 205-206

<sup>44</sup> McEwen (1991), p. 987-988.

risks being lost when protesters seek for a justification. While appealing to the latter implies the pursuit of an acquittal, CD should express the agent's willingness to face the consequences of her own actions.

This position holds that virtuous civil disobedients should not seek to play any *active* role at the trial, beyond that of pleading guilty. Under this perspective, CD represents a breach of law that aims to communicate a message, and that terminates with the arrest. Once the act has been committed, conscientious disobedients should not seek to achieve anything else in terms of acquittal: they may appear in court to take on the legal consequences of the illegal act, as a sign of consistency with the endorsement of the overall political system. Appearing at the trial would be their way to bear witness to their commitment to the cause for which they are protesting. Yet, civil disobedients should seek nothing from the trial itself, apart from *being there*: insofar as CD is pursued to draw public attention on a public issue, there is no reason to deny that it implies, nonetheless, a breach of the law, as such subject to legal punishment. This is what grounds claim (A) above.

However, there are reasons in favour of claim (B) as well. They arise, in my view, out of the shared communicative nature of CD and of the criminal trial. According to what we saw in chapter 4, and in the previous two sections of this chapter, citizens who embark on CD, and those who appear at the criminal trial, approach their fellow citizens with a *performative* attitude: they treat others with the appropriate respect due to autonomous agents, seeking to *persuade* them by appealing to the strength of their own argument. This should support the idea that CD, as a communicative act, may not terminate when the police arrest the protesters. Rather, we should conceive of CD as carrying 'from the streets' into the court room: the trial might then represent a central moment of communication for a civil disobedient. A polity that fosters citizens' participation in the public life, and their commitment to the values of a democratic community, should encourage and welcome individuals who 'actively' contribute to the debate about the

common good. Such contribution should not lead the individual to surrender herself to the court's judgment without offering reasons for her behaviour.<sup>45</sup> Quite the contrary: virtuous citizens should be keen to explain the reasons behind their act of CD, and to reaffirm their commitment to the value of autonomy. As we saw above, the trial calls the civil disobedients to account for their alleged wrongdoing, identified with the defiance of the law: there is no open contradiction, then, between one's status as a civil disobedient and the attempt to defend one's own behaviour at the criminal trial.

The next step in my discussion is to show in more detail why virtuous civil disobedients should challenge the accusation of wrongdoing moved against them by the prosecutors. I have already suggested that there are *communicative* reasons to do so. In addition to this, however, I will argue that responding in court, through the legal procedures offered by the trial,<sup>46</sup> may be the way for the civil disobedient to show *respect* for law.

## 8. Plea Bargain and Civic Courage

We have seen above what reasons are offered in support of claim (A). My task is now to question the validity of (A), and to defend my alternative claim (B). In this section, I consider cases where pleading *guilty* after the act of CD should be criticised, as displaying the wrong attitude towards the law. My goal is not to offer a final argument against the guilty plea, but to suggest that pleading guilty is not necessarily a symptom of civic responsibility and respect for the law. I will deal more directly with claim B in the next section.

A guilty plea constitutes the defendant's express confession of the crime with which she is charged. Pleading guilty means admitting *both* responsibility *and* criminal liability. The civil disobedient who pleads guilty does acknowledge the wrongness of her action: by entering a plea of

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<sup>45</sup> This is not necessarily the case of the guilty plea, however, given that the defendant could give a speech before the sentence is issued, in mitigation of her plea of guilty, explaining why she did what she did. I discuss this case in the last section.

<sup>46</sup> For a criticism of the very idea that the civil disobedient should answer the charges "through the legal procedures offered by the trial", see Veitch (2006).

guilty, she admits her wrongdoing, and at the same time forfeits her right to a trial.<sup>47</sup> I described above why, according to one perspective on CD, this kind of behaviour seems to fit with the character of a virtuous civil disobedient. The decision to enter a *not guilty* plea, on the other hand, might conceal an attempt to avoid the consequences of one's action and, more importantly, to question the authority of the law to compel its citizens to obey. My intention is to criticise this view, pointing out that a *not-guilty* plea for CD might, in many cases, deserve *more praise* than an admission of 'guilt'.

To begin with, I want to draw attention to a case when pleading *guilty* is *incompatible* with the character of a virtuous civil disobedient. This is the case of the *plea bargain*, which reveals an important aspect in the character of a civil disobedient who, on the other hand, decides to challenge the prosecution. In the next section, then, I will focus more specifically on the *not-guilty* plea.

When the defendant is faced with a very serious charge, or with more than one charge, she might 'bargain' a guilty plea either to a lesser offence, or to a lesser number of offences than that originally contested to her. Doing so makes it possible for the defendant to receive a lesser punishment overall. This also suits, to some extent, the interest of the prosecutor, who would at least secure that some of the charges against the defendant are indeed confirmed. The underlying idea is that, as an instrument to abbreviate the whole process, plea-bargaining would help preserve scarce resources. However, there are clear advantages on the defendant's side as well: if she is guilty of the major charge(s), it is in her interest to plead guilty to the lesser offence, so to receive a lower sentence overall. In similar cases, the counsel will often suggest to the defendant a plea bargain.

The plea bargain generates issues in cases when the defendant is not guilty or maintains innocence from all the charges. In fact, the counsel might advise her to plead guilty to the lesser charge, because this would be likely to result in a non-custodial verdict: on the other hand, were the

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<sup>47</sup> Ashworth & Redmayne (2010), p.265.

prosecutor successful in showing the defendant's guilt at the trial, the defendant would probably face a custodial sentence. In similar cases, the prospect of a harsh punishment might lead the defendant to abandon a plausible defence she might have, and to plead guilty *insincerely* (which also includes cases where she is indeed guilty, but does not realise she is). The discount for a guilty plea can make an important difference between immediate custody and a non-custodial sentence: it can allow for as much as a third of the overall penalty.<sup>48</sup>

I mention this case merely to highlight that we should not take a guilty plea *ipso facto* as a sign of the *sincerity* of the civil disobedient. There may be cases where, after an act of CD, pleading guilty may reduce the risks of incurring the punishment that the court may think appropriate to the crime. A guilty plea might allow the disobedients to pay a lesser price for what they have done, and we might question whether this would be compatible with the nature and spirit of CD. What I want to point out here is that if the choice of pleading *not guilty* may be criticised as the agent's attempt to escape the punishment, a similar charge might be moved against the *guilty* plea. A defendant who believes herself to be innocent might see good reasons to accept a plea bargain, in order to avoid the risk of being mistakenly sentenced and jailed; a defendant who knows she is guilty would accept a plea bargain with the hope to have her overall punishment considerably reduced. Both cases reveal how a guilty plea can display some degree of *insincerity*, and/or weakness of character, in the individual who chooses it.<sup>49</sup>

Furthermore, this also suggests that, in cases like these, the decision to plead 'not guilty' in spite of the pressure received, may display 'inner strength' in the defendant. In fact, there is more to be said about a civil disobedient who (a) accepts to appear in court when summoned, (b) is willing to cooperate with the institutions regulating the political life of the community, (c) admits her *responsibility* for acting against the letter of the law, and (d) pleads 'not guilty' when asked to

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<sup>48</sup> Ashworth & Redmayne (2010), chapter 10.

<sup>49</sup> For a very critical assessment of plea bargain, as violating the spirit, and possibly also the letter, of four fundamental rights set out by the ECHR, see Ashworth and Redmayne (2010), ch. 10; Schulofer (1992). See also Weigend, T., "Why Have a Trial When You Can Have a Bargain?", in Duff *et al.* (2006), chapter 12.

account for her behaviour. This individual does not deny the right of the state to punish citizens who act against the law; nor does she claim that the prosecutor is referring to acts she did not commit; nor is she, either, coercing the court to listen to her, since she exercises her right to a fair trial. Rather, she appears in court to bear witness to the reasons that motivated her breach of a particular legal directive, and to *persuade* the political community to understand what these reasons are. Most of all, a civil disobedient who pleads *not guilty* might be a ‘virtuous citizen’, insofar as her choice to go to the trial is motivated by a desire to explain to her fellow citizens that she has not neglected her political obligation *to the community*.

The considerations above concerning plea-bargaining are not meant to argue that every guilty plea is based on a bargain. They are intended, however, to suggest that a civil disobedient that pleads *guilty* might not act out of a sense of respect for the law and for her fellow citizens, but rather she could be moved by a concern with her own self-interest. I showed above how a *guilty* plea may sometimes represent a way to *diminish* the legal consequences of one’s own illegal conduct: this might, in some cases, lead to *insincere* pleas, where the defendant pleads guilty in spite of her innocence.<sup>50</sup> It appears, then, that a *guilty* plea might reveal some form of weakness in the defendant. On the other hand, someone who (a) knows that the prosecutor is *right* in accusing her of committing a particular action (to the extent she admits her *responsibility*), (b) is offered a considerable discount in the punishment she might receive, on condition of pleading *guilty* and (c) nonetheless pleads *not guilty* and chooses to go on to the trial may be displaying a form of *civic courage*. By civic courage, I mean the disposition of a citizen who is not willing to compromise her commitment to the values of a democratic community for fear of serious consequences (e.g. sanctions) to herself.

This form of civic virtue is exemplified by the case of the so-called “Camden 28”. This label refers to a group of activists who, in 1973, were charged with various felonies in relation to a series

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<sup>50</sup> As in cases known as “Alford’s Plea”, from *North Carolina vs. Alford*, 400 US 25 (1970).



of anti-war protests, during which they had entered draft board offices at night, and destroyed draft registrations. Each of the defendants was facing more than 40 years in jail. Immediately before the trial, they were offered a plea bargain: by pleading guilty to a single misdemeanour charge, they would have been discharged of all the other ones. The Camden 28 eventually decided to reject the plea, and to go to the trial to defend their conduct: eventually, they managed to persuade the jury of their *innocence*, and became the first anti-war protesters to be acquitted by a jury.<sup>51</sup> It is important to notice that, by challenging the prosecution and risking a very harsh punishment, in order to be able to offer reasons for their law breaking actions, those activists displayed civic courage and a high sense of responsibility in front of their community. To this extent, they displayed the character traits of virtuous citizens.

This reveals that a civil disobedient might plead *not guilty* not as a way to avert or reduce the risk of incurring punishment, but *in spite of* the threat of punishment. It is by accepting the risk of facing the court, to persuade fellow citizens of the civic disposition behind their act of disobedience, that ‘civil’ disobedients may reveal their character as virtuous citizens.<sup>52</sup>

## 9. On Pleading Not-Guilty after CD

We have arrived at the main part of the present discussion, that is, my defence of what I indicated above as claim *B*. I now want to focus on, and criticise, the idea that virtuous civil disobedients, as citizens who respect the law, should abstain from pleading *not guilty* and from questioning whether their illegal action deserves punishment. This idea, that I want to criticise, is grounded on the assumption that a civil disobedient should be aware, *before* breaching the law, that

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<sup>51</sup> Zinn (1997), pp.427-432.

<sup>52</sup> I am aware that there are cases where the same criticisms might be moved against the *not guilty* plea. This refers to its use in what are known as ‘solidarity tactics’. Solidarity tactics are often used by activists, and can be quite effective, especially when defendants are well-organized. Activists use them to negotiate collectively with the authorities, yet applying some form of pressure on them. Some of these strategies imply collectively pleading not-guilty, and invoking the right to a speedy trial and to court appointed counsel: this puts a strain on the court system that often results in the charges being dropped. These tactics pose a serious problem concerning the ‘willingness to cooperate’: due to my emphasis on the ‘performative attitude’, I take them to be unsuitable for the kind of CD I am discussing, given the attempt to coerce the state to drop the charges. They also show that the *not guilty* plea can, under some circumstances, reveal a flawed disposition towards the legal system.

the resort to illegal action brings with it the legal punishment. We saw above that, although the act of disobedience is based on a desire to communicate with fellow citizens, its symbolic nature<sup>53</sup> does not affect its being a breach of law, which still deserves *legal* sanctions. Thus, the argument goes, it is part of the act of CD that defendants accept punishment without arguing against its justification.

What characterizes the nature of CD, according to this view, would then be a sort of *ex ante* acceptance of punishment.<sup>54</sup> This would imply that civil disobedients should not challenge the accusation of wrongdoing, and the punishment that will follow from it: they should plead guilty to bear witness to their commitment to the authority of law.

[In an act of CD, t]he law is broken, but fidelity to law is expressed (...) by the willingness to accept the legal consequences of one's conduct<sup>55</sup>.

I want to argue, against this view, that an *ex ante* acceptance of punishment may fail to express 'fidelity to the law', and that it may not necessarily give moral support to the act of disobedience. The moral status of an agent who acts contrary to law is not enhanced by an *in-built* willingness to undergo punishment. The fact that, *before* acting, one agrees she will be rightly punished for breaching the law, does not make one more 'faithful to the law' than someone who seeks to avoid the punishment. The former case does not display a stronger respect for the law than the latter one does. If this is correct, as I hope to show, it means that there might be no reason to necessarily approve of a civil disobedient who acts illegally and then pleads 'guilty'; nor to disapprove of a civil disobedient who equally acts illegally, but claims she should *not* be punished. If the focus of our concern is on the attitude of *respect* for the law, it might be that the attempt to *avoid* punishment might be more appropriate to virtuous CD.

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<sup>53</sup> See chapter 2.

<sup>54</sup> This indicates that, *before* committing the act, the agents should now, and accept, that they will be punished for that act. They accept the punishment for law breaking *before* breaching the law.

<sup>55</sup> Rawls (1999), sec. 55. See also Sabl (2001), p. 320: "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".

We might then be in a position to reply to claim *A* mentioned above: our disapproval of a civil disobedient who pleads ‘not guilty’ and who tries to argue that she should not be punished for having acted illegally, might rest on a misconception of what ‘respecting the law’ means. My argument relies on the following two sub-claims:

a) an *ex-ante* willingness to be punished might fail to acknowledge the power of the law to bind morally its subjects;

b) an admission of ‘guilt’ is an admission of failing to treat others with the respect due to their status as autonomous agents. However, one who chooses CD does so out of a commitment to respecting individual autonomy. It follows that civil disobedients may not declare themselves ‘guilty as charged’.

What lies behind these sub-claims is the idea that, under some circumstances, the *not guilty* plea may be one way for the civil disobedients to show that they take the law *seriously*. In the following section, I explain why I believe so.

## **10. Taking the Law Seriously: Narrow Vs. Broad Acceptance of Punishment**

In chapter 5, I claimed that citizens have a prima-facie moral obligation to obey the law of the state in which they live, and that such obligation is primarily an obligation due to one’s own fellow citizens and not to the law as such. A citizen of a democratic community recognises the fundamental connection between her own autonomy and the community’s stability. One also sees that one’s own right to be respected as an autonomous agent entails a requirement to see to it that the same right is as well accorded to fellow citizens.

To this extent, compliance with the state’s legal directives hinges on the obligations one has to one’s fellow citizens: by acting against the law, one wrongs *them*. We saw in chapter 5 that this generates a fair-play based obligation to accept the sanction inflicted by the state’s officials after the

act of CD (arrest, fine, summons, etc.). This is why, I suggested, it would be morally inconsistent for a civil disobedient to try to avoid *arrest* or, more generally, accountability for the illegal action.

However, appearing at the trial does not rest merely on a duty of fair-play. In fact, it seems consistent with the principles of CD to argue that a civil disobedient might even *aim to appear at the trial*, as part of her overall communicative endeavour: that is, in order to exercise her right as an autonomous and responsible agent. If the criminal trial and CD share the same communicative nature, representing ways of addressing citizens as autonomous agents, then a convergence between the two may appear likely. Thus, civil disobedients should see in the trial the place to pursue rational persuasion of the state. Appearing at the trial might be one of the *central* aims of CD: that is to say, civil disobedients should pursue their communicative aims both ‘out in the street’, with their illegal action, and in the court room, when called to account at the criminal trial. Once again, the communicative action of CD may not end with police arrest.

This falls short of establishing that CD also requires pleading *guilty* when at the trial. In my view, there are two senses in which we can intend the meaning of “accepting the punishment” for an act of CD. By distinguishing them, we can grasp why, from the fact civil disobedients have reasons to comply with an order to appear in court,<sup>56</sup> it does not follow they should also claim they are guilty of the criminal conduct they are charged with. There is a “narrow” sense of ‘accepting punishment’, which refers mainly to compliance with the orders of the officials after the breach of the law. The argument discussed above in chapter 5 defends this narrow sense of accepting punishment, by giving reasons why civil disobedients should not, for example, *run away* from the legal consequences of their action. However, there is also a “broad” notion of ‘accepting punishment’, which relies on a degree of ‘passivity’ in the face of the punishment. This is exemplified, as already mentioned, by Gandhi, who took the *ex ante* acceptance of punishment as a

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<sup>56</sup> I do not argue that aiming for a trial should be constitutive of CD. Here I highlight, however, what I think is an undeniable link between communicative CD, on the one hand, and the trial as the place for reason-giving, on the other.

central element of CD: by pleading ‘guilty’ and avoiding challenging the legitimacy of the state to punish illegal behaviour, the disobedients show their law-abiding character.

From what I argued above, it follows that while I agree that *narrow* acceptance of punishment should be constitutive of a law-abiding act of CD, I deny that a *broad* acceptance would strengthen the moral status of the civil disobedient. Rather, I will suggest that accepting punishment in the *broad* sense might even diminish the law-abiding nature of CD.

I contend that civil disobedients have a duty to *expose* themselves to the risk of punishment, but not to *seek* punishment, nor to submit to it by pleading guilty without contesting the accusation.<sup>57</sup> According to the position I defend, an *ex ante* acceptance of punishment might fail to show respect for law’s binding authority over its subjects.<sup>58</sup> I therefore criticise the very idea that accepting punishment (in the “broad” sense) displays an agent’s attitude of respect for the law: quite the contrary, it might be that the *ex ante* disposition to submit to punishment would fail to grant the appropriate respect to law in a crucial way.

What does it mean to have respect for the authority of law? It means accepting that law has the power to influence individual behaviour by giving reasons for action:<sup>59</sup> the fact that the law says ‘Do not X’ is a (pro tanto) binding reason for an agent to avoid X-ing. It is a claim for compliance from its subjects; a claim whose legitimacy ‘virtuous citizens’ have internalised, thus seeing law’s instructions not as coercive impositions of power, but as directives aimed at the common good.<sup>60</sup> It is from this standpoint that we can say that a citizen *respects* the law. This form of respect plays a central role in the account of civic virtue that I defend in this work. It entails a willingness to take the law ‘seriously’, that is, to understand what claims the law makes and why it makes them.

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<sup>57</sup> A similar position is defended in Boyle (1988).

<sup>58</sup> See Levine (2005); and Olsen (1984).

<sup>59</sup> See Raz (1975), pp.49-85; (1986), pp.23-38.

<sup>60</sup> See Hart (1961), p. 90: “What the *external* point of view [that of someone who takes laws as a *signal* that people will behave in a certain way, albeit just to avoid unpleasant consequences] cannot reproduce is the way in which the rules function as rules in the lives of (...) private persons who use them, in one situation after another, as guides to the conduct of social life (...). For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.”

Citizens take the law seriously when they see that “the existence of a legal rule directing one to  $\varphi$  is always a non-trivial reason to  $\varphi$ ”.<sup>61</sup>

Given this notion of respect, we should be wary of the idea that an *ex ante* acceptance of punishment is necessary in order to display the *appropriate* respect for the law. Consider a different case of rule following, that of a game, e.g. football. Imagine a football player who deliberately commits a series of infractions during the match: she touches the ball with the hand to help herself towards scoring a goal, she tackles her opponent very violently, she feigns pain to falsely accuse the opponent of irregular tackles... This person just plays like this, in the hope of getting away with it: however, she is well aware that she is violating the rules of the game and, in fact, always accepts the punishment from the referee, without arguing whether or not she really deserves that red card. She is willing to accept the punishment, for she knows that she acted irregularly. There seems to be something *intrinsically wrong* in this individual as a football player: in spite of the fact that she ‘respects’ the referee’s authority to punish her, it would be very hard to say that this player is displaying the character of the good player, who *abides* by the rules of football. It would be quite inappropriate to show her to young players, as an example to follow.<sup>62</sup> Along the same lines, we can imagine a daughter who disobeys her father’s command to stay at home on a particular night: the girl openly defies the father’s order by walking out of the house. However, on returning home she accepts being punished by her father for the act of disobedience. Barring particular circumstances, we should be wary of saying that the girl, in accepting the punishment imposed on her by her father, is thereby showing respect for the latter’s authority. It seems even less plausible to say that by undergoing the punishment, that girl is displaying the character of ‘a good daughter’.

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<sup>61</sup> Edmundson (2006), p. 9.

<sup>62</sup> Nonetheless, the history of football is full of cases like this. During this year’s Football World Cup, Ghana was going to score at the very last minute against Uruguay, and to qualify for the semi-finals. However, Uruguay’s midfielder Suarez deliberately stopped the ball with the hand, hence preventing Ghana’s victory. It should go without saying that Suarez did not act as a good football player should – although he did not argue when the referee sent him off, and regardless of the fact that his compatriots saw him as the country’s saviour. An even clearer case was that of Manchester United player Eric Cantona, who remains famous for having jumped off the field during a match to kick Matthew Simmons, a supporter of the opponent team. Again, his ‘acceptance’ of the punishment does not seem to contribute to a positive assessment of his character as game player. See Greenfield, & Osborn (2001), pp.149-150

The point is that her open disobedience lacked the appropriate degree of respect she should owe her parents. Both in this case, and in that of the football player, something is missing in the relationship between the subject (the player, the daughter) and the *authority* (the rules of the game, the parent).<sup>63</sup> What, in my view, is missing is the obligation-generating weight that the norm (in these cases, the game's rules and father's order) is supposed to have. *Pro tanto*, this should have priority over whatever happens *after* that norm has been disregarded:

while seeking to evade punishment –whether by stealth, violence or necessity defence arguments- implicitly accepts the obligatory force of the law, breaking the law and accepting the punishment, with plans to break it again, simply instantiates the belief that the law has no moral force.<sup>64</sup>

What I am trying to demonstrate is that being willing to accept the punishment *before* the act of disobedience (the *ex ante* willingness to be punished discussed above) does not give proper consideration to the fact that the law claims the authority to obligate its subjects to obey. An *ex ante* acceptance of punishment might not give support to the agent's disobedience: in some cases, it would rather display the agent's failure to treat the law with the due respect, that is, to take the law seriously.

This connects to the idea that “an open refusal to obey an unjust law [with the willingness to accept punishment for that] shows the highest respect for 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”.<sup>65</sup> Arguing that an open violation of a legal enactment, accompanied by an *ex ante* readiness to be punished, would display the agent's respect for the law, may be unwarranted because it would raise questions concerning what kind of authority is granted to the law by an individual acting in this way. Someone who thinks her duty to obey is discharged by acting

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<sup>63</sup> See Raz, (1979), p. 13, 21, for the distinction between ‘*being* an authority’ and ‘*having* an authority’.

<sup>64</sup> Levine (2004), p. 375.

<sup>65</sup> Storing, H.J., “The case against Civil Disobedience”, in Bedau (1991), p. 93.

illegally, and then accepting the punishment, may be taking such duty, to say the least, not seriously enough. Once the subject acknowledges the role of the law, she should not deem an illegal behaviour compatible with her own political obligation.

Thus, the criticism against a not-guilty plea for CD might be misleading. A civil disobedient who tries to defend herself against the charges of wrongdoing, by arguing that she should not be punished, and that her action was *not against the law*, may be displaying a proper attitude of respect for law, as opposed to one who admits her guilt. Pleading ‘not guilty’ for CD would not defy the authority of the law: rather, it may reaffirm it. Someone who does CD and is *unwilling* to be declared ‘guilty’, recognises the moral power of the law to bind individual conduct, in a way that may possibly be stronger than the Gandhi-like civil disobedient: the attempt to justify one’s behaviour, through the legal means offered by the trial, demonstrates the disobedients’ commitment to taking the law seriously.

If what I argued so far holds, there may be nothing reprehensible in a civil disobedient who tries to argue against the rightness of her punishment. Pleading ‘guilty’, I suggested, does not seem to constitute a moral requirement for being a virtuous civil disobedient. Respect for the authority of law may be displayed as well, and sometimes to a higher degree, by arguing that one should not be punished for doing CD.

This discussion points out two reasons to question the link between being a civil disobedient and pleading *guilty*. One refers to the communicative nature of CD. The chief goal, for civil disobedients, is to open a process of communication with the rest of the community, and *to keep it open*.<sup>66</sup> They resort to breaching the law to send a message able to reach other citizens, and to elicit their reply, in the attempt to *persuade* them of the necessity to reconsider a particular law or policy. This includes, as we saw above, offering reasons to explain one’s own behaviour, and show fidelity

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<sup>66</sup> On this point, see Sabl (2001), p. 4.



to the liberal values grounding the community. Pleading ‘not guilty’ is one way to further this goal, because it engages the state in a deeper examination of the nature, and the reasons, behind the defendants’ deliberate defiance of the letter of the law. This result might be jeopardized by ‘a quick surrender’ from the civil disobedients: the criminal trial, as a ‘two-way’ process, should allow the citizen to answer the charges and to call the state, in turn, *to do the same*. This would be a way to further the discussion between the citizens and the state, and seems to be in adherence with the aims of an act of CD. Hence, from a mere instrumental perspective, there is a serious case for the *not guilty* plea in CD.

We should notice, in passing, that this also supports the case against *standing mute* and *nolo contendere*, which we saw above as alternative options available to the civil disobedient at the trial. It is true that a defendant has a right to remain silent when faced with the question regarding her own conduct: yet, we can see how this choice openly contradicts the choice to embark on CD, which is based on the desire to establish a process of communication with the community one belongs to.<sup>67</sup> By refusing to talk at the trial, the civil disobedient jeopardizes the underlying search for cooperation towards the common good. Barred exceptional circumstances, I do not consider *standing mute* to be a suitable plea *for a civil disobedient*. Similar considerations apply to the choice of pleading “*nolo contendere*”: here, the defendant does not take a clear stand on her position, rather, she says she will accept what comes. At least from a communicative perspective, central to my account of CD, this would be contradictory for, as in the case just mentioned, the civil disobedient should offer reasons to her fellow citizens to explain why she breached the law. The *nolo contendere* plea, as a compromised position between pleading *guilty* and *not guilty*, does not sit well with the choice to embark on *principled* disobedience. As with *standing mute*, I do not consider this plea as appropriate to an act of CD that displays civic virtue in the disobeying agent.

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<sup>67</sup> Duff *et al.* (2007), p.119-120.

Going back to the *guilty plea*, there is a more important issue concerning the meaning of declaring oneself *guilty*. To understand this point, we need to interpret the significance of a not-guilty plea from the perspective of the responsibility/liability dichotomy mentioned above.<sup>68</sup> Behind a not-guilty plea, there is the defendant's denial of criminal liability for the act— that is to say, a denial that what the defendant did was *wrong*. As already noticed, defendants might challenge the very fact with which they are charged, that is, that they are *responsible* for committing the act deemed illegal. However, the defendants need not deny their responsibility in order to plead not-guilty. They might be claiming that, while being responsible for doing X, they should not be punished for it —that is, they might deny criminal liability for the act. As in the case of the Pit-stop Ploughshares, the defendants might argue that although X is against the *law*, and although they did X, they had a justification for doing X: therefore, they should not be punished, that is, treated as criminals.

We need to focus on *the reasons why a law-abiding citizen aims to avoid a guilty verdict*. These do not refer to a desire to escape the pain that punishment would inflict on the disobedient.<sup>69</sup> There is a deeper motivation for rejecting the label “guilty”. When discussing the moral obligation to obey the *law*, in the previous chapter, I highlighted how citizens ought to respect individual autonomy, that is, to respect other persons' status as autonomous agents. Where law is recognised as necessary to preserve the autonomy of the community's members and to offer opportunities for self-realization, our duty to respect other persons generates a duty to show respect for the law. This correlation hinges on the fact that, where the law is well-functioning, people can organise their expectations around its directives. Citizens “construct their daily lives around the scaffolding of laws. Disrespect for law destabilizes this structure.”<sup>70</sup> The criminal act represents a denial of the respect owed to other person: being declared guilty, or labelling oneself ‘guilty’, amounts to

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<sup>68</sup> Ibid.

<sup>69</sup> As I suggested in the case of plea-bargain, it appears that someone who pleads not-guilty —especially when offered a bargain- displays civic courage, i.e. readiness to face an harsher punishment in order to defend one's behaviour.

<sup>70</sup> Higgins (2004), p.66.

admitting one's own disrespect for the law and, thus, for other persons. This, in turn, is a betrayal of the values that the civil disobedients, on the other hand, intend to preserve.

It follows that a law-abiding individual seeks to eschew the verdict of 'guilty' not (only) to avoid the legal sanctions that accompany such verdict, but because she wants to be a citizen who *respects* the law. She does not want to be ranked as 'criminal', in the same way in which a player who respects the rules of the game does not want to be called a 'cheater'. The behaviour she adopted when doing CD flows from her commitment to respecting individual autonomy; if she was to declare herself *guilty*, she would contradict her intention to act in abidance with the values of a democratic community. This is why a virtuous civil disobedient should seek to persuade the prosecutors, and the community, that she did what she did out of respect for autonomy and, therefore, for the law. The fact that CD implies the breach of a particular law should support the idea

(...) that the acts we all have in mind as acts of civil disobedience really are violations of the law of the pertinent jurisdiction properly understood. But it may turn out that on a more sophisticated and enlightened view of the law they are not.<sup>71</sup>

For this same reason, I am also sceptical about the value of offering a statement in mitigation after pleading guilty, a strategy that is sometimes followed by activists in the attempt to distinguish themselves from plain law-breakers. Thus, rather than denying their criminal liability, the civil disobedients might plead guilty but then, before the sentence is issued, when offered the chance they could give a speech to explain why they did what they did. This was, for example, the behaviour of Gandhi. Although I am, by no means, asserting that it would be 'wrong' to choose such a strategy, I think that, for a civil disobedient who acts in accordance with an attitude of respect for the law, this kind of behaviour might fall prey to the same comments I made above regarding the guilty plea *per se*. Given the possible contradiction between the choice of doing CD,

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<sup>71</sup> Dworkin (1985) p.115. See the connection between Dworkin's claim here, and the distinction between responsibility and liability discussed on pp. 173-174 above.

and defining oneself ‘guilty’, I would argue that, at least from the perspective of showing respect for the law, in the sense I have discussed above, the choice of a guilty plea followed by a statement in mitigation would still fail to acknowledge law’s power to bind citizens to act in a certain way. While a statement in mitigation could certainly fit with the communicative aims of CD and of the criminal trial it is, in my view, still problematic with regard to the relationship between the citizen and the law.

The argument I am offering is an attempt to understand this relationship in light of a “more sophisticated and enlightened view of the law”.<sup>72</sup> This view enables us to see what reasons citizens have to *respect* the law, as the institution that protects and promotes individual autonomy. As we saw in chapter 1, the authority of law does not derive from its being a mere command imposed over its subjects: law derives its power from its relation to human well being. Thus, the value of the law lies in the value of the autonomy it protects and promotes. This need not support the idea that “*lex iniusta non est lex*”: the obligation to obey the law extends to those directives that are not unreasonably unjust.<sup>73</sup> However, the perspective presented in this work is committed, once more, to the idea that the relationship between the citizen and the law should go beyond that of merely a subject faced with a *system of rules*:

[Positivism] holds that a legal obligation exists when (and only when) an established *rule* of law imposes such an obligation. (...) [Against this view], we may want to say that an obligation exists whenever the case supporting such an obligation, in terms of binding legal *principles* of different sorts, is stronger than then case against it.<sup>74</sup>

A law-abiding civil disobedient could plead ‘not guilty’ to argue she did not defy her political obligation: she could rightly claim that her act, though against what the law says, was not against what the law is meant to implement, that is, not against the duty to respect other persons as

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<sup>72</sup> See fn. 71.

<sup>73</sup> See Edmundson (2004), pp. 215-259.

<sup>74</sup> Dworkin (1977), pp. 64-65.

autonomous agents. This is where the main difference between an action of CD and a *criminal* action lies. The breach of the law, in the former case, may represent the way virtuous citizens “acquit rather than (...) challenge their duty as citizens”.<sup>75</sup>

There is a *statistical presumption* that [illegal acts] are, in any given case, wrong. But that is not to say that it is their character as illegal acts that makes them wrong or contributes in any degree to their wrongness. Rather their illegality is a characteristic contingently linked to the other properties that truly make them wrong; so that its presence may be a more or less reliable index or clue to the presence of wrongness, not its ground or basis.”<sup>76</sup>

## 11. Justification Vs Excuse

It is important to consider one aspect concerning the claim just made about pleading not guilty after CD. One thing that was mentioned only in passing in the foregoing discussion was that the not guilty plea may be backed by different claims: that is to say, there are various legal defences at the criminal trial, for a defendant to deny one’s own *liability*.<sup>77</sup> These fall under two categories: defences of ‘justification’ and defences of ‘excuse’.<sup>78</sup> As the terms suggest, what is at stake here is the important difference between ‘being justified’ and ‘being excused’. An individual might be charged with murder: it might turn out, after investigation, that the defendant acted in self-defence, for she was being attacked by the victim trying to kill her. In this case, the defendant could be found not guilty, hence acquitted, for her conduct was *justified* by the threat posed to her by the victim’s attack. On the other hand, it might be claimed that the defendant, at the time she killed the victim,

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<sup>75</sup> Dworkin, (1985), p.105.

<sup>76</sup> Feinberg (1994), p.173.

<sup>77</sup> Of course, a defendant might even not go that far, and might deny *responsibility*, that is, that she committed the act she is charged with. However, in my opinion this seems to be self-contradicting in the case of CD, which implies the open and deliberate violation of the law. It would be odd for a civil disobedient to claim, for example, that she did not occupy the airport runway. What she could do is to admit she committed the act, yet claim that, under those circumstances, that action was not a criminal wrong.

<sup>78</sup> Antony Duff has criticised this either/or division between excuse and justification, pointing out the “futile, procrustean attempt to force all defences into one of these two categories”. His claim is that there are many cases in which an action might have neither an ‘excuse’, nor a ‘justification’, but rather a ‘warrant’ or an ‘exemption’. See Duff (2007), p. 265 and ff. See also Husak, D., “Beyond the Justification/Excuse Dichotomy”, in Kramer, Reiff, and Cruft, (eds.), *Crime, Punishment and Responsibility: Antony Duff’s Philosophy of Law*, Oxford: Oxford University Press, forthcoming in 2010.

was acting in a state of mental insanity. This might reduce her (criminal) responsibility, and could lead as well to the defendant's acquittal, on grounds that her conduct was *excused* due to her insanity.<sup>79</sup>

The two defences are backed by very different assessments of the defendant's behaviour. Saying that she was *justified* in acting as she did implies a degree of *approval* for what she did under the circumstances: given she was under attack it was, all things considered, permissible for her to act in self-defence (and, implicitly, it would be for anyone else who happens to be in the same situation). The idea of *excuse* is not supported by the same consideration: saying that she is excused because she was insane when she acted, does not express a form of approval for what she did. We would consider her behaviour *unreasonable*, which is not the case with someone who acted justifiably:<sup>80</sup> we would think that a *responsible* person would not have acted in the way the defendant did.

These brief considerations are sufficient to bring to light an important point. It goes without saying that what a civil disobedient should aim for is not acquittal through *excuse*: this would contradict her claim that she acted in abidance with her obligations *qua* member of the community. A civil disobedient who pleads not guilty aims to prove that her action was *justified*, that her behaviour, though illegal, was that of a *reasonable* citizen.<sup>81</sup> In addition to showing *respect for others* as autonomous agents, she is moved by a concern with *self-respect*:

The self-respecting person aspires to live up to the proper standards for success in and fitness for the life she leads, and holds herself out to be judged by those standards. It follows that it is part of the nature of self-respect that a self-respecting person wants to be able to give an intelligible rational account of herself, to be able to show that her actions

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<sup>79</sup> The famous case of John W. Hinckley, Jr., who in 1981 attempted to kill the US President Ronald Reagan, and was later acquitted, is an example of the insanity defence. See Bonnie *et al.*, (2008).

<sup>80</sup> “[J]ustified actions should be conceived of as right actions, while excused actions should be thought of as wrong actions done nonculpably”. Hurd (1999), p.1558. See also Baron (2005).

<sup>81</sup> Douglas Husak challenges the idea that justification has ‘logical’ and/or ‘normative’ priority over excuse. See Husak (2005).

were the actions of someone who aspired to live up to the proper standards of success in her life and fitness to lead it.<sup>82</sup>

There are many ways in which defendants could claim, at the trial, that their action was *justified*. The more frequent, and in my view more appropriate legal defence, is the already mentioned defence of *necessity*, which relies on the broad idea that the illegal act was justified, under the circumstances, as necessary to avert a more serious evil.<sup>83</sup> This defence is often entered, with different rates of success, by anti-war,<sup>84</sup> anti-nuclear, and pro-life activists,<sup>85</sup> and nowadays we see an increasing role of the defence of necessity in trials of environmental activists.<sup>86</sup>

It has been suggested that the law should acknowledge the peculiar nature of conscientious actions like CD, and allow for a legal defence available to those who resort to this form of illegal behaviour. It is not my intention to make any suggestion as regards this point, given that my task in this thesis has been to analyse the dispositions of virtuous civil disobedients towards the law, and not how the law should treat those who do CD.<sup>87</sup> Hence, while I am arguing that a civil disobedient should plead not guilty, I am not claiming that the state should always acquit her: as I pointed out before, the communicative process might be deemed successful even when the message sent does not receive a positive reply.

Similarly, I do not think that we need a special legal defence available for those who do CD. This is because I believe that allowing for a verdict tailored on CD might diminish the latter's value

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<sup>82</sup> Gardner (2007), p. 133. Gardner, however, tends to justify both justification *and* excuse as compatible with individual self-respect, a claim I do not agree with, for reasons I explain in the text.

<sup>83</sup> Cavallaro (1993) identifies 4 requirements for a valid defence of necessity: 1) that when the defendant committed the action, she was faced with a choice of evils, and chose the lesser one; 2) that she acted to prevent imminent harm; 3) that she had a reasonable expectation of a casual connection between her action and the harm to be averted; 4) that there were no other legal alternatives available. *Ibid.*, p. 356.

<sup>84</sup> See the case of the Pit-stop Ploughshares discussed above, p. 174; and the two activists at Fairford RAF base, discussed above in chapter 2.

<sup>85</sup> Anti-abortion activists are the less likely to be acquitted on grounds of necessity, especially with reference to requirement (3) mentioned in fn. 83 above. See Falcon Y Tella, (2004), p. 205.

<sup>86</sup> Vidal (2008). Matthew Humphrey has recently argued that environmental activists may have strong reasons to appeal to the defence of necessity, in virtue of the fact that, through their protest, they are aiming to avert *irreversible* harms, e.g. the extinction of forms of life in the ecosystem due to global warming. See Humphrey (2006).

<sup>87</sup> Thus, I do not deny that the state might owe something special to 'virtuous civil disobedients', by for example labelling them 'guilty but civilly disobedient', as argued by Hall (2007). What I say is that it is not up to the citizen to ask for such a special treatment.

as an action at “the outer limit” of the law.<sup>88</sup> The risk of incurring the legal punishment is part of the choice to do CD, and it is because of this risk that we can admire the civil disobedient as someone who shows the kind of civic courage I mentioned above, with reference to the plea bargain. Allowing for a special justification for CD, in addition to those that are already available to a defendant, it is not necessary under a system that grants responsible citizens the right to be heard, and to defend themselves at the trial. Nor do the civil disobedients need to demand such special exemption: given that their action is the product of a deliberate choice, if their act of CD is carried out under a sufficiently democratic system, they should think it is up to the judge or jury to decide whether they deserve to be punished for that, or not. This would imply an all-things-considered judgment, with the statements issued by the protesters during the criminal proceedings being only one factor in the final decision. Allowing for a special legal defence for CD might also bring the civil disobedient closer to the conscientious objector, i.e. someone who asks for some special exemption from the law, instead of acting with the aim to contribute to what is in the common good. Fear of punishment should not be an element motivating the behaviour of virtuous civil disobedients: thus, demanding a special protection from the law should not be one of their main concerns.

## Summary

The discussion above sheds more light on claim (B) mentioned above. It is not enough to argue that civil disobedients *might* choose to plead *not guilty* to persuade the community that their illegal behaviour is not a criminal wrong: what I have argued is that they *should* aim to prove that their action deserves the *approval of* the community, that is to say, that it represents what reasonable citizens (‘good citizens’) would do under the circumstances. Arguing that one should be *excused* is not appropriate to the communicative aims of CD, because it fails to assert the action’s *conscientiousness*, that is, the fact that what motivates the breach of the law in CD is a concern with

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<sup>88</sup> Rawls (1999), p. 321.



the common good. This disposition, as an expression of *civic virtue*, represents an *admirable trait* in the citizen: it is, therefore, the main concern of a civil disobedient that her action of CD can finally meet with the *approval* of her fellow citizens.

I have claimed that arguing against one's own punishment acknowledges the moral weight of our obligations to fellow citizens, and the derivative obligation to obey the law: and that this fits well with the portrait of an agent who respects the law. The appropriateness of pleading guilty at a trial for CD should then be established on a case-to-case basis. My aim in this chapter has not been to rule out the guilty plea as an element in the communicative process enacted by the act of CD:<sup>89</sup> I focused on, and criticised, the narrower claim that being a civil disobedient *implies* pleading *guilty*. What I tried to show is that the reasons usually adduced to criticise the choice to *plead not guilty* for CD fail to be conclusive. An analysis of the reasons behind the *not guilty* plea, of the nature of the criminal trial as a communicative enterprise, and of the meaning of *respecting* the law, support the idea that a *virtuous* civil disobedient ought to face the legal consequences of her law breaking behaviour: however, this does not imply a surrender of her own right, as an autonomous being, to (be asked to) offer reasons to account for her action. Given the distinction between justification and excuse mentioned above, there are strong reasons to hold that a civil disobedient should go to the trial not only to defend her conduct against the threat of punishment, but to seek, through *persuasion*, the approval of her fellow citizens for the way she acted. It is in light of the considerations presented in this work that, I have argued, we might conceive of CD as the action that a virtuous citizen would do, *out of character*, under the circumstances. In spite of its law-breaking character, an act of CD may constitute, at least under regimes that approximate the 'idea' of democracy, what a 'good citizen' should do.

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<sup>89</sup> For example, I do not reject the possibility that the guilty plea might have a *symbolic* value as well.

## CONCLUSION

The view defended in this work has highlighted the centrality of a disposition of respect for autonomy in the life of democratic communities. Throughout these chapters, I have constantly referred to ‘virtuous citizens’ as those who act out of a disposition of respect for the law. Yet, I have argued that ‘respect for the law’ is a good trait of character because of its relations to the more fundamental duty to respect fellow citizens as autonomous agents. I suggested that in order to assess the behaviour of individuals qua citizens, we need to consider what kind of disposition lie behind their actions. This was the thought grounding my claim, in chapter 1, that an act of obedience to the law may not necessarily reveal good traits of character in the agent.

The approach defended in this thesis will probably appear extremely idealistic. In addition to the raised eyebrows that an attempt to portray “the excellent citizen” is doomed to meet, it is also true that the kind of societies I have discussed can hardly find its correspondent in the current globalised scenario, where ever-increasing inequalities among individuals, and structural forms of injustice and oppression, seem to call for much more than acts of ‘persuasive communication’. Also, it is probably a further weakness of this thesis that it centres exclusively on the relation of an individual to her own community, while ignoring the growing role played by extra-national social movements in the fight for global justice. It might well be the case that, as ‘citizens of the world’, we have different obligations from the ones I have been discussing in this thesis. Given that, as I have claimed, there are contexts where the choice to do CD would not represent ‘the right mean’, there are reasons for being sceptical that the form of disobedience I have discussed throughout this work will often take place in the current political context.

Nevertheless, the main claim of this work remains in place. This hinges on the defence of forms of participation in the democratic debate that, while being ‘unconventional’, reveal a disposition to cooperate with others in the common interest. It is not implausible to expect, following from what I have argued in this thesis, that in a society that is increasingly unjust,

virtuous citizens might display their respect for the law, and for their fellows as autonomous agents, not by simply communicating their concerns, but by overthrowing the political regime. This might certainly be a reassuring thought if, as Fromm has warned us, “human history began with an act of disobedience, and it is not unlikely that it will be terminated by an act of obedience.”<sup>1</sup>

The debate on CD, as I have showed, has progressively abandoned the attempt to define what “is” CD, focusing progressively more on what attitudes characterize a civil act of law-defiance: this, I believe, has happened in response to the changes that have taken place, in the last 20 years, in the way societies are organised, and in the way they interact with each other. It appears, therefore, that the notion of what constitutes a ‘civil’ behaviour has changed, and will change further, in accordance with the changes in the political dimension of our life. This may signal that the choice to examine our obligations qua citizens by focusing on our inner dispositions, rather than on the external ‘structure’ of our societies, might be a path worth pursuing further.

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<sup>1</sup> Fromm (1984), p.1

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