Expert Report June 22 2023

Professor Kimberley Brownlee
University of British Columbia

[This is an abbreviated version of the report submitted to the BC Provincial Court as an exhibit in the cases listed below. Portions of the report on pp.3-8 were accepted as evidence. This abbreviated version excludes the analysis of the defendants' actions (in Sections D.6 and D.8) as well as any specific references to their case made elsewhere in the report. Posted online: September 11 2023]

RE: Mr. Howard Breen and Ms. Melanie Murray
Nanaimo Provincial Court Files: 89752; 89768-2-C; 89829; 89874; 89955; 89830
Duncan Provincial Court File: 44305

A. Summary

Instruction: 'As requested, please produce a report on civil disobedience in the context of environmental movements, with an opinion on if/how the activities of Mr. Breen and Ms. Murray qualify.'

Sections B and C summarise my qualifications and the materials on which this report relies.

Section D.1 outlines the tradition, concept, and democratic function of non-violent civil disobedience both within Canada and abroad. Section D.2 surveys different positions that courts have taken on civil disobedience and climate activism. (Although many types of climate activism are legal, the term 'climate activism' will refer here to activities that are presumptively in breach of law.) The subsequent parts of Section D assess the defensibility of both climate activism and the defendants' specific actions.

Section D.3 considers philosophical discussions about the nature of, and possible rationales for, necessary breaches of law, offering some clarificatory comments. Section D.4 specifies the conditions for morally justified climate activism, which are: 1) just cause, 2) last resort, and 3) parsimony. Section D.5 answers possible objections.

Section D.6 analyses […] The report notes that actions which involve *indirect action* (where the defendants had no principled reason to oppose the specific legal norms they breached or, at least, they did not intend to oppose those breached norms in their protest) might seem to fall short of justification. But, the assessment of *indirect action* must be informed by an appreciation that sometimes *direct action* is either impossible or unconscionable. Highly constrained, conscientious, and communicative breaches – be they direct or indirect – which are undertaken as a last resort with the aim of mitigating specific effects of the climate crisis have as good a claim to vindication as the best-known examples of justified civil disobedience, such as Rosa Parks's refusal to give up her bus seat.

Section D.7 focuses on the demands of sincere belief and deep conviction, outlining a rationale for an excusatory demands-of-conviction defence for non-violent climate activism, drawing on the work of former UK Law Commissioner Jeremy Horder, who applies this excuse to certain acts of conscientious objection. A rigorous analysis of *conscientiousness* shows that this lawful excuse applies more readily to certain acts of civil disobedience including non-violent climate activism, as these conscientious agents are willing to be seen and to bear the risks of holding true to their convictions.

Finally, Section D.8 assesses […].

B. Expert Qualifications

This analysis is informed by my expertise on the theory and practice of civil disobedience. I am the author of *Conscience and Conviction: The Case for Civil Disobedience* (Oxford University Press, 2012), the *Stanford Encyclopedia of Philosophy* entry on civil disobedience (2007; 2021), and numerous academic and public-facing articles. I have presented this work to the Law Society of Ireland, the Royal College of Surgeons in Ireland, physicians at Duke University Hospital in North Carolina, and judges of the Victoria Court of Appeal and Federal Court of Australia as well as in numerous named and keynote lectures. This work has been cited by human rights groups and NGOs including the ACLU.

I hold a DPhil in Philosophy from Oxford University, an MPhil in Philosophy from Cambridge University, and a BA in Philosophy from McGill University. I am a Rhodes Scholar, Commonwealth Scholar, and Fulbright Fellow. I do not hold a Law degree. Presently, I hold the Canada Research Chair in Ethics and Political & Social Philosophy at the University of British Columbia. Prior to this, I held a Professorship in the University of Warwick Philosophy Department and an Associate Professorship in the Warwick Law School (UK). Please see attached *curriculum vitae*.

C. Facts and Assumptions Informing this Report

Please see the attached letter of instructions, court filings, and links to public reporting on the defendants' actions. Since an analysis of putatively principled action must attend to the person's commitments and beliefs, and since the court filings do not speak to the defendants' commitments, this report draws on publicly available investigative reporting to inform the opinions in Sections D.6 and D.8. This is consistent with the CLEBC guidance that expert witness reliance on second-hand evidence is generally permissible.[1]

[1] In its guidance on 'Briefing Expert Witnesses', the CLEBC states that expert witness reliance on second-hand evidence is generally permissible: 'In *R. v. Lavallee*, 1990 CanLII 95 (SCC), Wilson J. distilled the ratio of *Abbey* into four principles (at para. 66):

(1) An expert opinion is admissible if relevant, even if it is based on second-hand evidence.

D. Full Opinion

D.1 The Tradition, Concept, and Democratic Function of Civil Disobedience

D.1.i The Tradition

Henry David Thoreau observed that many people serve their society with their bodies only, as its military recruits and *posse comitatus* for example. As such, they do not engage in the free exercise of judgment or moral sense, but instead put themselves on a level with wood, earth, and stones, or dogs and horses, and yet are often esteemed as good citizens. Some others serve their society with their heads, as its legislators, politicians, lawyers, ministers, and office-holders. Yet, serving with the head alone is perilous, Thoreau cautioned, since it means rarely making moral distinctions and therefore being as likely to serve the devil as God without intending it. Only a very few people, as heroes, patriots, martyrs, and reformers in the great sense, 'serve the State with their consciences also, and so necessarily resist it for the most part; and they are commonly treated by it as enemies.'[2]

Although Thoreau is credited with coining the term 'civil disobedience', the practice is as old as Antigone and Socrates. It includes the noble efforts of Mahatma Gandhi, the Women's Freedom League, Martin Luther King Jr, Rosa Parks, the African National Congress, Henry Morgentaler, Julia Butterfly Hill, and many others. Thoreau, for one, refused for many years to pay his state poll tax as a protest against slavery, the extermination of Native Americans, and the war against Mexico. In his famous 1849 essay 'Resistance to Civil Government', Thoreau justified his tax-refusal as a way to ensure he did not lend himself to the government's wrongs which he condemned, and he encouraged his fellow townspeople to do likewise. Since then, many writers and activists have drawn from Thoreau's account of principled non-cooperation – or *civil resistance* – including Leo Tolstoy, Gandhi, King, and Gene Sharp.[3] Most recently, academics publishing in *The Lancet* (2020) and *Nature* (2022) have entertained the idea that medical doctors and scientists have obligations to engage in civil disobedience aimed at mitigating the climate crisis, particularly in jurisdictions such as New Zealand 'where participation incurs a lower risk of harm'.[4]

---

(2) This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
(3) Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
(4) Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.'

See https://www.cle.bc.ca/wp-content/uploads/2021/09/758_Expert-Evidence_2021.pdf (accessed April 2023).

[2] Thoreau, Henry David (1849), 'Resistance to Civil Government' (various editions). See: https://wwnorton.com/college/history/archive/resources/documents/ch13_04.htm.

[3] *Civil resistance* is a broader notion than *civil disobedience*; it includes both lawful and civilly disobedient forms of action.

[4] Bennett, H., Macmillan, A., Jones, R., Blaiklock, A., & McMillan, J. (2020), 'Should health professionals participate in civil disobedience in response to the climate change health emergency?', *The Lancet*, *395*(10220), 304-8. See also, Capstick, S., Thierry, A., Cox, E., Berglund, O., Westlake, S., &

Gandhi drew on Thoreau's ideas in his non-violent campaigns for civil rights, first in South Africa in the 1890s and then in India from 1915 onward. He persuaded Indians to resign British honours, boycott government institutions, strike, mobilise in peaceful demonstrations, and refuse to pay taxes.[5] Gandhi's efforts also included prolonged fasts and his famous 1930 Salt March, a 240-mile walk from Ahmedabad to the Arabian Sea coast with thousands of followers, to collect salt from the shore, in violation of the 1882 Salt Act. The action prompted millions of Indians to follow suit.

During the US civil rights movement, King wrote powerfully from the Birmingham, Alabama, city jail of the pain in being asked to wait for a better season to push for the full rights of a citizen:

> I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action"; who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will.[6]

Many US civil rights campaigns took the form of test cases, where activists sought to test the constitutionality of specific laws by breaching them. On December 1, 1955, Rosa Parks famously refused to vacate her seat in the 'coloured' section of a Montgomery, Alabama, bus once the whites-only section had filled. The bus driver evicted her and contacted the police, who arrested her and fined her. Parks's action helped to trigger the year-long, 40,000-person-strong Montgomery bus boycott, which led to the USSC ruling in 1956 that segregated buses were unconstitutional.[7]

Canada has its own tradition of civil disobedience and direct action. Keith Fleming writes that throughout the 19th and 20th centuries,

---

Steinberger, J. K. (2022), 'Civil disobedience by scientists helps press for urgent climate action', *Nature Climate Change*, *12*(9), 773-4.

[5] Brown, J., 'Gandhi, Mohandas Karamchand [known as Mahatma Gandhi] (1869–1948), political leader and religious and social reformer'. *Oxford Dictionary of National Biography*: https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-33318.

[6] King, Martin Luther Jr. (1963), 'Letter from Birmingham City Jail'. Reprinted in Bedau, Hugo (ed.), (1991), *Civil Disobedience in Focus*. London: Routledge.

[7] Theoharis, Jeanne (2015a), 'How History Got the Rosa Parks Story Wrong,' *Washington Post*, December, 2015: www.washingtonpost.com/posteverything/wp/2015/12/01/how-history-got-the-rosa-parks-story-wrong/.

> …every protest movement of note in Canada involving disputes as wide-ranging as women's voting rights, labour union recognition, temperance legislation, wartime conscription, and social welfare reforms, to mention only a few, invariably incorporated some element of civil disobedience.[8]

One of Canada's most famous activists, Dr Henry Morgentaler, described his efforts to provide abortion care in the 1970s and 80s as *civil disobedience*, convincing three francophone juries in Montreal that he provided a medically necessary procedure by offering abortion services in contravention of the Criminal Code.[9] In 1988, following his second appearance before Canada's Supreme Court, Dr Morgentaler's acquittal was upheld, resulting in the decriminalisation of abortion.

More recently, in 2012, Montrealers engaged in Canada's largest display of civil disobedience to date, known as the 'Maple Spring'. Over 200,000 Montrealers participated in broadly peaceful demonstrations in breach of draconian limits on expression and assembly imposed by the Quebec government in response to student protests against tuition hikes.[10] Fleming observes that:

> If not everyone agreed with the specific tactics and aims of the Maple Spring protesters, and certainly there were critics aplenty, peaceful civil disobedience had become [by then], at least tacitly, a generally accepted form of political dissent within an accommodative Canadian political culture defined by its general deference to political authority and hierarchy, acceptance of interventionist government, preference for order and compromise over confrontation, and the need to balance personal freedom with the public good.[11]

Cultural commitments to peace, order, and compromise are best understood as commitments to the rule of law and the principles of fundamental justice, commitments which justified civil disobedience usually serves (see Section D.1.iii).

---

[8] Fleming, Keith (2020), '"Socially Disruptive Actions ... Have Become as Canadian as Maple Syrup": Civil Disobedience in Canada, 1960–2012', *Journal of Canadian Studies*, 54: 1, 181-212.

[9] Cowan, Paul (1984), *Democracy on Trial*, National Film Board of Canada: https://www.nfb.ca/film/democracy_on_trial/

[10] In May 2012, the Quebec government passed Bill 78, which made any demonstration of more than 50 people illegal unless organisers gave police eight hours' notice and the date, time, and route of the demonstration, which police then had the discretion to modify. The Act also made illegal any demonstration within 50 metres of an education building as well as any act or omission that helped or induced someone else to commit an offence under the Act. Ironically, although it was framed as protecting students' rights to attend their classes and not be intimidated, the Act suspended the winter semester at 14 colleges and 11 universities. Bill 78 was condemned by human rights advocates including the UN High Commissioner for Human Rights, Navi Pillay who saw it as part of an 'alarming trend'. See CBC News (2012), 'Ottawa Defends Quebec Bill 78 against UN Critique', accessed at: https://www.cbc.ca/news/canada/montreal/ottawa-defends-quebec-bill-78-against-un-critique-1.1283594. Not all protesters engaged in civil disobedience. Some displayed a lack of self-restraint, conscientiousness, and principled commitment. For analysis, see Brownlee, Kimberley (2012), 'Quebec's Spring of Discontent', *E-International Relations*, June 24 2012: https://www.e-ir.info/2012/06/24/quebecs-spring-of-discontent/

[11] Fleming (2020), 183; see also Wiseman, Nelson (2007), *In Search of Canadian Political Culture*. Vancouver: UBC Press.

D.1.ii The Concept of Civil Disobedience

Whereas Thoreau understood 'civil' to characterize specific political relations between citizens and their government, most contemporary scholars understand the 'civil' in *civil disobedience* or *civil resistance* to relate to *civility*, a kind of self-restraint necessary for concord under conditions of pluralism.[12] The two notions of 'civil' are in fact related. One early meaning of *civility* was 'fitness for a civil, post-feudal society', i.e. fitness to be a citizen rather than a subject and to live in a society governed by respect, decency, tolerance, and reasonable concern for others.[13]

Civil disobedience is a highly constrained form of action, typically specified as a a) conscientious and b) communicative c) breach of a legal norm d) undertaken with the aim of bringing about a change in law or policy e) through a deliberative process rather than through coercion or terrorisation.[14] Some accounts, such as John Rawls's in *A Theory of Justice* (1971), hold that f) forewarning authorities, g) non-violence, and h) fidelity to the legal system are also necessary conditions for *civil disobedience*. Many contemporary accounts reject f), g), and h) for the following reasons.

f) Forewarning authorities, as a necessary condition for civil disobedience, is likely to be self-defeating. People who forewarn authorities are often unable to carry out their intended actions.[15] That said, when the planned actions will interfere with emergency services, forewarning those services is a mark of *civility*, as is taking responsibility for the action once it occurs.

g) *Violence* and *non-violence* are complex notions, and sometimes paradigmatically non-violent acts such as an ambulance workers' strike can cause more harm than some violent acts do, such as minor acts of property damage.[16] The key is that *civil* disobedience is a highly constrained practice distinguished by its conscientiousness: its practitioners aim to minimize harm, to give reasons for their actions, and to promote dialogue in their society, not to drown out the moral appeal of their actions with aggressive tactics. *Non-violence* as such need not be built into the very definition of *civil disobedience*, but can serve as a broad condition of defensibility.

h) If fidelity to the legal system were a defining condition of *civil disobedience*, then paradigmatic examples of civil disobedients such as Gandhi or, perhaps, Nelson Mandela,

[12] See Delmas, Candice, and Kimberley Brownlee (2021), 'Civil Disobedience', *Stanford Encyclopedia of Philosophy* https://plato.stanford.edu/entries/civil-disobedience/.
[13] Calhoun, Cheshire (2000), 'The Virtue of Civility', *Philosophy & Public Affairs* 29: 3, 251-75.
[14] Delmas and Brownlee (2021).
[15] Smart, Brian (1991), 'Defining Civil Disobedience' in *Civil Disobedience in Focus*. Hugo A. Bedau (ed.), London: Routledge.
[16] Raz, Joseph (1979), *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 267.

would fall outside the definition because their aims were revolutionary.[17] Within a functioning liberal democracy, fidelity is a credible condition of defensibility.

Civil disobedience can be either *direct* or *indirect*. *Direct action* is an infringement of the law or policy the person believes is unjust. *Indirect action* is a breach of another law, which the person does not oppose. Rawls observes that a definition of *civil disobedience* should allow for direct and indirect action because there are sometimes strong reasons not to infringe on the law or policy held to be unjust. 'Instead, one may disobey traffic ordinances or laws of trespass as a way of presenting one's case. Thus, if the government enacts a vague and harsh statute against treason, it would not be appropriate to commit treason as a way of objecting to it, and in any event, the penalty might be far more than one should reasonably be ready to accept.'[18]

Justified civil disobedience refers that subset of civilly disobedient acts which satisfies stringent conditions for moral justification. In Rawls's analysis, those conditions are: 1) acting in defence of the principles of justice, 2) as a last resort, and 3) in coordination with other dissenters so as not to unduly burden the majority's sense of justice or risk lasting injury to a just constitution. Rawls's conditions are designed for the idealised context of a just or nearly just society and must be refined for application to real-world cases. Sections D.4 and D.5 refine the conditions for morally justified civil disobedience in the context of the climate crisis.[19]

D.1.iii The Democratic Function of Civil Disobedience

The above overview of the tradition and concept of *civil disobedience* anticipates this summary of its democratic function. Civil disobedience can highlight or reveal gross injustice, as Rosa Parks's act did. It can test the constitutionality of laws. It can be the catalyst for large-scale movements which are often necessary to prod politicians – and indeed courts – to recognise that society's needs are changing. One of the most oft-cited, though apocryphal, incidents from Franklin D. Roosevelt's presidency is a policy meeting he held with labour leaders shortly after his election, where he reportedly told them: 'I agree with you. I want to do it. Now make me do it.'

When activists manage to communicate their sense of urgency, they confront society with views that are usually sidelined or demonised in mainstream media, and this can reinvigorate general discussion about the merits of government policies and, thereby, empower society to hold government accountable. In this way, activists can correct democratic deficits,[20] and force the champions of dominant opinion to reflect on their views.[21]

---

[17] Brownlee, Kimberley (2016), 'The Civil Disobedience of Edward Snowden: A Reply to William Scheuerman', *Philosophy and Social Criticism*, 1-6.
[18] Rawls, J. (1971), *A Theory of Justice*. Harvard University Press, 320.
[19] Rawls (1971), ch. VI.
[20] Markovits, Daniel (2005), 'Democratic Disobedience' in *Yale Law Journal*, Vol. 114, 1897-1952.
[21] Mill, John Stuart [1859] (1999), *On Liberty.* Edward Alexander (ed.), Broadview Press.

When activists step just beyond the law in civil disobedience, they are more likely to be heard, and politicians are more likely to be asked about their activities, which can remedy a comparative unfairness often found in democratic politics, that those with the most resources and the greatest interest in the *status quo* usually have the largest microphones. When activists' causes are indisputably just, they can serve society not only by questioning that *status quo*, but also by impeding and rectifying moral wrongs, thereby acting as a stabilizing force within society.[22]

In these ways, civil disobedience can strengthen the rule of law. David Dyzenhaus writes:

> …when many people think of the decline of the rule of law, they worry more about the individuals who blockade bridges, railways, roads and pipelines with no police intervention or charges laid, as well as the occupation of downtown Portland. That point raises an important set of issues for the rule of law. But it also seems to depend on some mistaken assumptions.
>
> The first situation referred to is of course the protests over the construction of the Coastal GasLink Pipeline through Wet'suwet'en First Nation territory in British Columbia. Those protests quickly grew in both scope and size, as they became about the ongoing injustice of Canada's treatment of Indigenous peoples and spread across the country, causing significant economic damage and disrupting the lives of many.
>
> While these protests often involved acts of lawbreaking, and the authorities often were slow to enforce the law or lay charges against those involved, there was no problem from a rule of law perspective. For these were acts of civil disobedience, that is, disobedience to particular laws in order to alert both the public and the political authorities to the fact that the law is being used as an instrument of a great injustice which remains part of Canada's political and legal fabric. Moreover, the injustice to which they point is arguably that the Canadian state is not living up to the rule of law. Rather, it is enforcing a settler-colonial set of rules, thereby continuing to disrespect commitments the Crown once made.[23]

If citizens could never legitimately resort to justified civil disobedience, then, in Dyzenhaus's words, the Canadian government would have effectively placed itself beyond the reach of rule of law.

With regard to efficacy, empirical research indicates that civil resistance (including civil disobedience) is often highly efficacious in expanding society's moral horizons, far more so than either aggressive tactics or conventional forms of participation tend to be. Erica Chenoweth, an expert on the effectiveness of civil resistance movements, states that,

---

[22] Cf. Rawls (1971), 383.

[23] Dyzenhaus, David (2020), 'Civil Disobedience and the Rule of Law', *The Lawyer's Daily*, July 27 2020: https://www-thelawyersdaily-ca.eu1.proxy.openathens.net/articles/20261/civil-disobedience-and-rule-of-law-david-dyzenhaus. Also accessible at: https://www.law.utoronto.ca/news/civil-disobedience-and-rule-law-professor-david-dyzenhaus-lawyers-daily.

> People power – also called non-violent or civil resistance – is one of the most effective ways by which diverse populations have demanded change. Over the past hundred years, students, workers, children, the elderly, people with disabilities, and others who have been marginalized in society have used civil resistance to bring down dictators, end colonial occupation, stop legalized discrimination and oppression, secure fair labour practices and the right to vote, protect human rights, end civil wars, and even create new countries.[24]

Chenoweth adds that successful movements have distinctive features. First, they continually expand in size and diversity. Second, they tend to succeed once they secure key defections from specific powerbrokers,

> In the climate movement, this includes institutions that benefit from the status quo, especially corporations and shareholders whose pursuit of profit entails environmentally destructive activity from extraction and deforestation to overconsumption. Movements succeed when they induce people and institutions with access to power and resources to join the struggle and use this access to expand their leverage.[25]

Third, while remaining true to their civil commitments, successful movements tend to deploy a variety of methods to increase leverage and pressure on their opponents:

> …they often go beyond straight demonstrations, protests and other symbolic action and pursue sustained coordinated action. Methods with economic impacts such as targeted strikes, boycotts and other forms of economic non-cooperation – can be especially effective in increasing pressure on those who hold power, either politically or financially.[26]

Fourth, successful movements tend to take years, with organisers maintaining discipline and commitment to non-violent methods. The persistent, disciplined contributions of committed activists are vital for a society to reach that critical tipping point which changes everyone's behaviour.[27]

---

[24] Chenoweth, Erica (2022), 'People Power' in *The Climate Book*. Greta Thunberg (ed.). Allen Lane, Penguin, 364.
[25] *Ibid.*, 365.
[26] *Ibid.*, 365.
[27] Chenoweth (2022). See also Sunstein, Cass (2019), *How Change Happens*. MIT Press; and Centola, D. (2021), *Change: How to Make Big Things Happen*. Little, Brown Spark.

D.2 Court Positions on Civil Disobedience and Climate Activism

D.2.i Court Positions on Civil Disobedience

Judges' views on civil disobedience vary greatly: a) some judges dismiss civil disobedience as mere ordinary offending, asserting that civil *disobedience* is a philosophical notion unknown the law;[28] b) some judges view civil disobedience as more serious than comparable ordinary offending on the grounds disobedients improperly arrogate to themselves licence to disobey laws which others are binding themselves to follow;[29] and c) some judges view civil disobedience as praiseworthy – in the way of the Socratic gadfly – and they view civil disobedience as especially praiseworthy when it is undertaken in defence of an indisputably just cause that is in dire need of defenders.[30]

a) The claim that *civil disobedience* is unknown to the law is myopic, if not disingenuous, for several reasons.

First, a paradigm case of justified civil disobedience, such Rosa Parks's quiet refusal to give up her bus seat, is not ordinary offending. Her act was a courageous stance against gross injustice despite the personal risks, and it triggered a city-wide boycott that led a year later to a landmark USSC judgement vindicating her action. The same may be said of Dr Morgentaler's efforts to provide abortion care in Canada. After he appeared before the House Committee on Health and Welfare in 1967 to argue for the liberalisation of abortion laws, women started to come to him in desperation. Dr Morgentaler initially told them he could not help them, feeling like a hypocrite and a coward. Once he started to provide abortion care, he felt relieved that he was finally doing what took genuine courage.[31] In 1976, after three juries had acquitted Dr Morgentaler, the Quebec Justice Minister, Marc-André Bedard, wrote to inform the Canadian government that Quebec could no longer enforce the relevant section of the Criminal Code. He did not receive a reply.

Second, a search of the CanLii database shows just how frequently courts refer to 'civil disobedience'. Over 300 Canadian cases including 55 federal cases make some reference to 'civil disobedience'. Similarly, the Lii database shows that over 1000 US cases mention 'civil disobedience' including 614 federal cases and, within the past 30 years, a dozen USSC cases.[32] […] In addition, a search shows that over 4,000 US Statutes and Acts of legislation refer to 'civil disobedience', and many encyclopedias on law include entries on or references to civil disobedience.[33] While, as noted above, courts are

---

[28] CJ McEachern, *R v. Bridges* (1991) 62 C.C.C. (3d) 455 at 458 (BCCA); *R v Kapp*, [2006] 3 CNLR 282.
[29] J Hertz, *United States of America v. Platte et al* (2005), 401 F.3d 1176 (10th Cir.).
[30] Lewis, Paul, and Nidhi Prakash (2011), 'Ratcliffe coal protesters spared jail sentences', *The Guardian,* Wednesday, January 5, 2011; see also, Williams, Lynne (2004), 'Restraining Dissent is Harmful' in *Bangor Daily News* September 10, 2004. See also Galland, Nancy and Stander, Richard (2003), 'Bangor Judge, Too, Recognises Importance of Civil Disobedience' in *Peace Talk*; see also, Brownlee, Kimberley (2020), *Conscience and Conviction*. Oxford University Press, ch. 5.
[31] Cowan, (1984).
[32] A search of Nexis produces over 50 references to 'civil disobedience' in recent UK cases.
[33] Clark, D. S. (Ed.) (2007). *Encyclopedia of law & society: American and global perspectives*. (Vols. 1-3). Sage Publications, Inc., doi: https://doi.org/10.4135/9781412952637; see also, Bouckaert, B., & De Geest,

by no means uniformly favourable, many are respectful of civil disobedience, which further highlights the myopia – indeed the falsity – in saying that the concept is unknown to the law.

Third, some legal systems embed into their very foundations a right to engage in conduct that is at least akin to civil disobedience, if not stronger action. In German Basic Law, citizens have a constitutional right of resistance: 'All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.'[34] The constitutional right of resistance as a last resort is a built-in check upon expected conformity with other laws. *Civil disobedience* is a concept known to the law.

b) The view that civil disobedience is, by nature, more serious than comparable ordinary offending is deeply implausible because the civil disobedient's cause matters enormously. Does her cause and her conduct reflect a consistent commitment to fundamental justice, in the way for instance that Rosa Parks's did? If it does, then she has a credible claim to justification *ceteris paribus* because her consistent commitment to justice creates an internal constraint upon her action: she could not step beyond the law as she does without undefeated reason. Therefore, far from engaging in an improper and anti-democratic arrogation of licence to break the law, the justice-driven civil disobedient stands up for the very heart of the rule of law: she rectifies a democratic deficit and defends fundamental justice.

c) The judges who appreciate the democratic function of civil disobedience tend to declare that such conduct is praiseworthy and even sometimes necessary. Such judges not only praise activists' characters but stress the value of civil disobedience itself. Trial Judge E. Allen Hunter did this in the sentencing of Nancy Galland and Richard Stander for their 2003 protest against the Iraq War, in which they held a sit-in at the Bangor, Maine, office of Sen. Susan Collins (R-Maine). Amongst other things, Judge Hunter said: 'I remember that in the 1960s there were actions of civil disobedience that, eventually, made our life better…We all have derived benefits from acts of civil disobedience like the Boston Tea Party. That act of civil disobedience has played an extremely important and vital political role in our history.'[35] Judge Hunter sentenced Galland and Stander far more lightly than he did ten other sit-in protesters who had pleaded no contest.[36]

G. (2000). *Encyclopedia of law and economics*. Edward Elgar; and see the *World Encyclopedia of Law* at: https://lawin.org/civil-disobedience/.

[34] The four sections of Article 20 are: (1) The Federal Republic of Germany is a democratic and social federal state; (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies; (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice; (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available. See *Basic Law for the Federal Republic of Germany* in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 28 June 2022 (Federal Law Gazette I, p. 968), accessible at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

[35] Williams (2004); Galland *et al* (2003). See also, Brownlee, (2020), ch. 5.

[36] Irvine, Alex (2003), '"This just in" Piece on the Oct. 31 sentencing of Nancy Galland and Richard Stander', *Portland Phoenix*, https://digitalcommons.portlandlibrary.com/news_phoenix/1416/

In 2011, 20 environmentalists who had been convicted by a jury in Nottingham, UK, for *planning* to occupy and vandalise a Ratcliffe power station, were spared by the judge in the case.[37] Judge Jonathan Teare 'stepped up' when the jury did not, sparing 18 of the activists from jail sentences and instead imposing lenient sentences ranging from 18 months' conditional discharge to 90 hours' unpaid work. Judge Teare noted that the public might consider his sentencing 'impossibly lenient', but he had been put in a highly unique position given the moral standing of the campaigners. He praised them, saying: 'You are all decent men and women with a genuine concern for others, and in particular for the survival of planet Earth in something resembling its present form.'[38]

Reporting in the *Guardian* notes that, as crown prosecutors and corporations know, campaigners who use non-violent action (i.e. do not injure people) to challenge the law are often acquitted by juries. John Vidal writes: 'In the past decade, prosecutions of protesters against GM crops, incinerators, new roads and nuclear, chemical and arms trade companies have all collapsed after defendants argued that they had acted according to their consciences and that they were trying to prevent a greater crime.'[39]

Relevant to this discussion is not only how judges view climate activism but how prosecutors view it too. As of March 2023, over 120 lawyers have signed a declaration affirming that they will no longer prosecute climate activists.[40] The UK-based prosecutor, Jolyon Maugham, King's Counsel and Director of the Good Law Project, explains that the law should not be the victory dance of power by destructive industries: 'I cannot support laws that defend those who destroy the planet, and criminalise those who try to protect it. This is a principle I will stand by.'[41]

Although juries are often friendly to climate activists' claims that their acts were necessary, trial judges and appeal court judges have in the past tended to dismiss such claims, though they sometimes mete out lenient, non-custodial punishments to campaigners as noted above. Legal theoretical work suggests that, in select common law jurisdictions, this lack of success may have been due less to anything special about civil disobedience than to ambivalence by various common law judges about a general principle of necessity.[42] That said, in 2019, the Washington State Court of Appeals (WCA) issued a landmark judgment in *State v. Ward*, which was upheld by the Washington Supreme Court (WSC), holding that, in principle, a necessity claim could be

[37] Lewis *et al* (2011).
[38] Lewis *et al* (2011).
[39] Vidal, John (2008), 'Climb Every Chimney...' *The Guardian*, 12 September 2008. Vidal notes for instance that, in 2008, six Greenpeace activists were acquitted by a jury in Maidstone, UK, for occupying and criminally damaging the Kingsnorth power station to the tune of £30,000.
[40] For the list of lawyers who have made this commitment, see *Lawyers Are Responsible:* https://www.lar.earth.
[41] Maughan, Jolyon (2023) 'Why I'm joining more than 100 lawyers in refusing to prosecute climate protesters' *The Guardian*, 24 March 2023: https://www.theguardian.com/commentisfree/2023/mar/24/100-lawyers-prosecute-climate-protesters-laws-planet-criminalise.
[42] See Dennis, Ian Howard (2009), 'On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse' in *Criminal Law and Philosophy*, 3, 29-49.

made for some acts of civilly disobedient climate activism, a signal that times may be changing.[43]

Legal theorists observe that an element of necessity features in various defences with different nomenclatures, such as self-defence, third-party intervention, duress by threats, duress by circumstances, and medical necessity, all of which share family resemblances, but not all of which involve imminent risk, such as some cases of medical necessity (e.g. when a doctor must make a decision about surgery on behalf of an incompetent patient).[44] C. M. V. Clarkson argues that what unites necessary acts such as self-defence, duress, and medical necessity is more important than what separates them. In all of them, a defendant commits what would otherwise be a crime in an effort to avoid some sort of crisis to protect herself or others. And, the real issues are how the law should respond and in what circumstances it should afford a defence.[45]

D.3 Philosophical Debates about Necessary Breaches of Law

Philosophical discussions about (putatively) necessary breaches of law analyse the merits of two distinct, theoretical rationales: the 'lesser of two evils' rationale and the 'moral involuntariness' or 'compelled will' rationale.[46]

The *lesser-evil rationale* is a harm-based rationale that the act done does less harm than the harm threatened. In a simple form, this rationale is potentially problematic because 1) it is under-inclusive since it cannot accommodate the necessity of perpetuating a harm that is equal to or greater than the threatened harm, such as killing in self-defence or using force to effect an arrest; and 2) it is simplistically consequentialist, and hence doubtful as a rationale to apply to complex cases involving people's lives, needs, and rights. A more nuanced version of the lesser-evil rationale focuses not on minimizing overall aggregate *harm*, but on avoiding the greater *injustice* by committing a lesser injustice.[47] It might be called the *lesser-injustice rationale*, and it avoids the problems of simplistic consequentialism. It can also make sense of claims that certain activities, such as a road block, while potentially harmful, are far less 'evil' than, say, an unjust war or the devastation of old-growth forests.

The *moral-involuntariness / compelled-will rationale* is a culpability-based rationale that an agent is exculpated because their will is overborne by the necessity. Here 'moral

[43] See State v. Ward, 8 Wash. App. 2d 365, 438 P.3d 588 (2019). The WCA did not find that Ward met those conditions, but that he should have been permitted to make a case to a jury.
[44] For a related discussion, see Coughlan, S. (2013), 'The Rise and Fall of Duress: How duress changed necessity before being excluded by self-defence', *Queen's Law Journal*, *39*, 83. See also, Clarkson, C. M. V. (2004), 'Necessary Action: A New Defence' in *Criminal Law Review*, Feb, 81-95. Dennis notes that 'It is perhaps the judges' intuition that different moral principles were involved that may help to explain the very different historical development of necessity at common law from self-defence and duress by threats.' Dennis (2009).
[45] Clarkson, (2004).
[46] See Dennis (2009) for a cognate discussion of some of these problems.
[47] McMahan, Jeff (2009), *Killing in War.* Oxford University Press, ch. 1.

involuntariness' means that, while the person acknowledges that they acted as an agent, they are not blameworthy for the wrong they did because the *wrong* was involuntary or compelled. This rationale is potentially problematic because 1) it is ambiguous: it sits on the fence between a denial of responsibility since the person's will is overborne and an assertion of responsibility since, unlike physical compulsion, the person willed the act they took because of the crisis they faced; 2) it is under-inclusive: it cannot accommodate measured exercises of judgement, such as a doctor's weighing the merits of a medical procedure for a patient unable to consent; and 3) it frames the agent's conduct in the guise of human weakness, an image that is strikingly at odds with the profound courage shown by someone like Rosa Parks or Henry Morgentaler who serves society with their conscience.

The situations of grave injustice to which these activists responded were ones in which it would have been unconscionable to counsel patience, as King noted in his Letter from Birmingham Jail. Parks, King, Morgentaler, and many others made considered choices to act as they did, but these were choices it would have been unreasonable to ask them to postpone. Indeed, to say in such cases that a person of conscience might reasonably do *nothing* is to deny the presence of a moral crisis.

D.4 The Conditions for Morally Justified Civil Disobedience

An act of civil disobedience is morally justified when the following conditions are met:

1) *Just cause:* The action is undertaken in response to a morally urgent situation or substantial injustice, that is to say, the action is directly responsive to morally urgent needs, i.e. fundamental, non-contingent needs and rights including brute survival needs and fundamental freedoms.

2) *Last resort*: The action is undertaken as a last resort where that means, in a liberal democracy, that otherwise reasonable legal alternatives are either absolutely futile or relatively futile, and likely to remain so;[48]

3) *Parsimony*: The action is parsimonious in its chosen methods.

D.4.i Just Cause: Evidence of Moral Urgency

The first condition for morally justified civil disobedience is that it be undertaken in response to a substantial injustice or other form of moral crisis, where the focus is on protecting fundamental, non-contingent needs and rights including human rights, The terms 'substantial injustice' and 'moral crisis' capture a range of contexts beyond simple, one-off emergencies.

[48] Some of the material in this sub-section is paraphrased from Brownlee, Kimberley (2012a), *Conscience and Conviction: The Case for Civil Disobedience.* Oxford University Press, Introduction and chs. 6 and 8.

Non-contingent needs are necessary conditions for non-contingent ends that a needing being cannot help but have. To determine whether a need is non-contingent (and thus potentially morally urgent), we must ask: 'What for?'[49] For example, 'I need water.' 'What for?' 'I cannot live without it.' That's very different from: 'I need water.' 'What for?' 'I want to finally get these dishes washed.' My need for water in the dishes case is *contingent* on my desire to wash the dishes. My need for water to survive is *non-contingent* and morally urgent: I need drinkable water regardless of whether I want to drink water or want to survive. Without water, I will die. Similarly, 'There need to be undisturbed wetlands'. 'What for?' 'These species cannot survive without it,' which is very different from: 'There need to be undisturbed wetlands.' 'What for?' 'They are aesthetically unique, and we want to appreciate that.'

The relevant kind of survival is not mere existence: a person locked up in solitary confinement will continue to *exist*.[50] The relevant kind of survival is persistence of a being as the kind of being it is. In the case of persons, that includes the exercise of fundamental freedoms and the protection of human rights. (Something similar is true *mutatis mutandis* for members of other sentient species.)

One way to determine whether civil disobedients are responding to a morally urgent situation is offered by Kwame Anthony Appiah. It focuses on whether future generations will condemn our society if we fail to do our best to remedy the present situation. Appiah identifies three signs that our society is engaging in practices that future generations will condemn:

1. The arguments against the practices are already well-known.

2. Supporters of the practices tend not to offer moral counterarguments but instead invoke tradition, human nature or lifestyle.

3. Supporters engage in strategic ignorance, 'avoiding truths that might force them to face the evils in which they're complicit.'[51]

Concerning the climate crisis, Appiah states:

> It's not as though we're unaware of what we're doing to the planet: We know the harm done by deforestation, wetland destruction, pollution, overfishing, greenhouse gas emissions -- the whole litany. Our descendants, who will inherit this devastated Earth, are unlikely to have the luxury of such recklessness. Chances are, they won't be able to avert their eyes, even if they want to.[52]

---

[49] Reader, Soran, and Brock, Gillian (2004), 'Needs, Moral Demands, and Moral Theory' in *Utilitas* 16: 3, 251-266.
[50] See pp.190-191 of Brownlee (2012a) for a specification of non-contingent *basic* needs.
[51] Appiah, Kwame Anthony (2010), 'What Will Future Generations Condemn Us For?' *Washington Post,* 26 September 2010: http://www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092404113.html?hpid=opinionsbox1
[52] Appiah (2010).

One complicating feature of the climate crisis as a crisis is that it seems to be a collective-action problem. As Appiah points out, one person driving an SUV – or even one province allowing the logging of a single old-growth forest – won't be determinative. This reality can make it difficult to appreciate that our society may be perpetuating harms and injustices that are sufficiently morally urgent to warrant civil disobedience in response.

There are, however, at least two answers to the collective-action worry. First, sometimes a climate-crisis issue is not a collective-action problem. Some acts, such as the twinning of an oil pipeline that triples the amount of oil transported from Alberta to the BC coast, and increases the risk of spills in the ocean, pipe leaks into residential areas, damage to habitats, and loss of animal life (let alone the emissions that come from the use of the oil), is a discrete action attributable to a specific set of parties. Thus, that act differs from aggregations of individually harmless conduct – such as many people driving SUVs – where none of those people does palpable harm on their own.

Second, even if all climate-damaging practices were collective-action problems where no one action on its own caused immense harm or injustice, that would not undermine the moral justification of civilly disobedient climate activism because prospective action – including constrained disobedience – can be required to prevent or mitigate catastrophe. It can be necessary to rein in harmful behaviours that are not yet catastrophic in order to prevent their aggregative impact from occurring where that aggregate will be catastrophic.

A critic might say that a difficulty in grappling with the climate crisis is that – as Appiah's list above indicates – there are so many fronts on which progress and political will are required that an activist couldn't justifiably engage in civil disobedience against any single problem – such as largely unchecked air travel – because there are so many other problems she must challenge as well. This *tu quoque* objection can be answered in a few words. The objection is akin to saying that Rosa Parks could not credibly challenge the segregated bus system because the playgrounds, restaurants, schools, housing, and jobs were segregated too. With modest actions like hers, the US civil rights movement exposed just how deep and pervasive the crisis was.

The complex features of the climate crisis must be taken into account in the determination of whether a defendant's action was realistically avoidable or not, i.e. was a last resort.

D.4.ii A Last Resort

There is a widely accepted requirement that civil disobedience must be undertaken as a last resort, i.e. that there must be no reasonable legal alternatives.[53]

One credible understanding of the *reasonableness* of available legal alternatives is in terms of likely effectiveness or even possible effectiveness, i.e. the available legal options

[53] This paragraph draws from Delmas and Brownlee (2021).

must not be wholly futile as efforts to mitigate the crisis. Focusing on *futility* is appropriate in cases where the first condition for moral justification has been met. In a morally urgent situation, to respond by doing something that is wholly futile and that one *knows* is futile would be unconscionable.

There are two ways in which actions can be futile: they can be absolutely futile or relatively futile. An action is *absolutely* futile if it could never achieve the intended result: a person standing on her head will never cure cancer or save a child drowning in a pond. An action is *relatively* futile if, in principle, it is potentially effective but it will be continually outpaced by the crisis that it aims to avert. A person splashing a single bucket of water on a house fire over and over again may, after many hours, put out the fire. But, by that time, the house will be gone. Legal forms of political participation might over time gradually change a society's and a government's position on a morally urgent issue such as the climate crisis. But those legal forms of participation are nonetheless *relatively* futile if the crisis will continue to increase in severity at a rate that outpaces those efforts, i.e. if the crisis expands exponentially or risks becoming irremediable.

If one were to say that, in a democracy, the relevant test is *absolute futility* only, then civil disobedience would be ruled out *tout court*, despite its noble tradition and its democratic function. It would be ruled out because, in a democracy, you can always vote. This declaration – that you can always vote – is essentially what the United States Supreme Court told American women in *Dobbs v. Jackson Women's Health Organisation* (2022), when it undid a 50-year precedent recognising a constitutional right to abortion. In declaring that women can always vote, the USSC disregarded that, between elections, thousands of women and girls would be compelled to carry unwanted pregnancies to term irrespective of whether they had endured rape or incest, faced severe health risks, had existing commitments, or had contrary aspirations. The USSC also disregarded the fact that fundamental rights should not be subject to the whims of popular opinion.

Many experts on civil disobedience – including the most influential thinker on the topic John Rawls – observe that the causes defended by a minority group are often those most opposed by people in power, and the minority's use of legal channels may for that reason be ineffective.[54] Defenders of a minority view not only have a smaller microphone, but are also often saying things that are deeply unpopular with people in power.

Moreover, although a person living in a liberal democracy can always continue to use ordinary legal methods without end, she can be confident she has passed the *last resort* test for justified civil disobedience when both her past actions and *the actions of other people* have shown the majority to be immovable or apathetic. In short, if many other people's buckets of water have not put out the housefire, it would be quixotic to think that her one bucket will make all the difference. In such a case, Rawls says, a person may reasonably conclude that further attempts to use purely legal methods will be fruitless and her civil disobedience passes the test of last resort.[55]

[54] Rawls (1971), 327.
[55] Rawls (1971), 328.

Given the relevance of others' futile efforts to the last resort test, first-time disobedients and long-time activists can be viewed in the same light. The first-time disobedient should not be thought to be less sincere – or faced with less of a last resort situation – than a long-time activist, because others' futile efforts to remedy the moral crisis show that this is a last resort situation for anyone.

That said, the paradigm example of a justified civil disobedient relied on this report – Rosa Parks – was a long-time activist before she became famous in 1955 for refusing to give up her bus seat. In 1943, she joined the NAACP and then became the Montgomery chapter's secretary:

> She spent the next decade pushing for voter registration, seeking justice for black victims of white brutality and sexual violence, supporting wrongfully accused black men, and pressing for desegregation of schools and public spaces. Committed to both the power of organized nonviolent direct action and the moral right of self defense, she called Malcolm X her personal hero. [56]

In the years prior to 1955, Parks experienced the personal challenges of pushing for justice:

> Repeatedly in her writings, Parks underscored the difficulties in mobilizing in the years before her bus protest: "People blamed [the] NAACP for not winning cases when they did not support it and give strength enough." She found it demoralizing, if understandable, that in the decade before the boycott, "the masses seemed not to put forth too much effort to struggle against the status quo," noting how those who challenged the racial order like she did were labeled "radicals, sore heads, agitators, trouble makers." Indeed, Rosa Parks was red-baited and received death threats and hate mail for years in Montgomery and in Detroit for her movement work.

When the police arrested her in December, 1955, for refusing to give up her seat, she spoke up: 'Calling attention to the larger power in the system, Parks questioned the arresting officers, "Why do you push us around?" One officer answered, "I don't know, but the law is the law and you're under arrest."'

In the context of the climate crisis, Chenoweth observes that, right now, the missing key ingredient for good solutions is political will. Greta Thunberg stated it more categorically at the United Nations in 2019:

> You say you hear us and that you understand the urgency. But no matter how sad and angry I am, I do not want to believe that. Because if you really understood the situation and still kept on failing to act, then you would be evil. And that I refuse to believe…You are failing us. But the young people are starting to understand

[56] This quotation and the two that follow it are drawn from Theoharis (2015a). See also, Theoharis, Jeanne (2015b), *The Rebellious Life of Rosa Parks*. Beacon Press.

> your betrayal. The eyes of all future generations are upon you. And if you choose to fail us, I say: We will never forgive you.[57]

On-the-ground activists, scientists, and civil servants are better placed than I am to assess whether, over the past few years, Canada's provincial and federal governments have started to show the requisite political will or merely pay lip service. Even if they are beginning to show the requisite political will, the correct test for last resort is *relative futility* in light of past and present apathy and immovability. In other words, even if tiny shoots of political will are emerging, the crisis may be outpacing ordinary participatory efforts to cultivate those shoots. To say in such conditions that a person of conscience might reasonably do nothing is to deny the presence of a genuine moral crisis. In a crisis, doing *nothing* is not a reasonable option for any person of conscience: if a child is drowning in a pond in front of us, it would be unconscionable for us to do *literally* nothing. The situation calls for action and, at the very least, we should shout for help.

D.4.iii Parsimony

The milder a disobedient's response is to a crisis the better. A parsimonious response is no more severe than what would be needed to reasonably avert the crisis. Two kinds of non-excessiveness are built into parsimony:

a) The act must be no more severe than what would be needed to avert the threat.

b) Of the acts that would avert the threat (if there are any), the act done must be no more severe (or not significantly more severe) than the severity of the threat.

Parsimony is sensitive both to the relative severity of our options in a moral crisis and to the relative severity of the crisis itself. Parsimony does not, however, demand success. The two kinds of non-excessiveness that comprise *parsimony* align with the doctrine of proportionality that is well-known and well-accepted in human rights law. Parsimonious, justice-driven civil disobedience aligns with human rights law's commitment to proportionality.

The notion of *parsimony* does not raise under-inclusiveness worries (e.g. a parsimonious response in a case of self-defence might do equal or greater harm than that threatened). It also does not require us to rank strictly the available responses to a crisis: two or more responses might be equally parsimonious.

The parsimony of a response depends on several factors including the context and the identities or offices of the people facing the moral crisis. In relation to social injustice, the parsimony condition limits the crisis-responses available to highly influential people, such as corporate bosses, lobbyists, and political insiders, who have easy ways to be

[57] Thunberg, Greta (2019), Speech at the UN Climate Action Summit. https://www.npr.org/2019/09/23/763452863/transcript-greta-thunbergs-speech-at-the-u-n-climate-action-summit

effective, far more than it limits the crisis-responses available to marginalized groups, political outsiders, or cash-and-influence strapped environmentalists.

Direct action is often, but not always a feature of a parsimonious response. The distinction between direct and indirect civil disobedience is relevant to the possibility of mounting constitutional test cases, since people cannot test the constitutionality of a law in court without actually breaching it. In general, however, while some scholars argue that direct action is preferable to indirect action because it is most clearly legible as an act of protest against the law breached,[58] most scholars defend the acceptability of indirect action since not all unjust laws or policies can be disobeyed directly and some that can be shouldn't be.[59] In other words, sometimes *direct action* is impossible, and sometimes it is possible but unconscionable.

For instance, a same-sex couple living in a jurisdiction that forbids same-sex marriage cannot get married in violation of the law. Black Lives Matter activists cannot directly disobey police brutality, stop-and-frisk policing, or the acquittal of police officers who killed unarmed Blacks. Also, even when a person could engage in direct disobedience of an unjust law, doing so may be unduly burdensome, such as when the punishment for the breach is extreme.[60]

Similarly, it is difficult, if not impossible, for ordinary citizens to engage in direct action against military policy. Indirect action, such as refusing to pay taxes or trespassing onto military bases to engage in minor acts of vandalism, may be the closest that they can get to direct action against military policy. Indeed, in any context, indirect action is the only form of civil disobedience open to people who oppose laws or policies within whose scope they do not fall. When they engage in indirect action, they breach a law they do not oppose and, to that extent, they act strategically.[61] But, their strategy is parsimonious when it meets the two tests of relative severity noted above; and it's reasonable when lawful participation would be relatively or absolutely futile.

Even where direct breach of law is possible, indirect action can be the more reasonable and parsimonious choice. Indeed, sometimes, it can be the only *civilly* disobedient choice. For example, suppose that the punishment for sexual assault was execution. A dissenter would act indefensibly (and certainly *not* civilly) if he protested against this extreme punishment by engaging in sexual assault. His only *civilly* disobedient option is indirect action, and that action would be a more efficacious way to challenge the injustice of the extreme punishment.[62]

As all of this implies, the *last resort* condition and the *parsimony* condition work together. For civil disobedience, 'last resort' refers to the breach of some a legal norm. It does not refer to breaching the specific law that the activist opposes. Parsimony

[58] For discussion, see Delmas and Brownlee (2021).
[59] Rawls (1971), 320; Brownlee (2012a), 19–20; Delmas and Brownlee (2021).
[60] This paragraph draws from Delmas and Brownlee (2021).
[61] See Brownlee (2012a), ch. 5.
[62] Rawls (1971), 320.

constraints the nature of the breach that the activist may engage in; if breaching the law she opposes would be impossible or unconscionable, then *parsimony* and *last resort* require her to breach a different law.

The *parsimony* condition informs defendants' interactions with the courts. Actions described as 'mischief' may be more parsimonious than breaches of injunctions *ceteris paribus* because the former do not pose an apparent challenge to the integrity and authority of the court, which a breach of an injunction might seem to do, thereby putting the court in a difficult position.

As a final note on the court's position, Joseph Raz observes that 'Sometimes courts ought to decide cases not according to the law but against it. Civil disobedience, for example, may be the only morally acceptable course of action for the courts.'[63] However, Joel Feinberg rightly cautions that the high court judge is not protected by the same degree of secrecy as the mere juror. Nor can she so easily escape sanctions afterward, being subject to impeachment and subject to social pressure to give an account of each judicial decision and mode of argument.[64] In my view, courts cannot engage in civil disobedience because civil disobedience is communicative and non-evasive, i.e. it involves an open acknowledgement (sometimes after the fact) of the action being taken and the reasons for taking it. However, courts can – and indeed *must* – prioritise principles of fundamental justice.

D.5 Possible Objections to the Moral Justification of Climate Activism

D.5.i Democracy

Objection: All civil disobedience is anti-democratic: disobedients improperly arrogate to themselves license to disobey laws which others follow.

Replies: First, as noted in Section D.1, democracy is a work in progress. It is never the case that the votes are counted, the decisions taken, and then everyone goes home. When breakdowns occur in the mechanisms for conventional engagement, civil disobedience offers a comparatively modest way to rectify these democratic deficits by focusing

[63] Raz, Joseph (1994), *Ethics in the Public Domain.* Oxford: Oxford University Press, 328. In my view, such a judge is not acting in civil disobedience because she cannot announce herself to be doing so.
[64] Joel Feinberg argues that: 'The conscientious judge's situation is quite different [from that of the ordinary citizen or the juror], especially when he is a judge in the nation's highest appellate court . . . the judge does not have legal power of the same degree of effectiveness as that of the ordinary citizen or the juror. Paradoxically, the higher we climb in the court system, the less effective power to breach official duties do we find. I suspect that is because the duties themselves, at that level, are regarded with awe and thought to be of maximum or supreme stringency.' Feinberg, Joel (2003), *Problems at the Roots of Law.* Oxford: Oxford University Press, 17. Michelle Madden-Dempsey has observed in conversation that Feinberg's view may conflate strong discretion with weak discretion. Although, contra Ronald Dworkin, judges may exercise strong discretion (in determining standards of reasonableness, for example), they nonetheless may lack weak discretion to be the final arbiter on a case; social pressures will limit a judge's weak discretion to say whether some conduct satisfies a given standard.

attention on neglected issues.[65] When activists' causes are indisputably just, they can remedy wrongs and serve as a stabilising force.

Second, there is inescapable comparative unfairness between majorities and vulnerable or silenced minorities both in their capacity to get their concerns onto the public table for discussion and in their ability to influence policy before decisions are taken. Powerful majorities have far larger microphones, which poses the risk that the law becomes the victory dance of power. Given this comparative unfairness, there must be some leeway in how vulnerable minorities or silenced minorities may participate politically, particularly when they are defending the very survival of our species.

D.5.ii Legal Options

Objection: In liberal democracies, members always have adequate avenues for legal participation; they do not need to resort to civil disobedience.

Reply: Even in liberal democracies, tyrannies can arise including notably *social tyranny* or the tyranny of the majority opinion.[66] Moreover, liberal democracies can engage in rights-abuses and be guilty of needs-neglect resulting from (though not only from) conformist pressures, influences, and biases.

As noted above, the people raising the climate-crisis alarm are often deeply unpopular with those in power. Those in the minority can have good reason to step just outside the law (i.e. to engage in those conscientious, constrained and communicative acts that are civil disobedience) to garner a larger audience for their view, especially since they aim to combat a moral crisis.

D.5.iii What the Law Can Recognise

Objection: The law cannot recognise that some value other than following the law could be of paramount importance.

Replies: First, any exemption granted to people based on faith or belief is an acknowledgment by the law of the possibility of value-competition.

Second, acts of civil disobedience driven by a respect for fundamental rights and freedoms are acts that the law can acknowledge as legitimate because they are in keeping with the humanism that tempers law's own insistence on the priority of adherence to law.[67]

Third, human rights law itself has the law recognize many values other than following the law. Indeed, 'following the law', as such, is a thin value, not least because the law is in the service of values more fundamental than itself.

---

[65] Markovits, Daniel (2005), 'Democratic Disobedience' in Yale Law Journal 114, 1897-1952.
[66] See Brownlee (2012a), 195-6, for a full reply.
[67] Brownlee (2012a), 193.

D.5.iv Hypocrisy

Objection: The civil disobedient who makes a necessity claim is disingenuous or hypocritical because, in making such a claim, she seeks to avoid punishment. She contrasts with the civil disobedient who offers no such defence and who, thus, does not seek to avoid conviction and punishment but rather submits herself for judgement.

Replies: First, we should not read too much into a willingness to accept punishment. A person might accept punishment in order to become a martyr. Accepting punishment can have strategic value, as King observed: 'If you confront a man who has been cruelly misusing you, and say "Punish me, if you will; I do not deserve it, but I will accept it, so that the world will know I am right and you are wrong," then you wield a powerful and just weapon.'[68]

Second, not being punished is simply a by-product of arguing successfully that the act was defensible. As noted above, Judge Hunter punished Galland and Stander less harshly for defending their sit-in protest against the Iraq war than he did their fellow protesters who pleaded no contest.

D.5.v A Slippery Slope

Objection: Tolerating civil disobedience sends us down a slippery slope. Briefly, allowing a necessity defence for climate activism would open up space for abuse through the assertion of spurious defences.

Replies: First, this problem is no more pressing in the context of climate activism – or civil disobedience more broadly – than in any other context in which necessity is a possible defence.

Second, the slippery slope charge fails to respect civil disobedients as persons, i.e. as ends in themselves, who should neither be used as scapegoats nor held accountable for other people's independent decisions to engage in non-conscientious, disruptive behaviour.

Third, one of Rawls's conditions for justified civil disobedience is that the activists coordinate with other dissenting groups so as not to overwhelm the majority's sense of justice. He observes that, in a given moment, there might be many groups with an equally sound case for being civilly disobedient, but if they were all to disobey at the same time serious disorder might follow, risking a potential breakdown in respect for law and the constitution. 'There is also an upper bound on the ability of the public forum to handle such forms of dissent… [and] the effectiveness of civil disobedience as a form of protest declines beyond a certain point.' The ideal solution, Rawls says, 'calls for a cooperative

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

political alliance of the minorities to regulate the overall level of dissent'.[69] Thus, if courts worried that vindicating one set of activists would open a floodgate to admittedly understandable but collectively intolerable action, then courts could, in subsequent cases, apply Rawls's *coordination with other activists* test. Dissenters who failed to coordinate effectively with others could fail the test of *parsimony* and, indeed, could be deemed to be less conscientious and less *civil*.

D.6 Application of the Above Analysis to Mr. Breen's and Ms. Murray's Actions

The analysis below aims to answer two questions in relation to each case file. First, do the actions described fit with the paradigm of civil disobedience? Second, do those actions satisfy the conditions for moral justification discussed in Section D.4?

Before proceeding, it is worth noting that, in cases of ordinary offending, breaching a parole order [or an undertaking] would typically be viewed as an aggravating factor. In the context of justified civil disobedience, however, such a breach might be mitigating. The committed actions of Gandhi, Rosa Parks, Martin Luther King Jr. and Henry Morgentaler among others were not one-off events. These activists continued in their efforts to combat injustice – they continued to serve their societies with their conscience – as the personal stakes rose higher. In Gandhi's and King's cases, the stakes rose so high that they lost their lives. In Parks's case, even though the Montgomery bus boycott was successful, her family faced death threats afterward and could not find steady work.[70] In Morgentaler's case, his clinics were raided repeatedly by police; his first acquittal by a jury was replaced by a higher court with a guilty verdict without trial; and he spent time in jail including a brief period in isolation.[71] These activists' persistent and ultimately successful efforts fit Chenoweth's observation that: '…successful mobilization [through civil resistance] often takes years – not weeks or months – to build the pressure necessary for change. Effective movements stay the course and maintain discipline and strategic unity, even as their support base expands' and as external pressure on them mounts.[72]

[…]

Concerning *parsimony*, [a] risk of lost revenue […] is relevant […] but that risk must be put in context. Once again, Rosa Parks is a useful reference point. The Montgomery bus driver could have pointed to her action as a threat to revenue since her refusal to move and his call to the police delayed his route, which may have cost the bus system some riders that day. It is worth noting that boycotts […] are described in the theoretical literature as civil disobedience (when they are in breach of law) despite the financial pressure they bring to bear.

---

[69] Rawls (1971), 328.
[70] Theoharis (2015a).
[71] Cowan, Paul (1984), *Democracy on Trial*, National Film Board of Canada: https://www.nfb.ca/film/democracy_on_trial/. See also, Dunphy, Catherine (1996), *Morgentaler: A Difficult Hero*. Random House Canada.
[72] Chenoweth (2022), 365.

[…]

Road blocks, sit-ins, and otherwise impeding others' activities are a common form of civil disobedience when undertaken with care. As noted in Section D.1, although forewarning authorities is not a necessary condition for *civil* disobedience, the civility of a block is greatest when activists aim to avoid areas that would impede emergency services, alert those services beforehand if possible, and move aside for emergency vehicles to pass through.

[…]

The *parsimony* condition is a relative standard which does not require uniqueness, i.e. two or more types of action might be equally parsimonious relative to the severity of the moral crisis at hand and relative to the kinds acts required to mitigate or abort the crisis. As noted above, when compared against the far greater 'evil' of an unjust war or the devastation of old-growth forests, a well-executed, civilly disobedient block – even though it is potentially harmful – is parsimonious.

That said, a matter that is relevant to parsimony is how activists conduct themselves when confronted by the prospect of arrest. Whether refusing to disperse so as to be arrested, going limp, resisting arrest, or otherwise amplifying their encounter with the police can be parsimonious civil disobedience is a difficult question to answer. Even if such acts are parsimonious – and I believe sometimes they are – they nonetheless change the dynamics of the encounter and can risk drowning out the moral appeal of the just cause. Put differently, even though such acts are intended to wake a community up, they can sometimes distract or antagonize instead. That said, that 'distraction' is sometimes facilitated by people with a vested interest in the *status quo*. As King observed, 'We who engage in non-violent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive.'[73] In other words, a community should not misattribute the tension that it's feeling to climate activists raising the alarm. The urgency of the *climate crisis* is the real tension coming to the surface.

D.7 The Rationale for a Demands-of-Conviction Defence

Fundamental personal freedoms recognised in domestic and international law include freedoms of conscience and religion as well as freedom of thought, belief, opinion, and expression including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association. These freedoms track cognate and interrelated interests pertaining to creating and expressing ideas, holding deep beliefs, values, and convictions, gathering together to discuss and live according to them, and communicating these beliefs, ideas, and values to others.

[73] King (1963) in Bedau (1991).

In recent work, former UK Law Commissioner, Jeremy Horder, argues that sincere belief or conscientious moral conviction can support a legal excuse for (some) principled disobedience.[74] He articulates what he calls the demands-of-conscience defence, which he says is an excusatory defence premised on the requirement to treat people with equal respect as autonomous beings.[75] Since the demands in question pertain to belief, thought, and religion as well, the defence is more aptly labelled a demands-of-*conviction* defence.

While Horder denies that the excuse extends to civil disobedience, I maintain that civil disobedients have a better claim to the accommodations given to *conscientious belief* than do private objectors because civil disobedients are willing to be seen and to bear the risks of being seen to adhere to their beliefs. Unlike the non-communicative or surreptitious objector, the civil disobedient can say, as Rosa Parks did, 'My feet is weary, but my soul's at rest'. Or, in Gandhi's phrase: 'My life is my message'.

Horder offers an autonomy-based argument for the demands-of-conviction defence, which will be supplemented here by a further, two-part argument based on psychological costliness and akrasia. A third possible ground for the defence, rooted in compulsion, is uncompelling (as explained below).

D.7.i Grounds for a Demands-of-Conviction Defence

The first ground for this excuse is respect for persons' autonomy as human beings who are part authors of their own lives. Horder argues rightly that, to insist that persons should always sacrifice their ultimate beliefs and deepest commitments in order to comply with legal demands however trivial those demands may be is to place disproportionate emphasis on the importance of law-abidingness; and this unduly affects persons' prospects for realising full personal autonomy, the value of which is key in a liberal democracy.[76]

This autonomy ground is an assertion of persons' basic responsibility, that an act of disobedience is an autonomous one taken on the strength of deep beliefs and convictions, which the persons may point to when asked to account for their conduct. It is an assertion that, when pressed, it is possible for persons to give reasons (or partial reasons) for believing they had undefeated reason to act as they did. In other words, it is possible for them to give an excuse or partial excuse to those who do not share their view of what is most important.

A second ground for the defence, in my view, is psychological costliness and akrasia, i.e. weakness of will. This ground has both non-instrumental and instrumental sides. In non-instrumental terms, the demands-of-conviction defence recognises the psychological

[74] The defence at issue here follows the narrow, technical sense of 'defence' in criminal law, that is, as any part of a defendant's case which a) if advanced successfully would warrant acquittal, and b) is compatible with the defendant conceding that the offence charged had indeed been committed. Gardner, John (2007), *Offences and Defences*. Oxford University Press, 141.
[75] Horder, Jeremy (2004), *Excusing Crime.* Oxford: Oxford University Press, ch. 5.
[76] Horder (2004), ch. 5.

importance, distinct from autonomy, of persons not always having to give priority to literal adherence with the law over their deepest beliefs and commitments. The defence recognises the psychological risks of self-alienation, incongruity, and akrasia that dog absolute expectations of adherence to formal norms. In valuing autonomy, a liberal democracy must also value the pre-conditions for autonomy, one of which is an integrated mind and the capacity for practical reasoning. This ground reflects persons' Aristotelian interest in taking responsibility for their conduct. It highlights that, unless people have opportunities to cultivate the skills of practical reasoning, good judgement, and will, they will be less able and less motivated to take responsibility for their conduct.[77]

In instrumental terms, the psychological-costliness ground shows that it is in the interests of a liberal democracy that the dictates of law not assert absolute priority either in principle or in practice since this can weaken citizens' will (akrasia) and, consequently, risk leading to a general decrease in law-abidance. If the law asks people *always* to prioritise literal compliance, then they may find it more difficult generally to follow the law, even the good laws, than they would do if the law's expectations were tempered and responsive to persons' ultimate beliefs. In short, the psychological-costliness ground recognises that it is important for a well-functioning liberal democracy that its members maintain and cultivate the will, commitment, and capacity for general law-abidance.[78] The demands-of-conviction defence acknowledges the threat to this posed by absolutist expectations that limit citizens' opportunities to cultivate the skills of practical judgement.

A third putative ground for a demands-of-conviction defence, which is uncompelling, is compulsion.[79] The thought here is that people are compelled or their will is so overborne by their convictions that the only act they could take is the breach of law they took. This notion of *compulsion* differs from the notion of *moral involuntariness* discussed above, though it shares some features. The compulsion ground is problematic for several reasons.

First, as with moral involuntariness, it is unclear whether such 'compulsion' amounts to an assertion or a denial of responsibility. On the one hand, 'conviction'-based compulsion would have to differ from physical compulsion since in cases of physical compulsion the person is not an agent. There is no *actus reus*. The innocent person whom the evil aggressor hurls down a well at a man trapped at the bottom is subject to physical compulsion. There is no act that is the innocent threat's act. She is simply used as a tool by the aggressor to do wrong. As Ian Dennis notes, when a person is so used, she does not *will* the act.[80] But, when a person acts on the basis of conviction, she *does* will her act even if she says she 'could not do otherwise'. However, on the other hand, if a person is

[77] Brownlee (2012a), ch. 5.
[78] For a discussion of the value of law-abidance, see Edmundson, William A. (2006), 'The Virtue of Law-Abidance' in *Philosophers' Imprint*, 6: 4, 1-21.
[79] Cf. Fletcher, George (1978). *Rethinking Criminal Law.* Boston: Little, Brown & Co.
[80] Dennis, Ian Howard (2009), 'On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse' in *Criminal Law and Philosophy*, 3, 29-49.

compelled to will her act, then, although she wishes to be seen to will it, she could not will otherwise and, hence, is not responsible for her willing. Neither the assertion of responsibility nor the denial of responsibility gives an intuitive picture of such 'compulsion'.

That said, the denial of responsibility is the more problematic of the two. For one thing, a denial of responsibility for a supposedly conviction-driven act is in tension with the Aristotelian notion of the agent as a person who wishes to show that she has reasons for acting as she does. Denying responsibility for her convictions and her conduct reflects a Hobbesian conception of the person, according to which she seeks to avoid the consequences of her conduct rather than to show that, despite everything, she can give reasons for why she thought she should act as she did. It sits entirely at odds with both the non-evasive nature of genuine conscientiousness and her interests in taking responsibility for her conduct.

Furthermore, unless supplemented by other elements, the compulsion ground gives a false portrait of conscientiousness as a brute, passionate, unthinking, if not slightly deranged obsession by whose force a person is spellbound and rendered less autonomous. The kinds of beliefs and commitments with which such blind compulsion would most readily align are those least likely to satisfy minimal conditions of logical validity and evidential satisfactoriness. Examples would be the parents who believe that as a matter of honour they must kill their daughter who has been raped, or parents who instruct their daughter who has become pregnant to kill her pet dog in punishment, or parents who refuse to take their child with curable diabetes to see a doctor because they believe healing should be done through prayer alone, or a zealous animal liberationist who poisons factory animals' feed. A demands-of-conviction defence premised on *compulsion* would most likely protect the capricious passions and proclivities of the least reasonable rather than the sincere and serious, reflective moral commitments of the more reasonable. Hence, I reject this ground.

D.7.ii The Nature and Scope of the Defence

With the autonomy ground and the psychological-costliness ground for the demands-of-conviction defence in hand, we may ask: To which kinds of acts could this defence apply? And how strong a defence might it give?

The answer to the second question turns largely on the answer to the first. What are the limits to the kinds of harms and wrongs that could be excused on grounds of conviction?

Horder argues that the demands-of-conviction defence applies only to a limited range of acts of personal or private disobedience, such as a refusal to have a blood transfusion, a failure to complete one's part of a double-suicide pact, or a refusal to withdraw treatment upon request from a terminally ill patient to whom the carer is attached (though he has doubts about this last example). In these cases where the defence could apply, Horder argues that some accommodation must be made for the person's moral commitments and non-moral goals and projects constitutive of her identity. When these commitments clash

with the demands of the law, the person can show that she had reason to believe she had undefeated reasons to act.

In a broadly similar vein, Raz holds that, although granting a general legal right to private (conscientious) objection would be problematic since it would entail allowing people to disobey the law for reasons of personal conviction even when by doing so they act egregiously,[81] nevertheless there should be limited protection from being coerced to act against conviction.[82] Operating in the background is the idea that, in at least some (private) contexts, people should not be held liable for breach of law if the breach is committed because they think the law is morally objectionable. This arises, Raz argues, from the principle of humanism, which acknowledges society's duty to honour human dignity and personal autonomy.[83] It entails amongst other things respecting that people can have deep convictions, and that the law places overly burdensome pressure upon them when it coerces them to privilege the law above their convictions in all cases.

Both Raz and Horder argue that this modest legal protection does *not* extend to civil disobedience for reasons concerning 1) the ostensibly political and strategic nature of civil disobedience, and 2) the problems for democracy posed by legitimating a practice like civil disobedience. In essence, although civil disobedience is often animated by deep moral conviction, the motives for it are at least partly political and strategic. When people civilly disobey in a liberal democracy, they deliberately breach the law so as to challenge the legitimacy of democratically enacted laws (the *strategic action problem*). In doing so, they challenge the democratic legislature's supreme right to take strategic decisions for the whole community (the *democracy problem*) even though the legislature is better placed than ordinary citizens are to account for all of the reasons that bear upon the right guidance to follow.[84] Hence, civil disobedients' conduct falls outside the scope of the humanistic principle of respect that underlies the demands-of-conviction defence. By contrast, if people engage in personal or private disobedience, they do not seek to challenge the state's right, through law, to take decisions on behalf of the entire community. That is, they do not choose for purely strategic reasons the laws to be disobeyed.[85]

I disagree with the above assessment of civil disobedients. In my view, civil disobedients have a better claim than private objectors to the protection of a demands-of-conviction

[81] In many US states, the law includes a religious exemption for child abuse and neglect that allows parents to appeal to religion or faith-based rituals as a legal defence for such abuse. In a 2008 Wisconsin case, this defence of exemption was not available to a couple, as they were charged with second-degree reckless homicide, not child abuse and neglect, after allowing their 11-year-old daughter to slip into a coma and die due to curable juvenile diabetes while the family stood around her and prayed. The parents could have faced 25 years in prison, but were sentenced very leniently to six months imprisonment respectively (1 month per year for six years) and 10 years of probation.
[82] Raz (1979), 286.
[83] Raz (1979), chs. 14 and 15.
[84] Horder (2004), 224.
[85] Horder (2004), 224.

excuse. Let me briefly expand upon my answers to the *strategic action problem* and *democracy problem* outlined above in Section D.5.[86]

First, sometimes indirect disobedience is the only reasonable action available. A civilian cannot directly refuse to follow lawful orders from the military. A person on the street cannot refuse to perform contracted experiments on animals. Also, sometimes, indirect disobedience is more defensible than direct disobedience, such as when it causes less harm or, in addition, is a more efficacious way to redress perceived injustices. Police officers would cause less harm by breaching their uniform codes than by engaging in an illegal strike, for example.

Second, the *strategic action problem* is not forceful against *direct* civil disobedience since direct action involves conscientiously communicative disobedience of the very law that is opposed. Rosa Parks's refusal to give up her seat and the ensuing bus boycott were communicative acts of dissociation from a bigoted practice. That dissociation was not strategic. It was founded upon a commitment to justice.

Also, it is mistaken to think that politics and strategy do not figure in at least some personal disobedience, specifically, evasive or surreptitious disobedience. Breaches of law carried out in secret with the aim of remaining secret are strategic acts. Breaches of law chosen with calculation to preserve liberty from state interference are strategic acts. In general, personal disobedience has no greater claim and often has a lesser claim than civil disobedience has to protection under a humanistic principle of respect for *conscientiousness*.

Undoubtedly, it is hard to show that an act of disobedience was not opportunistic. But, one possible test is whether the disobedience itself benefits the disobedient personally. If it does not, then there is little reason to think it is opportunistic. The overall cause of a protest – such as equal rights for women or for black people – may well benefit that person, but that is different from the disobedience *itself* benefiting them.

As to the *democracy problem*, it is doubtful that legislatures are invariably better placed than, say, environmentalists or soldiers are to account for all of the reasons concerning whether and how to protect the environment or go to war, especially since legislatures must contend with innumerable pressures that are likely to diminish their attentiveness to all salient reasons including time-pressures, media, opposing parties, party ideology, political capital, and well-funded lobbyists with profit-driven agendas. In view of these pressures, legislatures are sometimes *less* well-placed than on-the-ground experts are to assess the relevant reasons. At other times, they will be comparably placed or differently placed. Only rarely, if ever, will legislatures be undisputed epistemic authorities for a society.

[86] This section elaborates some ideas in Brownlee, Kimberley (2012b), 'Conscientious Objection and Civil Disobedience' in *The Routledge Companion to Philosophy of Law.* Andrei Marmor (ed.), London: Routledge, 537-8.

Second, how well-placed a party is to account for the reasons for or against a policy is a matter not only of epistemic access to relevant facts, but also of motivation to acknowledge those facts. Both the pressures that well-funded lobbies and media can exert and the threat of losing power are strong incentives for legislators to ignore reasons running counter to their electoral self-interest. This gives rise to the worry that the law can sometimes become the victory dance of power.

Third, even if the legislature were best placed to assess the relevant reasons for and against a policy, its members could still benefit from pointed minority opposition to ensure that they remain alive to all of the salient reasons, given the competing pressures they face.

Also, as noted above, democracy is a work in progress. It is not the case that the votes are counted, the decisions taken and then everyone goes home. Democracy is an ongoing process of giving and taking, discussing and competing, and prioritising and adapting. Defeated parties may continue to challenge the majority position and their doing so, far from being anti-democratic, reflects the true spirit of democracy as a system that accommodates diverse positions and is sensitive to shifts in perspectives. Moreover, on a sufficiently nuanced understanding of democratic deliberation and citizen obligation, civil disobedience can make a distinctive contribution. When breakdowns in the mechanisms for citizen engagement occur, civil disobedience is one comparatively modest way to rectify these democratic deficits by focusing attention on neglected issues.[87] In performing such services, civil disobedience is consistent with, and supportive of, democracy. This argument is not intended to lend a justificatory gloss to the excusatory demands-of-conviction defence. Rather, it shows that civil disobedience is not paternalistic and anti-democratic. Consequently, paternalistic worries need not be raised against the demands-of-conviction defence.

Furthermore, when people civilly disobey, they willingly expose themselves to the *risk* of punishment in order both to act in ways consistent with their deeply help commitments and to communicate their concerns to society. They act from the strength of their conscientious conviction and not from a desire to place themselves above the law.

Finally, with regard to procedural fairness, there is inescapable comparative unfairness between majorities and vulnerable minorities both in their capacity to get their concerns onto the public table for discussion and in their ability to influence policy before decisions are taken. Given this comparative unfairness, there must be some leeway in how such persons are permitted to participate. Putting the point bluntly, it is not unfair to grant such persons some space outside the bounds of the law to communicate their convictions; it is unfair to *deny* it to them. This supports an excusatory defence for civil disobedience.

A general reply to the *democracy problem* is as follows. Within a liberal society, as Horder himself acknowledges, the state's strategic concern to maintain authority over the use and threat of force by displacing people's inclination to retaliate against wrongdoers

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

with the criminal law, is bound up with and tempered by the requirements that 1) people not expect all wrongdoing to be controlled solely or largely through the *state's* authority to punish, and that 2) wrongdoers' dignity and needs be acknowledged.[88] This nuanced view of the liberal state's strategic aims is compatible with a generous set of excusing conditions that acknowledge wrongdoers' humanity and dignity. Thus, there is nothing, in principle, about the demands-of-conviction defence as an excusatory defence that need trouble a liberal commitment to democratic rule of law.

D.8 Applicability of a Demands-of-Conviction Defence to the Defendants' Activities

In D.6, I held […].

With regard to a demands-of-conviction excuse, we human beings are expressive creatures. We wish not only to lead our lives according to our beliefs and values, but also to be *seen* to lead our lives according to those beliefs and values. To be compelled to fail to live in line with our beliefs is normatively disorienting. To be forced to honour our beliefs only surreptitiously is disorienting too. It is a good legal system that can acknowledge the importance of expressing and manifesting deep conviction, and that can excuse when it cannot justify modest breaches of law taken in defence of such conviction.

[…]

It brings to mind Mill's declaration in *On Liberty* that if there are any persons who contest a received opinion, we should thank them for it, open our minds to listen to them, and rejoice that there is someone to do for us what we otherwise ought to do ourselves.[89] In a similar vein, Richard Dagger argues that,

> To be virtuous…is to perform well a socially necessary or important role. This does not mean that the virtuous person must always go along with the prevailing views or attitudes. On the contrary, Socrates and John Stuart Mill have persuaded many people to believe that questioning and challenging the prevailing views are among the highest forms of virtue.[90]

This view aligns with an increasingly common perception that our responsibilities as citizens go well beyond any narrow duty to comply with the law.

Disclaimer

This analysis is based on the information available to me at the time of writing (June 2023). There is no conflict of interest of which I am aware.

---

[88] Horder (2004), 196.
[89] Mill, (1999), 90.
[90] Dagger, Richard (1997), *Civic Virtues*. Oxford University Press 14.