POLITICAL DISSENT

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Abstract

Although political dissent is an idea that perennially receives much public attention, its standing in the academic literature is relatively slight. Very few thinkers engage the idea of dissent outside of its manifestation as an illegal action, and ever fewer dedicate any time to understanding the idea conceptually. A substantial portion of my dissertation aims to address this conspicuous gap. In the remaining portion, I advance a normative claim. My claim is that the very same justificatory considerations that pertain to illegal acts of dissent pertain as well to those acts that ought to be legally protected by a citizen's right to dissent. Put more simply, I argue that whether or not a dissenting action is done within, or outside of, the law is of no normative effect. The upshot of this argument is that it places the burden on agents to be responsible for all the dissenting actions they undertake. This is so regardless of whether or not those actions find institutional shelter.

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Introduction

Some years ago, I earned a Master's degree at Katholieke Universiteit Leuven in Belgium. During my tenure there, I had the opportunity to take part in something that, at the time, was completely foreign to me: a protest. You see, having been raised in an overtly conservative Canadian city, I never l really had cause to voice any feelings of discontent. To be perfectly honest, there weren't really any to speak of. But that night in Leuven, I became a dissenter. The details of our protest were mild by comparison. A right-wing group--one which proudly aligned itself with an especially intolerant political party[1]--had been given legal permission to stage a manifestation through our University town. They did so with the presumed intent of drawing public attention, and indeed public support, to their association and cause. It was with this intent that we, the students, had taken issue. To us, their association was illegitimate; and because it was, it didn't deserve the legally protected stage it had secured (or so our reasoning led us to believe). We protested the decision by blockading the pre-determined route their procession was to follow. And, for a time, our protest was successful (disgusted looks and insults from both sides was about as bad as it got). Eventually the authorities--who, anticipating such a response, had been present all the while in their role as 'crowd control'--decided that it was time to uphold the rule of law, and began to use force against our unsanctioned wall of bodies. They did so in the form of water-canons (which, having been designed for that very purpose, worked exceedingly well) and so the crowd dispersed, and the manifestation--although which much less energy and purpose than before--was free to proceed as scheduled.

What this story demonstrates, and under relatively innocuous conditions, are the many deep complexities surrounding issues of political dissent. Who was in the right in this situation? Was it the intolerant group which had secured legal approval for their (morally questionable) demonstration; or us, the group intolerant of their intolerance that unilaterally decided to block the demonstration? Whose rights of dissent had been more egregiously violated? Those who were dissenting the general views of the elected government; or those who dissented against the particular decision by that government to allow the manifestation? Were both responses to each group's actions legitimate? If so, which response was more legitimate? The response of blocking the legally sanctioned route for the demonstration; or the police's response of outward force to ensure that the legal sanction be carried through? Does it matter that one group acquired the state's approval and the other did not? If so, what special status did the group receive by thus acquiring it? These and similar questions all point to the subtle and intricate nature of the idea of political dissent. And it is this subtle and intricate nature that has encouraged the present investigation. My ambition in this work is to undertake a detailed analysis of the relationship that exists between the citizen and the state concerning disagreements by the former with respect to decisions made by the latter. For the most part, the analysis will be situated within the context of a liberal-democracy. This does not imply that the content of my analysis will be wholly irrelevant

[1] The party with which it aligned itself was Vlaams Blok. Among other platforms supported by Vlaams Blok, they were best recognized for their far-right anti-immigration initiative. Of note is that the party reorganized itself into Vlaams Belang in 2004 after a Court of Appeal in Ghent ruled that some of the affiliate organizations of Vlaams Blok had breached a 1981 anti-racism law. For more on this topic, c.f., Erk, 2005. 'From Vlaams Blok to Vlaams Belang: The Belgian Far-Right Renames Itself' in *Western European Politics*, vol.28.

to political regimes other than liberal-democracies however;[2] only that its fundamental interest will be to study the idea of dissent in societies governed by the values that are generally endorsed by this form of government.[3] In a world where acts of dissent seem to increasingly attract the attention of the media, and indeed of us all, the time appears to be ripe for just such an investigation.

The analysis will proceed in the following way. Chapter 1 will be concerned with laying out a general conceptual framework for dissenting actions. We encounter dissenting actions everywhere in our modern society: in the judge who disagrees with the majority opinion of her colleges; in the politician who filibusters a motion that is before a legislative assembly; perhaps most paradigmatically, in the citizen who protests against some policy enacted by her government. All of these cases of dissent share common features, and it will be the point of the first chapter of the dissertation to elucidate what these common features are. Furthermore, chapter 1 will be interested in articulating the particular distinction that exists between acts of dissent and acts of disobedience. As these two forms of antagonistic response will become the centerpiece for the analysis going forward, it is vital to understand exactly how they are related, and how they are differentiated.

In chapter 2 we turn our attention to the right to dissent. As we will see through an examination of the differences between dissenting and disobedient actions, when examined as political acts in particular, the only distinction of note is whether or not the act in question is undertaken in contravention of a state-issued directive. This encourages us to get much clearer on the kinds of dissenting activities the citizen ought to be protected in performing through her legal right to dissent. By employing the Hohfeldian analytical framework, I will argue that such a right includes a protection over the citizen's: a.) expression; b.) association and assembly; c.) political participation; and, d.) due process rights. I will then outline the reason these rights ought to constitute the citizen's right to dissent, especially as that right appears in the context of a liberal democratic political situation.

Chapter 3 engages the question of whether or not the citizen has a duty to obey the law. If it can be shown that the citizen does have such a duty, then a relevant distinction will have been disclosed between dissenting acts of an illegal nature and acts that are to be protected by the citizen's legal right to dissent. This distinction will then have an effect on the conditions under which each act can be considered justifiable. Put another way, if it can be shown that the citizen has a moral duty to obey the law, then she has a reason not to disobey that she doesn't have with respect to actions that are to be protected under her legal right to dissent. Of course, the opposite of this is also true. If it can be shown that the citizen has no such duty to obey the law, then there is no relevant distinction to speak of between illegal acts of political dissent and ones that ought to be protected by the citizen's right to dissent. If this much is true, then each category of

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[2] For more on political dissent as it occurs specifically in non-democratic regimes, c.f., Osa and Schock, 2008. 'A Long, Hard Slog: Political Opportunities, Social Networks and the Mobilization of Dissent in Non-Democracies' in *Research in Social Movements, Conflicts and Change*, vol.27; Osa and Corduneanu-Huci, 2003. 'Running Uphill: Political Opportunity in Non-Democracies' in *Comparative Sociology*, vol.2; Kamrava, 1998. 'Non-Democratic States and Political Liberalism in the Middle East: A Structural Analysis' in *Third World Quarterly*, vol.19, no.1.

[3] By 'liberal democracy' I mean to describe any state that is: a.) governed by a republican ideal; and is b.) supported by a robustly exercised rule of law; which ensures that c.) certain fundamental values commonly attributed to liberal democracies are protected (e.g., a commitment to moral autonomy; a respect for a plurality of beliefs; etc.)

dissenting act will presumably be open to the same justificatory analysis. As the arguments of chapter 3 will make clear, there do exist certain bases upon which citizen's can be said to have a duty to obey the law. However, this duty is not generalizable but one that in all cases depends on the relation that exists between particular citizens and the particular legal directive.

In chapter 4 the justificatory question pertaining to acts of political dissent is addressed squarely. My claim will be that in both the case of illegal acts of political dissent, as well as in the case of dissenting acts that ought to be protected by the citizen's right to dissent, the act in question may be considered justifiable when the moral reasons that favor performing the act outweigh the moral reasons that oppose performing it. As this approach invokes the idea of balance, it will apply to instances of dissent only on a case-by-case and approximate basis. This then suggests that it is far more important to determine prospective heuristic devices that may be used to assist the agent in coming to more justifiable moral decisions in each particular instance than it is to outline a list of hard and fast rules for the justification of each type of act. I undertake this endeavor first with respect to acts of illegal political dissent, and then to acts that ought to be protected by the citizen's right to dissent. My suggestion will be that, since the analysis of chapter 3 uncovered no special moral status pertaining to the fact that the state has issued a legal directive, the very same considerations that may be used to better assist the agent in coming to a more justifiable decision with respect to performing an act of illegal political dissent can be reproduced in assisting him in coming to a more justifiable decision with respect to performing an act that ought to be covered by his legal right to dissent. I then strengthen this claim, suggesting that the same moral responsibilities the agent has with respect to his decision to engage in an act of illegal political dissent apply *mutatis mutandis* to his decision to engage in an act that ought to be protected by his legal right to dissent.

Chapter 1: Dissent and Disobedience

According to the standard OED definition, dissent is a, "refus[al] to assent; to disagree, think differently or express such difference." More plainly, it is the, "(expression of) difference of opinion". This definition seems to capture much of what we would normally attribute to the term. Clearly dissent has something to do with disagreeing--with a refusal to 'go along'. It might even have something more narrowly to do with a disagreement of opinion, and with an *expression* of that disagreement. But as it stands, the definition is underwhelming--too many of the subtle nuances that help to distinguish dissent from other forms of disagreement are missing. In his recent book on dissent, Cass Sunstein offers an alternative definition. According to Sunstein, dissent is, "[a] rejection of the views that most people hold."[4] This again gives some shape to the term, but not nearly enough. What Sunstein adds to the definition--and what is assuredly a feature of dissent--is that dissent has a stronger gravitational pull than disagreement. Whereas disagreement can be, and often is, passive in nature, dissent is necessarily active--it is a *rejection*, rather than a mere *difference of opinion.* But this is as far as Sunstein's definition goes toward capturing what dissent is. For one thing, dissent need not be aimed at the views that 'most people hold'. It is not only possible, but I suspect quite common, for a person to dissent from views that are held by only a small percentage of people.[5] In addition to this, it is at least questionable to designate the proper object of dissent to be 'the views' that people might hold in the first place. It may be the case that a majority of people are of the view that chocolate is the best ice cream flavor, but it would certainly be strange--at least idiomatically speaking--to hear someone use the term 'dissent' to express a rejection of this view. In both of these ways, Sunstein's definition lacks the refinement needed to truly explain what dissent is. What is worse, this lack of refinement seems to be symptomatic of the existing literature on dissent. One is hard-pressed to find in that literature any sort of detailed analytic treatment of the idea, the trend instead being to engage dissent through perfunctory characterizations alone. It will therefore be the aim of this first chapter to offer a thorough analysis of what it means to dissent, and of how dissent relates to other comparable forms of antagonistic response.

The chapter will be structured in the following way. Section 1.1 will be concerned with outlining the conceptual conditions that belong to the idea of dissent. As I will show, these conceptual conditions all follow from a fundamental insight that seems to be missing from other treatments of dissent: namely, that *one must be a member of a group in order to dissent from a position taken by that group*.[6] This insight will then lead to other conditions that are theoretically

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[4] Sunstein, 2003. *Why Societies Need Dissent*. Cambridge, MA: Harvard University Press, p.7.

[5] Consider in this regard that opposition in Spain to its government's decision to join the coalition of countries invading Iraq in the second Iraq war was as high as 90% (http://www.cnn.com/2003/WORLD/europe/03/29/sprj.irq.spain/)

[6] I wish to get out of the way early on that the specific object of dissent will vary according to the situation in which dissent is exercised. Among other things, the object of one's dissent may be: a practice; a policy; a decision or line of reasoning; an official action or attitude; a norm adopted by some informal group; a norm adopted by an authoritative body; etc. Heretofore, when I speak of dissent generally, I will sometimes refer to the 'position' a group takes (as this term seems to capture a wide-range of possible objects of dissent), but at other times will employ more particularized terms to express my point. In any event, it should not be assumed that whatever term is used in the flow of a more general argument is the only one that may be relevant.

tied to an action being one of dissent. These will include items such as the motivational character of the dissenting agent, as well as the mode of the object of his dissent. As will quickly become apparent however, understanding dissent in any sort of substantive way will involve much more than a record of these bare conceptual qualities. In addition, certain practical considerations are essential for one to have success in activating their capacity to dissent. In particular, I speak of resource and environmental considerations as having a practical effect on the possibility for dissent, both of which will be the proper subject of section 1.2. In section 1.3 the investigation will turn to the distinction between dissent and disobedience. As these two ideas constitute the very basis for my project going forward, getting clear on how they are related, and how they are differentiated, is of principal importance. It will be my claim that two fundamental differences exist between dissent and disobedience: first, whereas dissent is always directed toward a position of a group, disobedience need not be; second, whereas disobedience is necessarily a response to something that is required of the agent, dissent need not be. These differences then lead to the fundamental point of distinction between each type of act: the intention of dissenting actions will in almost all cases be to effect some future influence over the group toward which the action is directed; this is not so with acts of disobedience. Section 1.4 narrows the discussion of disobedience to its particular manifestation as a political action. There, I define political disobedience as, 'the disobedience of any of those rules that have been designed specifically by the state to be taken as mandatory for those who fall within the particular jurisdiction covered by the rule'. I then broaden the discussion by examining both the features constitutive of political disobedience and the forms it might take in practice. Finally, in section 1.5 I provide an analysis of the difference between political disobedience and other forms of lawbreaking. In particular, the question of what makes a disobedient action against the state 'political' will be examined. My claim will be that, although impossible to define as sharply as some might like, the difference between actions of political disobedience and ordinary acts of lawbreaking is captured in the motivation behind each kind of action. Furthermore, since the motivational ground of politically disobedient actions will be shown to be identical to the ground that designates some act as one of dissent, it will be my claim that any act of political disobedience can also be characterized as one of illegal political dissent.

1.1: The Conceptual Conditions for Dissent

Why is it that when someone *disagrees* with some position, we do not ordinarily mean to say that the person is *dissenting* from that position? This is so despite there being much intuitive common ground between the two instances (e.g., in both cases, there exists a normative rejection of some view; in both cases, that normative rejection is expressed). A good place to begin pulling apart the differences between these two alternatives is to ask an auxiliary question: what features common to an ordinary instance of disagreement need be modified in order to turn that disagreement into an instance of dissent? My argument will be that in order to make this change, it won't be enough that we merely tweak the contingent details surrounding a normal case of disagreement (e.g., to strengthen the conviction behind the disagreement, or to have that conviction expressed in a particular way), but rather to tell a particular kind of story about the *person* who is behind the disagreement, the *group* with which she is in conflict, and the *relation* that exists between the two.

First, the person. For disagreement to become dissent, the person who disagrees must be a member of a group. Furthermore, she must direct her disagreement at a position (e.g., a norm, decision, practice, etc.) held by the group. This is the fundamental insight to understanding what dissent means. One cannot dissent from a group position if she is not part of the group; nor can one dissent in a non-group setting. It would make little sense, for example, to say that a member of the CAW (Canadian AutoWorkers Union), in her denunciation of a decision made by the United States government to raise federal taxes, *dissents* from that decision. Although the individual here is a member of a group (the Canadian AutoWorkers Union), and although she does disagree with some decision (the decision of the United States government to raise taxes), it is a decision that does not belong to a group with which she is affiliated (we are of course assuming that she is not an American citizen). In this case then, the fact that she belongs to a group, and disagrees with some group decision, is merely coincidental. Thus in this situation, although the individual is certainly condemning a decision made by the United States government, she is not dissenting from that decision.

Second, the group. If 'belonging to a group' is fundamental to the idea of dissent, then one must understand what it means to belong to a group in order to understand what it means to dissent. Belonging to a group entails that there is at least one unifying norm around which the group can converge--a norm (or set of norms) that in part or in whole defines the group. For instance, a Rolling Stones Fan Club might be based on nothing more than the mutual belief that the Rolling Stones make great music; then again, the group might require much more than this (e.g., that members be exceptionally well educated on the history of the band). What this implies is that the kind of norm a group will converge on will differ according to the kind of group one belongs to. Now, roughly speaking, groups can be divided into two categories: formal groups and informal groups.[7] Formal groups are groups with pre-determined structures--structures which are based on assigning specific roles to specific individuals, and on organizing those roles into hierarchies (typical examples might include corporations, University faculties, and governments). In formal groups, membership will be a matter of accepting the group's organizational structure;[8] and, more specifically, of accepting what H. L. A. Hart calls the 'secondary rules' proper to the group. For Hart, the secondary rules of a group include certain procedural rules that confer power to the group's officials so that those officials may introduce, modify, or enforce the 'ground-level' rules which aim to generate duties and obligations for those who belong to the group (Hart calls these 'primary rules').[9] It will therefore be the secondary rules of a group that will act as the unifying norms around which formal groups converge. What this means then is that membership in formal groups will in every case be predicated on a mutual

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[7] For a basic introduction of how formal groups differ from informal groups, c.f., Selznick, 1948. 'Foundations of the Theory of Organization' in *American Sociological Review*, vol.13, no.1.

[8] By 'organizational structure', I have in mind, e.g., Max Weber's Ideal of Bureaucracy (c.f., Weber, 1978. *Economy and Society: An Outline of Interpretive Sociology* (Roth and Wittich, eds.). Berkeley: University of California Press). Charles Perrow offers a succinct description on pp.736-738 of Perrow, 1991. 'A Society of Organizations' in *Theory and Society*, vol.20, no.6. C.f., also pp.341-343 of Meyer and Rowan, 1977. 'Institutionalized Organizations: Formal Structures as Myth and Ceremony' in *American Journal of Sociology*, vol.83, no.2.

[9] For more on the distinction between primary rules and secondary rules, c.f., chapter 5 of Hart, 1961. *The Concept of Law*. Oxford: Oxford University Press.

acceptance of the group's secondary rules (at least by the officials of the group). Informal groups, on the other hand, are the opposite of this. These groups come about by way of a spontaneous confluence around certain primary norms rather than through pre-determined judgements regarding the group's structure (typical examples of informal groups might include: friendships, fan groups, cultural clubs). Whereas formal groups are held together through their organizational framework, informal groups coalesce around the mutual and ongoing acceptance of the 'ground-level' norms that constitute the group. This then means that membership to informal groups is a matter of adopting, and adhering to, certain ground-level norms (e.g., trust, shared aesthetic taste, a shared history, etc.) rather than of accepting the group's secondary rules.

With this distinction in mind, we can more clearly understand what it means to dissent from a group. To dissent as a member of an informal group will always be a matter of rejecting a norm that (in part or in whole) defines what the group is. This follows logically from what has been said above. As the constitution of informal groups is the ongoing and mutual acceptance of certain 'ground-level' norms, and as dissent is by definition a response directed at some norm (or set or norms) belonging to that group, it follows that the norm (or set of norms) to which dissent is directed will, in informal groups, be the very norm (or set of norms) that, in part or in whole, defines what the group is. The matter is of course different in the case of formal groups. In formal groups, it is not a requirement that a large number of group members accept each 'ground-level' norm adopted by the group. Rather, the mere observance of certain procedural rules that govern the group is quite enough to maintain the group's formal character. Because this is so, it is of course possible (and perhaps even typical) for dissent to manifest in formal groups in a way that does not threaten the integrity of the group itself. In informal groups, dissent is always prone to threaten the group's integrity.

Third, the relation. All situations of conflict (e.g., disagreement, disapproval, contestation) are relational in some way. This means that it is the *kind* of relation that matters when distinguishing between each type of conflict. We know from above that the person who dissents must be a member of a group. And we know as well that membership to a particular kind of group is predicated on the acceptance of a specified set of norms ('secondary rules' for formal groups; 'ground-level norms' for informal groups) belonging to that group. We know finally that this specified set of norms will constitute (in part or in whole) the existence conditions making up the group itself. What all of this implies is that for dissent to occur, the relation that exists between the dissenter and the group from which she dissents must be one of *mutual support*: the group gains its identity from the norms accepted by the individuals who make up that group, while the individuals making up that group gain (part of) their identity from accepting (a specified set of) the group's norms. Concerning dissent then, the important idea to take away is this: since the group's existence is predicated on the members' support of (a specified set of) its norms, the group on the whole has an interest in its members' continued participation, which implies that individuals who belong to the group are given a means to effect change. Conversely however, since the individuals belonging to the group themselves identify

with the group's norms, dissent becomes the most likely form of grievance.[10] The effectiveness of a particular instance of dissent will almost totally be a product of the degree to which this mutual support is in play. To wit, dissent will be very effective if the group identifies to a large degree with the dissenting individuals, and the dissenting individuals identify to a large degree with the group; it will be conversely less effective when these identity relations are attenuated.

What the foregoing has described is one important difference between dissent and disagreement: whereas one can disagree with a position taken by a group even if she does not belong to the group, one cannot dissent from that position if she does not belong to the group. But there is a second important distinction between dissent and disagreement. The *object* of dissent will in all cases be *settled states of affairs*; furthermore, these settled states of affairs will always carry with them some kind of *practical effect*.

It is somewhat misleading--though perhaps not entirely incorrect--to suggest that one can dissent from an opinion. One dissents from an opinion only when that opinion leads to certain practical consequences. Consider the example referred to in the introduction to the present chapter. Even if it were the opinion of a majority of Canadians that chocolate is the best ice cream flavor, surely it would be a misnomer to express one's criticism of this opinion--even as a member of the group which expresses the opinion--by suggesting that one 'dissents from' the view that chocolate is the best ice cream flavor. This is so not because one's criticism is directed toward an opinion *per se*, but because the opinion in question--namely, that 'chocolate is the best ice cream flavor'--does not seem to carry with it any kind of practical effect. Let me clarify this point by invoking a further example. Consider how the term 'dissent' functions in the context of a Supreme Court decision.[11] When the Supreme Court of Canada declares its verdict, it comes in the form of a majority opinion, meaning that a majority of the Justices sitting on the Supreme Court are of a certain opinion regarding how the outcome of the case should be decided.[12] Oftentimes, this majority opinion is countered by a minority opinion--also called the 'dissenting opinion'--which is an opinion of a minority of Justices who disagree, for some reason or other, with either the verdict handed down, the reasoning used to reach that verdict, or both. Now at first blush, it would seem that here we have a clear-cut instance of dissent being directed at an opinion: the Justices who do not agree with the majority opinion are dissenting from that opinion. But a more sober interpretation would suggest something more nuanced. If the Justices are dissenting from the opinion of their majority counterparts, it is due only to what that majority opinion *signifies*--to wit, it signifies a *verdict* that carries with it the practical effect of the law. In fact, if we were to follow this line of reasoning all the way through, one might have reasonable

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[10] Note that this is so whether the chosen means for effecting change is expressed through either voicing one's opinion explicitly, or by 'speaking with one's feet', as it were. For a clear summary of the difference between the 'voice option' and the 'exit option', c.f., Hirschman, 1970. *Exit, Voice and Loyalty*. Cambridge, MA: Harvard University Press, pp.1-20.

[11] It should be noted that the right to judicial dissent is specific to certain kinds of legal systems--mostly to Anglo-American common law systems (such as can be found in Great Britain, the United States, Canada, Australia, etc.). Some continental European legal systems allow for judicial dissent (e.g., in Germany, Spain, Portugal, and Greece), whereas others do not (e.g., France, Italy, the Netherlands, Belgium, etc.). For more on this topic, c.f., Laffranque, 2003. 'Dissenting Opinion and Judicial Independence' in *Juridica International*, vol.13.

[12] The Supreme Court of Canada is made up of nine Justices (one Chief Justice and eight Puisne Justices). This ensures that every decision made will result in a *majority* opinion.

basis to question whether one can actually dissent from an opinion at all--whether, that is, one's dissent from an opinion would always be better expressed as dissent from the practical effect of that opinion (whether that effect be some decision or verdict, enacted policy, or otherwise). I am inclined to think that there is something to this argument. However, from the standpoint of a purely conceptual analysis of dissent, this semantic quibble can be put to one side. Here, it is enough to note that whatever object one is said to dissent from must both be settled, and carry with it some kind of practical effect.[13] Of course, it goes without saying that all of this does not hold for disagreement. One quite naturally disagrees with matters that are unsettled; matters which, moreover, carry no real practical effect (e.g., a disagreement over who is the proper heir to the title 'Best Rock n' Roll Band of All Time' is neither settled, nor does it likely carry with it any kind of practical effect). This indicates a second important difference between dissent and disagreement.

With the foregoing in mind, it is now possible to formulate a working-model of the conditions that make up the conceptual possibility for dissent. They are as follows. Dissent is:

a.) *an expression of disapproval*;

b.) *that is undertaken by a member of a group*;

c.) *and directed at a position held by the group (to which one belongs)*;

d.) *the position being settled, and carrying with it some kind of practical effect*.

In addition to these, I would like to add a fifth and sixth condition, both of which however will not be fully explained until section 1.3 of the present chapter. They are:

e.) *dissent is a normative act, based on a normative judgement*;

f.) *which (typically) aims to effect influence over some future state of affairs*.

What these six conditions constitute then is the conceptually appropriate designation of some action as a dissenting action. Whenever these conditions are mutually operative, one's rejection of some item can properly be called 'dissent'. If any of the conditions are absent, it is likely the case that another term would be more fitting.

1.2: The Practical Conditions for Dissent

We just learned that there exist certain conceptual restrictions attached to invoking the term 'dissent' which narrow the ways in which the term may be properly applied. Whether or not these conditions obtain will dictate whether or not a particular instance of conflict is one of dissent. But in the real world, these conceptual conditions are only the first hurdle toward a full understanding of the idea. There also exist certain practical considerations that bear a meaningful role in whether or not dissent can be effectively carried out in a given situation. In fact, it is my claim that these practical considerations will become just as important as their conceptual counterparts when evaluating the substantive quality of dissent.

Some people would argue that an important condition for dissent is that the issue at stake be of some significance; that the term 'dissent' does not properly apply when referred to merely trivial matters. From a strictly conceptual standpoint, they would be wrong. It is indeed conceptually possible to satisfy each condition of dissent without the issue of dissent being of

[13] This is why things like practices, norms, policies, etc. are unquestionably possible objects of dissent. All of these are by nature settled, and carry with them practical effects. Opinions, views, and the like *may* be settled, and *may* carry with them practical effects, but they do not do so by nature.

any major importance. But practically speaking, there does seem to be something to the idea that only when some matter has crossed a certain threshold of significance do we invoke the term 'dissent'--and that we do is not entirely unconnected to the conceptual conditions that surround the term. As discussed above, the conditions for dissent suggest that a mutually supportive relationship exists between a particular group and an individual (or group of individuals), such that the identity of each is at least partially determined by that relationship. And it just so happens that the things we identify with are oftentimes the very same things we take to be important. So it should come as no surprise that the issues which inspire dissenting actions will carry with them an impression of significance.[14] This is all as it should be. But there is something more to say here. In addition to those considerations which are in some way implied by certain conceptual conditions for dissent, there also seem to be some independent practical conditions that need be satisfied if one is to understand the term in any sort of substantive way. In this regard, there are at least two mutually supportive conditions that make up this category: first, for dissent to occur, one must have access to the *resources* necessary to carry out the dissenting action; second, the *environment* in which the dissenting action occurs must be ripe.

1.2.1: *Resources*

One clearly need have the resources required by an endeavor in order to carry out that endeavor; this is the case with any endeavor one proposes to undertake. If I wish to paint a picture, I need have access to the materials necessary to carry out my wish. If I would like to purchase an automobile, I need have the purchasing power (whatever form that power might take) necessary to do so. Dissent is of course no exception. There are certain resource requirements that need be met if I am to successfully carry out dissent against some position. Now, keeping in mind that acts of dissent are communicative acts (their aim being to communicate a message from one party to another) there are two different senses in which one may speak of the practical success conditions for dissent. The first sense of success turns on whether the *ultimate aim* of the dissenting action is brought to bear. For example, if the ultimate aim of my act of dissent against the government is to have a particular piece of legislation overturned, then for my act to be considered successful (in this first sense), the piece of legislation I have targeted must in fact be overturned (i.e., my communicative act must actually bring about its intended effect). But this is a very demanding sense of success. Not often do dissenting acts find success in this ultimate sense. There is also another, less ambitious, way a dissenting action may be considered successful. A dissenting action may be considered successful if it succeeds in communicating (to the relevant audience) what the action was designed to communicate. Success in this second sense is not concerned with whether or not the message brings about its ultimate aim; rather, its concern is whether or not the intended message has accurately been received by the relevant

[14] I am careful to here use the locution 'impression of significance'. Surely it is the case that although some issue might *appear* to some individual (or individuals) to be of vital importance, when tested against other issues, even to the individuals involved, that issue would lose much of its perceived significance.

audience.[15] Now, these two senses of success are of course related. As we will see--especially nearing the end of the present section--the further apart the two senses of success become, the more obsolete becomes the weaker of the two senses. The reason this is so should be obvious. As one's interest in accurately communicating a message to an audience (success in the second sense) is most often done with an intention to bring about some desired effect (success in the first sense), the less likely the message is to actually induce this effect, the less likely one will be to continue to use that same form of communication. Be that as it may, in what follows I will primarily be concerned with success in the weaker sense discussed. My interest in this section is not to determine what it might take for an act of dissent to be successful in an ultimate sense, but rather to ascertain the considerations that are relevant if dissent is to secure a *genuine practical possibility* of bringing about its ultimate aim. It is in this context that resource requirements and, for the most part, environmental considerations will be examined.

Now, at the most basic level, the resource requirements necessary to successfully carry out a dissenting action (in the weak sense just mentioned) are extremely slight. They are satisfied by the same minimal criteria that belong to any form of communication. These are: a.) the 'capacity to express or signify something' (whether that expression be through voice, bodily action, or otherwise); and, b.) the 'capacity that the expression or signification be received' (whether that reception be through sight, auditory detection, or otherwise). But as the aim of dissent becomes more specific, so too do the resource requirements demanded of the dissenting action. For example, if I wish to dissent against my government's decision to raise taxes, it won't be enough that (a) I have the mere capacity to express dissent and that (b) the government (or members of it) have the mere capacity to receive my expression. The capacity to express my disapproval must actually be *exercisable*--i.e., I must be in a situation whereby I am able to exercise my capacity in such a way that my expressed view can actually be communicated. If I am lucky, and live in a relatively well-functioning democratic society, I may have a chance to meet one-on-one with a representative of the government. But even this option will take some time and effort on my part, especially considering that such a meeting will only happen if it is conducive to the schedule of the representative, and not to my own. If instead I find myself to be a citizen of a more oppressive regime, I will most likely be forced to invest a great deal more time and effort (resource) into my dissenting action just in order to ensure that the basic practical requirements of communication are met. In this way, it would appear that as the acceptability of dissent decreases, the resources demanded to carry out dissent will increase in turn. And this then means that, oftentimes, it will be those situations where dissent is most needed that will prove most diminishing to one's actual ability to exercise a capacity to dissent. Now, whether or not this is true in every case is not immediately important. The more conservative point to take away here is that very specific resource requirements exist that go along with specific instances of dissent. Furthermore, each specific instance will demand a resource base that may or may not be readily available to the dissenting actor(s). In summary

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[15] The distinction I am drawing here is between the illocutionary force of an act versus its perlocutionary effect. The illocutionary force of a speech act is the effect the speaker *intends* the act to produce in his audience; the perlocutionary effect is the actual effect produced. For more on this distinction, c.f., Austin, 1962. *How To Do Things With Words* (Urmson and Sbisá, eds.). Cambridge, MA: Harvard University Press, esp. lectures VIII, IX, and X.

then, if one is to entertain the notion of dissent as a practical matter, they will be forced to assess the resources necessary to carry out that action. More to the point, they must assess what resources are necessary to successfully communicate their intended message to the relevant audience.[16]

1.2.2: *Environment*

We just noticed that, generally speaking, the resources that are required to carry out a dissenting action tend to increase as the acceptability of dissent decreases. Intuitively, this seems clear enough. Of course, this wouldn't be a problem at all if all environments were equal in terms of their response to dissent. But this is not the case. Certain environments are more conducive to dissent than others, and this has a practical effect on how readily dissent can occur in these environments. The typical example invoked here is the one suggested above: the distinction between liberal states that allow, and even protect, widespread dissent versus non-liberal states which do not. But it is important to note that the issue need not be understood only at this level of abstraction. There are households that are more conducive to dissent than others; the same goes for social clubs and corporations, and even friendships. In all of these cases, the particular environmental arrangement of the group in question will have a discernible effect on the practical possibility of a dissenting action finding success, or whether this practical possibility exists at all. One can point to a whole spectrum of environmental arrangements that can characterize a particular group with respect to dissent. There are those groups that actively reward dissent; those that go out of their way to accommodate it; groups that merely tolerate dissent; those that 'claim' to tolerate it, but in reality do not; and of course, groups that quite officially do not tolerate dissent at any level. Whatever environmental arrangement one finds oneself in, that arrangement will have a practical effect on how viable the option of dissent will be for that individual. It is not that dissent will be conceptually impossible if one's environment fails to be conducive to the dissenting action; rather, one's environmental situation will be a strong mitigating consideration for how an individual or group of individuals relate to the notion of dissent in a given group dynamic. Practically speaking, this becomes a very important consideration. It does for a simple reason: the most successful way a group can diminish dissent among its members is to slowly and imperceptibly remove those considerations that help to secure even the practical possibility for a dissenting action achieving its goal. This might be accomplished, for example, if a group were to simply eliminate what was once a very perspicuous medium for members to activate dissenting actions, forcing them instead to seek less reliable channels in the hope that dissent be altogether abandoned.[17] In this way, even in places where dissent appears to be the most accessible--and maybe even the most systemically protected--certain environmental conditions may exist that both discourage and thwart the practical possibility for dissent achieving its goal.

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[16] For more on the importance of considering the resources at one's disposal in dissenting movements, c.f., Sharp, 2011. *From Dictatorship to Democracy: A Conceptual Framework for Liberation*. Pontypool, Wales: Green Print.

[17] This is a charge that has sometimes been brought against Canadian Prime Minister Stephen Harper's method of governance. For example, c.f., Cox (2012, February 27). Mr. Harper, Dissent is Vital to Democracy. *The Globe and Mail*; and, Gergin (2011, April 6). Silencing Dissent: The Conservative Record. *Canadian Centre for Policy Alternatives*.

The lesson to take away from the foregoing then is that even in situations where each of the six conceptual conditions for dissent are satisfied, it may still be the case that dissent is practically unrealizable. This is so because, as a communicative action, dissent depends on the successful transmission of a certain message from one medium to another which, in a given practical setting, may or may not be possible. It is therefore essential that a treatment of dissent keep these practical considerations closely in mind. Without the genuine practical possibility of dissent achieving its goal (namely, by successfully communicating its message), the conceptual conditions become impotent.

1.3: Dissent versus Disobedience

We have gone over both the conceptual conditions for the possibility of dissent, as well as the practical considerations that oftentimes play just as vital a role in its operative implementation. With these analyses in mind, we are now in a position to distinguish between dissent and disobedience. The importance of doing so is consistent with our analysis to this point: although many would agree that dissent and disobedience are distinct in some way, few would be able to explain precisely how. Indeed, it seems a commonplace for the media to label dissenting agents 'disobedients', and disobedient agents 'dissenters'--and in many cases, they would not be wrong to do so. Nevertheless, there does appear to be at least some confusion regarding the relation between dissent and disobedience, and thus it is one that invites a much more thorough analysis than what is usually given to it. This is especially so considering the central position both terms will occupy in the treatise as we move forward.

As the analysis in section 1.1 explained, dissent is an expression of normative disapproval by a member of a group that is aimed at one (or several) of the positions held by the group. In this way, dissent acquires an *intentional* status. Since dissent is an expression of disapproval by some agent, its character falls into line with the intention of the agent who expresses such disapproval. Similarly, disobedience is an intentional action. It is quite natural to think that to obey someone is to do what she says because she says it; or, to put it another way, that her saying to do x *constitutes a reason* for doing x. If to obey is to act for a reason, and as one cannot act for a reason unintentionally, it follows that one cannot obey unintentionally. The same logic of course holds for cases of disobedience, which is the inverse of this. But that dissent and disobedience share this intentional quality does not then mean they relate to the quality in the same way. In particular, there are two ways dissent and disobedience come apart, and each have to do with a fundamental feature of the type of response in question. First, it is characteristic of disobedience, but not of dissent, that it be a response to directives that are intended to be taken as *mandatory* for the agent. Second, whereas dissent is an action directed specifically at a *group* to which one belongs, disobedience need not be. These two distinctive properties lead to the salient difference between each type of response: whereas the aim of the dissenting agent will

typically[18] be to effect influence over some future state of affairs, in cases of disobedience, this is not true. I will now explain in more detail each of these points.

There are different ways actions can become mandatory for agents. A first way is for an agent to be *obliged* to perform an action. This happens in situations where one is faced with an assessment of the form: 'if I want x, I am required to do y'.[19] Here, for the agent to satisfy some desire she has, it becomes mandatory that she perform some other action--oftentimes an action the agent would, all things considered, rather not perform (e.g., in the case of a 'hold-up', the agent is obliged to hand over her money due to a desire not to be shot). But this is not the only way actions can be said to be mandatory. A second way for an action to become mandatory is if the agent has an *obligation* to perform it. Because cases in which an agent is *obliged* to perform some action are fully within the volitional sphere of the agent--the only reason action y is mandatory for the agent is because she desires x (which will only come about through her performance of action y)--the mandatory nature of the action is *self-imposed*.[20] Conversely, in cases where an agent is *obligated* to perform some action, the mandatory nature of that performance is imposed *externally*. More precisely, it develops on the basis of the special way an agent relates to some rule. Now, rules come from different sources--they come from social practices, from (what are believed to be) legitimate authoritative sources, or from (what are believed to be) illegitimate authoritative sources. What separates the first two categories from the last one is that when rules emerge from either a social practice, or from what is (or what is believed by the agent to be) a legitimate authority, the agent can properly be said to relate to the rule in a way that engenders an obligation in her to perform whatever it is that the rule requires. This isn't necessarily the case when rules emerge from what is (or what is believed to be) an illegitimate authority. Let's consider each of these in turn.

With respect to the rules of a social practice, the agent will have an obligation to abide by those rules whenever she takes the practice itself it be justified.[21] Consider, for example, the social practice of queuing.[22] Individuals who observe the practice of queuing, and who take the rules of that practice to be justified, will also consider those rules to be a mandatory element of

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[18] It is not a *necessary* feature of dissenting actions that they have this aim. It is possible--for example, in cases of conscientious evasion (c.f., section 1.4.2 below)--that an act of dissent is done covertly or privately by an agent. This would suggest that such acts may be undertaken for purposes other than to effect an ongoing influence over some future state of affairs of the group. Although this is true, such private forms of dissent are exceptions to the rule, and thus can be considered outlier cases. My claim in this section is simply that in *most* cases of dissent, the aim of the dissenting agent will be to effect an influence over some future state of affairs of the group toward which the dissenting action is directed.

[19] C.f., Hart, 1961. *The Concept of Law*. Oxford: Oxford University Press, pp.82-83.

[20] This is the most important insight of Hart's analysis of 'being obliged' versus 'being obligated'. Even in the case of the gunman, where it would appear that the agent has no choice in the matter, Hart is keen to point out that this is yet another case where the agent is simply weighing a desire not to be shot against a second desire not to hand over money to the gunman. C.f., *ibid*.

[21] On the distinction between having an internal point of view concerning a rule versus having an external point of view, c.f., chapter 4 of *ibid*.

[22] For a very good and interesting take on the social practice of queuing, c.f., pp.303-306 of MacCormick, 1998. 'Norms, Institutions, and Institutional Facts' in *Law and Philosophy*, vol.17.

that practice.[23] This then will lead those individuals to behave in certain ways with respect to the rules (e.g., they will be critical of those who do not observe the rule; they will take the practice to itself be a justificatory reason for their criticism; etc.). On the other hand, agents who acquire obligations to abide by certain institutional rules can be said to do so on the basis that the institutional rule has (or is believed by the agent to have) been issued by a legitimate authority. If Emily believes her physician to be a legitimate authority on matters of health, she will take the fact that her physician has advised her to do health-related action x as a justificatory reason to do x. In other words, it is not the content of the advice that provides justification for Emily's abiding by her physician's advice, but the source whence the advice came.

In both of these ways, the agent can be said to be obligated to perform some action. In the case of the rules of a conventional practice, the agent is obligated to abide by the rules in virtue of taking the *practice* to be legitimate; in the case of institutional rules, the agent is obligated to abide by the rules in virtue of taking the *source that issues the rules* to be legitimate. On the other hand, when a rule is issued by what is (or what is believed by the agent to be) an illegitimate authority, that rule might better be understood as giving rise to an action the agent is only *obliged* to perform. Here, the agent will not relate to the rule in a way that imparts a duty, but rather in a way that more closely resembles the process of volitional balancing that was discussed at the outset of the section.

Let us return to our original claim. Since our claim was that disobedience is a response to something that is required of the agent, it may now be thought that whenever an agent has (or believes himself to have) a mandatory reason to comply, he can be said to disobey. But to think this would be a mistake. Here is why. A failure to comply with a mandatory directive *does not equate* to disobedience of that directive. And in at least one case where an agent has a mandatory reason to act in a particular way, this distinction becomes relevant. Consider the following. Every time we act, our choice of action is informed by various reasons. When we act on first-order reasons, we act on reasons that directly affix to the action at hand. For example, in deciding whether to work on my thesis or to meet a friend for a pint, first-order reasons that might contribute to my decision could include: a.) having an upcoming deadline concerning a chapter of my thesis; or, b.) knowledge that my friend would be hurt if I were not to meet her. Either of these reasons would directly inform my eventual choice of action, which means that they would function as first-order reasons in my deliberation. In addition to this order of reason however, we sometimes include second-order reasons in our deliberations. Second-order reasons are reasons to act or refrain from acting on the basis of first-order reasons.[24] One kind of second-order reason is what in the literature is called 'content-independent reasons'. A content-independent reason is a reason for the agent to perform (or refrain from performing) some action on the basis that the intention that she perform (or refrain from performing) the action is a reason for her to perform

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[23] C.f. this to an argument made by John Rawls in 'Two Concepts of Rules': "[i]f one wants to do an action which a certain practice specifies then there is no way to do it except to follow the rules which define it. Therefore, it doesn't make sense for a person to raise the question whether or not a rule of a practice correctly applies to his case where the action he contemplates is a form of action defined by a practice. If someone were to raise such a question, he would simply show that he didn't understand the situation in which he was acting." (Rawls, 1967. 'Two Concepts of Rules' in *Theories of Ethics* (Foot, ed.). Oxford: Oxford University Press, p.164).

[24] C.f., Raz, 1999. *Practical Reasons and Norms*. Oxford: Oxford University Press, p.39.

(or refrain from performing) it.[25] One typical example of this kind of reason is couched in the parental statement 'because I said so'. What a parent signifies by using this statement is that her intention that the child perform (or not perform) some action is a reason *for* that child to perform (or not perform) it. In other words, the content of the action, at least with respect to this particular kind of reason, is insignificant. What is significant is that the source from which the directive has been issued *intends* the directive to have binding force over the agent to whom it has been issued. It is my claim that it is exclusively this kind of reason that pertains to situations of disobedience. One disobeys when she fails to comply with a directive whose source intends the directive to be taken as mandatory. In other words, she disobeys when she fails to comply with a directive she has content-independent reason to obey.

Accordingly, it would be incorrect to claim that all mandatory directives entail the possibility of disobedience. Take the case of merely 'being obliged' as an example. If a kidnapper obliges a wealthy individual to exchange money for a loved one, and that individual, on the advice of police, fails to comply with the kidnapper's directive, she has not thereby disobeyed the directive. Only if the kidnapper intends his directive be taken as a content-independent reason for the wealthy individual to comply would such an instance be one of disobedience. But clearly the kidnapper does not intend his directive to be taken as such since he is using coercive measures to ensure his victim's compliance.

On the other hand, when it comes to obligations begat by social rules, it is at least debatable whether disobedience may apply. As was explained earlier, a social rule becomes mandatory for the agent whenever she takes the practice supporting the rule to constitute a justificatory reason to abide by it. In this way, an argument could be made that if a practice itself could be said to possess some kind of intentionality, then the agent could on that basis theoretically disobey a rule of that practice. I suppose this would be possible if, for example, it was the intention of the group which takes the practice to be justifiable (including the disobedient agent herself) that the rules of that practice have content-independent force. But for the purposes of my analysis I am hesitant to adopt this line of reasoning. To claim that one may disobey a social rule on the basis that some group intends those rules to be taken as having content-independent force is to tacitly accept the claim that groups can formulate intentions (in the relevant way) in the first place--and this is by no means an established position.[26] Furthermore, it seems much more paradigmatic of social rules that those who abide by them take the *content* of the practice to be the relevant justifiable feature rather than the practice itself (e.g., when asking an agent why she smiles when passing strangers on the street, she will more typically reply 'because it is the nice thing to do' rather than 'because that is what we do around here'). This then would suggest that social rules are, by nature, content-dependent. For these reasons, I am skeptical whether it is useful to include social rules among those that can be

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[25] I have taken this definition from Sciaraffa, 2009. 'On Content-Independent Reasons: It's Not in the Name' in *Law and Philosophy*, vol.28, no.3, p.234. For more on content-independent reasons, c.f. Hart, 1958. 'Legal and Moral Obligation' in *Essays in Moral Philosophy* (Melden, ed.). Seattle: University of Washington Press.

[26] For more on group intentionality, c.f., Tuomela, 1991. 'We Will Do It: An Analysis of Group Intentions' in *Philosophy and Phenomenological Research*, vol.51; Velleman, 1997. 'How to Share an Intention' in *Philosophy and Phenomenological Research*, vol.57; and, Pettit, 2001. 'Collective Intentions' in *Intention in Law and Philosophy* (Naffine, Owens and Williams, eds.). Farnham: Ashgate.

disobeyed. Furthermore, as my fuller argument does not require that I take a stand on this particular issue, coming to a definitive conclusion is in any case unnecessary.

Now, regardless of the conclusion one draws with respect to the nature of the content of social rules, it is surely far more paradigmatic to think of disobedience as a response to the intentions of either persons or institutions. Recall that earlier I suggested that an agent will take himself to be obligated to abide by some institutional rule if he believes the source of that rule to be legitimate. This is so because, were one not to believe the source of the rule to be legitimate, one would relate to the rule in a way comparable to being 'obliged' to abide by it rather than in a way engendering an obligation to do so. As we have seen however, when it comes to disobedience, it is not the epistemic state of the individual to whom the rule is issued that is important, but the intentional state of the person or institution issuing the rule. As many authors who have written on the topic of authority explain, the characteristic that is shared by all forms of authority is that it takes the fact that it has issued some directive to signify a content-independent reason for the intended recipient to abide by that directive.[27] This then means that for an action to be considered disobedient, it matters not whether the agent *believes* some authority to be legitimate as long as the authority itself *purports* to be legitimate. In other words, as long as the directive-issuing source takes itself to be an authority, it is possible for agents who fall within the jurisdiction of that purported authority to disobey.[28] This means further that one may disobey even when one is absolutely certain that there is no legitimacy to a particular authoritative directive. All that matters for one to disobey a rule is that: a.) she do so on the basis of normative reasons;[29] and, b.) the authoritative source issuing the rule takes itself to be legitimate. In this way, one may disobey a particular person who claims authority (e.g., a parent, a University professor, a police officer), or she may disobey the rules issued by an institution (e.g., a family, a University, the state).

This latter feature of disobedience is one of the ways in which it can be differentiated from dissent. Although one may dissent in a way that is disobedient, it is not necessary that she do so. Indeed, a fundamental quality of dissenting actions is that they may be performed in situations where the position one dissents from is in no way mandatory (e.g., if one dissents from a policy initiative that is merely 'tabled'). That being said, one cannot dissent from just any position whatsoever. As we argued in section 1.1, whenever one dissents, it is from a position that pertains to some group. Moreover, the position from which one dissents must pertain specifically to a group to which he belongs. This then is a second way dissent and disobedience

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[27] C.f., Friedman, 1973. 'On the Concept of Authority in Political Philosophy' in *Concepts in Social and Political Philosophy* (Flathman, ed.). New York: MacMillan Press; chapter 1 of Raz, 2009. *The Authority of Law* (2nd edition). Oxford: Oxford University Press; chapter 1 of Raz, 1986. *The Morality of Freedom*. Oxford: Clarendon Press; and, chapter 2 of Green, 1988. *The Authority of the State*. Oxford: Clarendon Press.

[28] The distinction I am referring to here is that between *de jure* authority (i.e., authority that is legitimate, or is at least 'held to be legitimate' by a population) and *de facto* authority (i.e., authority that has control over a population, but is illegitimate--or at least 'held to be illegitimate'--in having that control). For more on this distinction, c.f., Raz, 2009. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford: Oxford University Press, esp., pp.128-130.

[29] A normative reason is, "...a fact which gives a point or a purpose to one's action, and the action is undertaken for the sake or in pursuit of that point or purpose." (Raz, 2007. 'Reasons: Explanatory and Normative' in *University of Oxford Faculty of Law Legal Studies Research Paper Series*, no.13, p.1).

can be distinguished: whereas dissent is necessarily a group-directed response, disobedience need not be a response to a group-held position at all (one of course *may* disobey a group position, but it is also possible that she disobey the position held by an individual). These two distinctive qualities indicate what I take to be the most important difference between dissenting and disobedient actions: in cases of dissent, because the act is directed specifically at a group-held position, and because it need not respond to something that is considered 'mandatory' for the agent to do, it will, under the normal circumstances, aim to effect some influence over the group. That this is so is a direct result of the normative quality of dissent. Since dissent, like disobedience, is an act done on the basis of normative reasons, it is one that is undertaken in pursuit of the point of the action. It is now my claim that the point of dissenting actions will typically be to effect some future influence over the group to which the action is directed.

Now, two things are important to note about the intentional status I have attributed to dissenting actions. First, it is not that dissenting actions necessarily attempt to effect *change* within a group, but only that they attempt to effect an influence over the state of affairs of the group. This is so because many dissenting actions are directed at policies that are merely *proposed* by a group rather than at positions that are already in effect. When an individual dissents from a policy that is merely proposed, she does not aim to modify the current formulation of the group, but rather to keep it the same. In this way, the dissenting action can still be said to intend to *influence* the group, but not specifically in a way that will change it. Second, it may be objected that the intentional status I have attributed to dissent is far too narrow--that an agent can dissent from a position held by a group to which she belongs strictly on the basis of affirming her individuality within that group. Consider, for instance, the following narrative. Joan, who feels disillusioned with a bird-watching club she is part of, decides to dissent from some club policy *for no other reason* than to affirm her disillusionment with the club. Here, the purpose of Joan's action (it could be said) is not to effect some influence over her bird-watching club (in reality, she has no qualm with the policy from which she dissents), but merely to express the general displeasure she feels. How are we to understand Joan's action in this case? To my mind, only two possibilities are open to understanding the action: either, a.) Joan's dissent is merely a ploy to gain sympathy from the group, which means her dissent isn't dissent at all; or, b.) Joan uses her dissent to affirm her disillusionment with the group, in which case she does intend to effect some influence over the group, thus making her act a paradigmatic instance of dissent.

Of course, it should go without saying that the typical aim of disobedient actions are not to similarly effect influence over some future state of affairs. Although the reasons upon which one chooses to disobey must be normative, they often do not have such a narrow intent. The difference can be most clearly seen in the case of an agent acting purely on the basis of self-interested reasons. When an agent dissents from a group-held position on the basis of self-interested reasons, her aim will still be to effect influence over a future state of affairs within the group. For example, the intention of the agent who dissents from her government's decision to construct a school in her neighborhood, strictly on the basis of not wanting to be disturbed by the excess noise made by children, is to effect influence over that governmental decision. True, she may not be successful in realizing this intention, but it remains her intention nonetheless. On the other hand, when one disobeys on the basis of self-interested reasons, she need not do so with

this same intent. When a child disobeys her mother's directive to clean her room, she may or may not do so with the intention of effecting some sort of influence over the future household dynamic. In fact, it is my suspicion that more often than not, the child will disobey directives like this strictly on the basis of laziness or petulance.

With this comment, we have come to the end of our discussion on the distinction between dissenting and disobedient actions. In the next section, I turn the conversation to a more specific case of disobedience: disobedience of rules that have been issued by the state. For the most part, political disobedience will look a lot like the general account sketched here. It is tempting to narrow the definition of disobedience to the political realm by alluding to things like legitimacy; to wit, if some political entity is illegitimate, then (the argument might go) their rules are nugatory, and thus one could not be said to disobey those rules. Of course, from the way I have explained disobedience in this section, to do so would be a mistake. Since one of the features of disobedience is that the directive-issuing source takes itself to be legitimate (with respect to the subject of that directive), it matters not whether the source is, in actual fact, legitimate. Therefore, political disobedience will follow the very same framework as the general one laid out above, narrowed only with respect to: a.) the source that issues the directives; and, b.) the intentions of the disobedient agent.

1.4: Features and Forms of Political Disobedience

Whenever a state issues a directive, it is one the state intends to be taken as an authoritative order to those within the purview covered by that directive.[30] Every state-issued directive therefore satisfies the conditions necessary for disobedience. In particular, whenever an agent who is subject to some state-issued directive fails to comply with that directive on the basis of a normative reason (or set of normative reasons), she may be said to act in a disobedient manner. She does not however thereby act specifically in a 'politically' disobedient manner. As I will explain in the next section (1.5), the difference between political acts of disobedience and ordinary acts of lawbreaking is fully articulated in the kinds of reasons the agent has for engaging in the act. If the agent's reasons are politically motivated, her act of disobedience can be said to be 'politically disobedient'; if, on the other hand, the agent disobeys for any other reason, her action will more appropriately be considered an ordinary act of lawbreaking. As we will see below, although it is impossible to define as sharply as some might like, to act on the basis of a politically motivated reason is to act from the same intentional attitude we have just outlined to be characteristic of dissent. Couple this with the fact that any act of disobedience by a citizen against the state is by definition one directed at a group to which the citizen belongs, and we may derive the conclusion that all acts of political disobedience may also be considered acts of illegal political dissent. From this conclusion, a second may be derived: acts of illegal political dissent may be distinguished from acts of legal political dissent *exclusively* on the basis of whether or not the act in question is in contravention of a state-issued directive. If the act in question is in contravention of some state-issued directive, it is a case of illegal political dissent;

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[30] Whereas some state-issued directives are intended for a general audience (e.g, laws against assault and theft), others are aimed at very specific audiences (e.g., at those who drive; at those who are in a particular location; at those who are of a particular age; etc.). C.f. on this matter, Lecture I of Austin, 1832. *The Province of Jurisprudence Determined*. London: John Murray.

if it is not, it is a case of legal political dissent. In what follows, I will use the term 'political disobedience' to refer to acts of dissent that are in contravention of a state-issued directive (i.e., illegal). For all other (legal) acts of dissent against the state, I will simply use the term 'political dissent'.

1.4.1: *Features of Political Disobedience*

1. Every case of political disobedience will be an act that is either illegal in nature, or one that is against some other state-issued regulation.[31] The reason this is so should be obvious from what has been said to this point. Political disobedience is a response to rules which have been designed by the state to be taken as mandatory--rules that the state makes salient by codifying them as laws or regulations. Axiomatically, the point can be put this way: if I am to disobey politically, it is a state-designed rule I disobey; state-designed rules manifest through the codification of laws or regulations; therefore, every time I am said to be 'politically disobedient', I am doing something that is either illegal (as in 'against the law'), or in opposition to a state-issued regulation.

2. In every case of political disobedience, one either: a.) engages in an activity that is *proscribed* by the state; and/or, b.) fails to engage in an activity that is *prescribed* by the state. Laws and regulations take the form of either prohibitions or mandates. 'Do not exceed the speed limit of 40 km/h in a school zone' is, for example, a state issued prohibition--it tells you what you are *not* to do. Conversely, 'you must file your income taxes by no later than midnight on April 30' is an example of a mandate--it tells you what you *must* do. It is both possible, and in fact quite common, for either of these decrees to be disobeyed. It is also possible to disobey them for a variety of reasons. The point to take away here is that in every case of political disobedience, such disobedience will manifest in a way that consists of either: a.) doing something the state tells you not to do; b.) failing to do something the state tells you to do; or, c.) a complex of both.

3. Disobedience of state-issued directives can derive on the basis of a number of different reasons; reasons which, by and large, will constitute the form of disobedience invoked. As mentioned above, political disobedience is disobedience of a state-issued directive that is based on a particular kind of reason. The deep, and perhaps irresolvable, problem with this constitutive element of political disobedience is the acutely esoteric nature of motivations in general. How are we to determine the real motivations behind the disobedient actions of other individuals (or groups of individuals) when we can ourselves only ever obscurely appreciate the complex nature of our own motivational web? This is indeed a formidable problem--one probably more suited to the social psychologist. Nevertheless, there are at least a few philosophical elements to the issue that, if addressed in the right way, will help to clarify the questions we should be asking. I will engage this issue more thoroughly in the final section of the chapter (1.5).

[31] In many modern democracies, state-designed rules typically take the character of either laws or regulations. Both laws and regulations are enforceable, but generally speaking, regulations are ancillary or subordinate to laws--i.e., their authority is conferred on them by laws.

1.4.2: *Forms of Political Disobedience*

There are a variety of forms of political disobedience. For simplicity, I will narrow these forms to four general categories. They include: a.) conscientious refusal; b.) civil disobedience; c.) military action/radical protest; and, d.) revolutionary activity. I will discuss each in the order listed.

A. *Conscientious Refusal*

As the name would suggest, conscientious refusal is when one refuses to abide by a particular state-issued directive as a matter of conscience. Most typically, this form of disobedience has been associated with state decrees that certain individuals be conscripted to fight in a war for their country--but this is by no means its only manifestation. Henry David Thoreau conscientiously refused to pay his taxes as a protest against his government's involvement in both the slave trade and the Mexican-American war;[32] certain religions have refused to observe nationally mandated practices (e.g., Jehovah's witnesses refusing to recite the American pledge of allegiance[33]); even individual soldiers refusing to act on an order issued by a commanding officer is an example of conscientious refusal. The features that make up this form of political disobedience are as follows: a.) it responds exclusively to prescribed mandates; and, b.) it is done for moral reasons that conflict directly with the mandate issued. Let's quickly go through each feature. First, that conscientious refusal responds exclusively to prescribed mandates means it is never a response to a proscribed restriction. For example, if it is a regulation of my community that I not disseminate flyers among the other members of that community and, despite this regulation, I choose to do so anyway (citing moral reasons), I would not thereby be performing an act of conscientious refusal. To be sure, my action would be a disobedient one--moreover, disobedient for moral reasons. But my action does not thereby become one of conscientious refusal. In this case, I am not 'refusing' to abide by a prescribed mandate--I am rather contravening a proscribed restriction. Second, conscientious refusal is done for moral reasons that directly conflict with the prescribed mandate in question. The operative word here is 'directly': it is only to direct mandates that I can refuse action--I cannot choose alternative means to voice my disapproval of a particular mandate (e.g., staging a sit-in to protest against tax laws). In addition, the reasons upon which I am refusing to abide by the particular mandate must be moral reasons--I cannot refuse on prudential grounds (e.g., the reason for refusing to pay my taxes cannot be to finally have the funds necessary to purchase the car I always wanted). When all of these features appear together, we can properly be said to have a case of conscientious refusal. If any of these features is missing, it is questionable whether another term might not be better applied.

One final point--one connected to something discussed earlier--is worth mentioning before we move on. It is not necessary that one be transparent with one's actions when

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[32] C.f., pp.88-89 in Thoreau, 1982. *Walden and Other Writings*. Toronto: Bantam Books. It should be noted that Thoreau himself called this an act of 'civil disobedience' (in fact, coining the term), but as I understand his action, it would more appropriately fit into this category.

[33] C.f., *Minersville School District v. Gobitis*, 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940).

conscientiously refusing. Indeed, it is possible for one to *covertly* refuse.[34] One may, for example, choose not to inform the authorities of one's moral intention not to pay her taxes, and still be exercising an act of conscientious refusal (so long as the other criteria mentioned are met).[35] This form of conscientious refusal will however likely be criticized when uncovered, for the simple reason that one's intentions become much more questionable when they are 'discovered' than when they are voluntarily divulged.[36]

B. *Civil Disobedience*

A great deal of ink has been spilled on this form of political disobedience. This is so for a variety of reasons: e.g., a.) it a hotly debated issue which conditions should be included in a definition of civil disobedience, and which should not; b.) because of this, there is an even livelier debate surrounding which actions should be considered justified on the basis of a claim to civil disobedience; and, c.) based on that consideration, it is disputed how those who participate in acts of civil disobedience should be treated by authorities. Coming to a consensus definition of civil disobedience is notoriously difficult. This is so in part because the definition one eventually accepts is often a consequence of one's broader political outlook; and these, as is well known, differ widely. The staunch anarchist who considers any and all action against state force to be legitimate will have a hard time circumscribing an area that could reasonably be understood as civil disobedience. Conversely, a dyed-in-the-wool statist who thinks that any action against a state mandate is illegitimate would be just as hard-pressed to come to an operative definition. Thankfully, most of us do not belong to either of these groups. Most of us think that some state-issued rules are worthy of being obeyed and that others, under certain circumstances at least, are not. It is to this widespread political outlook that the category 'civil disobedience' fundamentally responds. Hugo Bedau, perhaps the first to offer a sustained analysis on the topic of civil disobedience,[37] offers the following definition: "anyone commits an act of civil disobedience if and only if he acts illegally, publicly, nonviolently, and conscientiously with the intent to frustrate (one of) the laws, policies, or decisions of his government."[38] This resembles, almost perfectly mind you, the formulation John Rawls gives to it in *A Theory of Justice*.[39] Now, it is not my intention to get into the nitty-gritty details of the many debates that surround the idea of civil

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[34] John Rawls calls this sub-category 'conscientious evasion'. C.f., Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press, p.324.

[35] It is for this reason we argued that a condition of dissent was only that it typically aims at effecting influence over some future state of affairs of the group toward which one's dissent is directed.

[36] The general thesis of Kimberley Brownlee's recent book--that actions of civil disobedience ought to be more robustly protected by law than acts of conscientious refusal--is more or less predicated on this fact. C.f., chapter 4 of Brownlee, 2012. *Conscience and Conviction: The Case for Civil Disobedience*. Oxford: Oxford University Press.

[37] Bedau begins his article 'On Civil Disobedience' thus: "[s]ince I have been unable to find a suitably detailed analysis of what civil disobedience is...I have decided to try to provide such an analysis myself." C.f., Bedau, 1961. 'On Civil Disobedience' in *Journal of Philosophy,* vol.58.

[38] *Ibid*, p.661.

[39] C.f., Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press, p.320 where Rawls defines civil disobedience as, "...a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."

disobedience. But to more fully understand this category of action as a particular form of political disobedience, we must at least take a cursory stroll through the terrain.

a.) First, an act of civil disobedience must be *illegal*. I take this to be undisputed and, as was expressed at the beginning of this section, a quality I contend belongs to all forms of political disobedience.

b.) Second, an act of civil disobedience must be *public*. Similar to the reasoning we saw at the end of the discussion on conscientious refusal, this means that the authenticity of the intentions of the civil disobedient would be somewhat less convincing if she were 'caught in the act' than if she made her illegal action public before it was committed. This may be so. However, even if one agrees with this reasoning, there is still some question as to how vital this condition is in the overall makeup of civil disobedience. For example, Brian Smart argues that in many cases, the only way for a particular act of civil disobedience to be successful will be to conscientiously undertake the action in a covert way.[40] Releasing animals from a research lab, or blockading a throughway at a busy time of day, are examples of this. Due to such reasoning, some theorists have opted to use the term 'openness' rather than 'publicity' to account for this feature of civil disobedience. It isn't that the civil disobedient must make her intentions public in advance of some disobedient action, but she must at least be willing to be open about that action at some point in time. In this way, the fundamental purpose of the provision is saved--it remains an entrenched feature of civil disobedience that the disobedient actor is willing to take responsibility for the action she has committed--but the (perhaps) unreasonable burden that the civil disobedient must always be willing to express her intention in advance is circumvented. On the other hand, there are those who reject this feature outright--along with the responsibility provision grounding it. Robert Paul Wolff, for example, suggests that "no one has any moral obligation whatsoever to resist an unjust government openly rather than clandestinely...the choice is simple: if the law is right, follow it. If the law is wrong, evade it."[41] This is a stark position, and one that only the most devoted adherents to the position of philosophical anarchism defend. I shall assume, therefore, that one condition proper to civil disobedience is that it contain the criterion of openness. Without accepting responsibility for one's act of civil disobedience, it becomes far too difficult to distinguish between these kinds of disobedient actions and other ordinary acts of law-breaking.

c.) Third, an act of civil disobedience must be *conscientious*. Similar to 'illegality', I take this feature of civil disobedience to be indisputable. Being 'conscientious' about a matter means that one has dedicated a suitable amount of reflection before pursuing action. More narrowly, it means that the reflective attitude undertaken by the disobedient actor has resulted in a moral conviction, such that the actor feels deeply convinced of the moral worth of her decision to act. Now, as was alluded to in the first part of the present section, that this feature of civil disobedience is grounded in a person's motivation exclusively makes it very difficult to assess the degree of authenticity surrounding the conscientiousness of one's disobedient action. Nevertheless, the point remains that, despite it being difficult to discern people's motivations, an act will only be civilly disobedient if the actor's motivations are of the right kind. In short, as a

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[40] C.f., Smart, 1991. 'Defining Civil Disobedience' in *Civil Disobedience in Focus* (Bedau, ed.). London: Routledge.

[41] Wolff, 1969. 'On Violence' in *Journal of Philosophy*, vol.66, p.611.

descriptive matter, whether x must be y will be kept distinct from the question of how and how easily we can determine whether it is.

d.) Fourth, an act of civil disobedience must be *nonviolent*. This is perhaps the most debated aspect of Bedau's definition--one which, in fact, a good number of thinkers simply dismiss out of hand.[42] Others offer more sober reasons for why this element should not be included as one constitutive of civil disobedience.[43] But even considering this, it is worth noting that there is something to the intuition that civil disobedience, to be properly characterized, must at the very least be *civil*.[44] Civility, so the argument would go, includes as part of its makeup the feature of nonviolence. Whether or not there are good arguments for the justified use of counter-violence against the state in certain situations is, upon this line of thinking, beside the point. The point here is simply that, if one is to engage in civil disobedience, one is engaging in a nonviolent form of disobedience. I accept this as conclusive.

All of these features together demonstrate that the disobedient actor possesses some sense of featly to the state to which she belongs. That she chooses to act in an open way (by communicating her grievance through action), and is willing to accept responsibility for what she has done (by making her action public) she has, generally speaking, affirmed her belief in the underlying legitimacy of the state. Of course, her actions have also expressed a strong moral counter-opinion regarding one or more discrete laws, policies, or decisions enforced by the state; but these are discrete grievances--not system-wide problems. This is the fundamental point of distinction between civil disobedience in particular, and other stronger forms of political disobedience: the civil disobedient does not aim to upset the entire political structure of her state. Instead, she aims to correct one or a few bad pieces of legislation or policy with the hope that though that correction, a political situation which is already decent will get even better. This is the primary tack taken by John Rawls regarding civil disobedience, and I think it is the correct one.[45]

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[42] C.f., for example, Raz, 2009. *The Authority of Law* (2nd edition). Oxford: Oxford University Press, p.265.

[43] C.f., Zinn, 1968. *Disobedience and Democracy: Nine Fallacies on Law and Order*. New York: Vintage Books, where he writes, "...would not any reasonable code have to weigh the *degree* of violence used in any case against the *importance* of the issue at stake? Thus, a massive amount of violence for a small or dubious reason would be harder to justify than a small amount of violence for an important and clear reason" (p.45); and Narveson, 1965. 'Pacifism: A Philosophical Analysis' in *Ethics*, vol.75, where he takes Zinn's idea even further by arguing that the entire principle of pacifism is in fact logically incoherent.

[44] For a discussion of the ambiguities surrounding the term 'civil', c.f., pp.76-79 of Bay, 1971. 'Civil Disobedience: Prerequisite for Democracy in a Modern Society' in *Civil Disobedience and Violence* (Murphy, ed.). Belmont: Wadsworth Publishing Company, Inc.

[45] Rawls writes, "along with such things as free and regular elections and an independent judiciary empowered to interpret the constitution (not necessarily written), civil disobedience used with due restraint and sound judgment helps to maintain and strengthen just institutions. By resisting injustice within the limits of fidelity to law, it serves to inhibit departures from justice and to correct them when they occur. A general disposition to engage in justified civil disobedience introduces stability into a well-ordered society, or one that is nearly just." (Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press, p.336).

C. *Militant Action/Radical Protest*

One important reason for conceiving civil disobedience in the Rawlsian way outlined above is to allow us the ability to distinguish between civil disobedience as a separate form of protest from other stronger forms. Sometimes individuals engage in what can be called radical protest movements, or 'militant action' (other handles that are sometimes included in this category are: 'coercive violence', 'organized forcible resistance', 'intimidation', and even 'terrorism'). Upon some definitions of civil disobedience--those, for example, that allow violence to be part of its definition--it becomes difficult to understand what exactly the difference between civil disobedience and militant action is. Is the protester who throws a brick violently through a window engaging in civil disobedience, or acting militantly? What of the individual who resists being forcibly moved from a restricted area by authorized agents? The distinction becomes especially muddy when activists like Martin Luther King, Jr., who unequivocally advocated for nonviolent forms of social change, also frequently employed the term 'militancy' in a positive light.[46] The question therefore bears asking: are militant action and civil disobedience just two ways of saying the same thing; or perhaps they are constitutively the same, but differ only in intensity (militant action being nothing but a more intense version of civil disobedience)? Kimberley Brownlee suggests something else. She argues that (at least one of) the difference(s) between civil disobedience and militant action lies in the *scope* of change sought by each. In this way, she seems to embrace Rawls' tack on civil disobedience. She writes that, "while a civil disobedient does not necessarily oppose the regime in which she acts, the militant or radical protester is deeply opposed to that regime (or a core aspect of that regime)."[47] This is indeed a salient difference between each act of political disobedience. But I wonder if it is good enough. For as we will see, there is another form of politically disobedient action called 'revolutionary activity' that seems to take this very same feature to be its distinctive quality. So it seems that we are left with three options that can account for the difference between civil disobedience and stronger forms of protest (like militant action). The difference is either: a.) a matter of general intensity: as the level of intensity of action rises, so too does a suitable application of the term 'militant' or 'radical' to the form of disobedient action; b.) a matter of intensity-in-relation-to-scope: the term 'militant' or 'radical' is applied to cases where the grievance felt extends beyond a simple legislation or policy change, but not so far as to signal a full-scale regime change; or, c.) a matter of violence: the term 'militancy' or 'radical' is applied to cases in which the use of violence is present, plain and simple.[48] All three, for different reasons, are useful. But it is clearly the case that the determinacy of application increases with each option (e.g., option (a) will surely result in almost as many ground-level debates as there are cases, while option (c) will do a

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[46] C.f., King's famous 1963 speech to the March on Washington, where he remarks of "...the marvelous new militancy" of the anti-racist struggle of those years (King, Jr., 1992. 'I Have a Dream' in *I Have a Dream: Writings and Speeches the Changed the World* (Washington, ed.). San Francisco: Harper; or where he argues that militant action is "indispensable" (see 'Black Power Defined' in the same text).

[47] See Brownlee, 2013. 'Civil Disobedience' in *The Stanford Encyclopedia of Philosophy*, Zalta (ed.), <http://plato.stanford.edu/archives/win2013/entries/civil-disobedience/>.

[48] Note that I do not wish to join the debate about what constitutes violence in this regard. I will take a relatively neutral line by following Wolff's definition: "violence is the illegitimate or unauthorized use of force to effect decisions against the will or desire of others." (Wolff, 1969. 'On Violence' in *Journal of Philosophy*, vol.66, p.605).

relatively better job cutting the cases quite succinctly into each category). It is for this reason that, as my argument progresses, I will defer most often to the presence of violence (option c) as the distinctive characteristic differentiating civil disobedience and militant action as forms of political disobedience.

D. *Revolutionary Activity*

The final form of political disobedience I will discuss is revolutionary activity. To some extent, the cat's already been let out of the bag regarding this form of disobedience. As I explained above, it is this particular form of disobedience that is marked by a general motivation to upset the entire structure of government, or the regime that is currently in power. No longer do disobedients feel that they are seeking to adjust or improve upon current conditions--theirs is a fight right down to the foundation of an existing political order. Revolutionary activity can occur in one of two ways: first, as a matter of reestablishing the form of government in place; or alternatively, as a full-scale revolt against the current governing body. Examples of the first approach to revolutionary activity might be: a.) the French Revolution of 1789, which sought to upend the monarchical rule that had been in effect in France since the early 5th century (rather than to convince then King Louis XVI to adjust his policies); or, b.) the American Revolution of roughly the same period, which sought to sever domestic political ties with England (rather than to renegotiate the terms of colonial rule). Examples of the second approach to revolutionary activity can be seen in much of the activity surrounding the recent Arab Spring uprisings. Here, there hasn't necessarily been a re-negotiation of the existing form of government, but rather one of the ruling body that currently holds power. Now, it can of course not be overstated how fluid the line between these two ways of engaging in revolution are. For example, the mass protests in Egypt in 2011 had the ostensible result of ousting long standing president Hosni Mubarak from power, but included the supplementary result of allowing a renewed discussion of political reform to the people of Egypt.[49] We must therefore be a touch careful when too quickly ascribing to any revolution a particular object or aim. For strictly conceptual purposes however, we should now be able to chart the features that need be present for a case of political disobedience to be included in the category of 'revolutionary activity'. They are: a.) that, like all other forms of political disobedience, the activity must be illegal in nature; b.) that the activity can--and most likely will--involve behavior that is both proscribed by the state, as well as a resistance to actions that are prescribed by the state; c.) that the activity is undertaken by a group of individuals (and, considering the extent of the aim of revolutionary activity, most likely a very large group of individuals); and, d.) that the activity is performed for the reason of bringing about a full-scale change in either the form of government currently in place, the regime that holds authority under the current form of government, or both.

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[49] The ultimate success and consequences of this 'renewed discussion' are beside the current point. For a good overview of the Egyptian revolution, c.f., Dalacoura, 2012. 'The 2011 Uprisings in the Arab Middle East: Political Change and Geopolitical Implications' in *International Affairs*, vol.88. C.f., also, Liolos, 2013. 'Erecting New Constitutional Cultures: The Problems and Promise of Constitutional Post-Arab Spring' in *Boston College International Comparative Law Review*, vol.36.

1.5: Political Disobedience versus Ordinary Lawbreaking

Let us now return to the topic alluded to at the outset of the preceding section (section 1.4). We have discussed political disobedience in some detail above, but have yet to crisply distinguish between disobedient actions of a political nature, and those that would more appropriately fall into the category of 'ordinary lawbreaking'. The importance of doing so should be obvious: since, as we have seen, one can disobey for a variety of reasons, certain types of disobedience become distinctive on the basis of the kinds of reasons one invokes for engaging in the activity. My claim is that acts of political disobedience are distinctive insofar as they are done on the basis of political reasons.

What then is it to act on the basis of a political reason? The most straightforward way to distinguish between acting on the basis of political reasons rather than acting for reasons of another kind is to seize on the term 'political'. For instance, it could be argued that politically disobedient behavior is exhaustively captured by those acts which are politically motivated--acts which have as their object some political issue--and ordinary lawbreaking all disobedient behavior besides. This is an interesting first approach, but one I fear is overly simplistic. To begin, such an approach begs the question of what can and should be considered political in the first place. Is a man stealing a piece of bread to feed himself or his children considered a political action? Maybe, but not likely. What if he steals that bread to feed a number of starving children in his community? This is much more likely to be considered political. The point is this: we can't respond to the question, 'what is it to be politically disobedient?' with the answer, 'it is to disobey politically', since to do so would be tautological. We would instead have to explain what it means to be political in the first place to further articulate what it means to be politically disobedient--and as it turns out, coming to a consensus definition of the term 'political' is no easy task.

Perhaps by 'political' we mean to suggest all disobedient actions that *relate to* the state. This definition will either be too vague, or too inclusive, to do us any service. It is too vague because here we again run up against a problem of first having to circumscribe the area of 'things that relate to the state' before we can make any use of the definition as it pertains to political disobedience; it is too inclusive since such a definition seems to encompass all the various kinds of disobedient action--political and otherwise. The problem gets no better if we narrow the definition only slightly. For instance, we could argue that only those matters that are *directed at* the state should be considered 'political'. Once again, such a definition is either too vague, or too inclusive to be of any service (e.g., it becomes quite difficult to understand what it is to direct an action against the state; and, for the matter, to assess the relevant purview of the state in the first place). A final attempt would involve narrowing the definition so much that we could be sure to avoid the charge of over-vagueness and/or over-inclusivity, but by doing so we would likely introduce other problems. For example, one could suggest that the 'political' action is any action which, either directly or indirectly, aims to effect an influence over some future state of affairs of the state. This is in fact very close to a number of the definitions one finds elsewhere in the literature,[50] and it clearly has the benefit of sharing the feature we have argued

[50] C.f., the 2nd treatise of Locke, 1988. *Two Treatises of Government*, Laslett (ed.). Cambridge: Cambridge University Press; pp.335-343 of Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press; and, pp. 266-271 of Raz, 2009. *The Authority of Law* (2nd ed.). Oxford: Oxford University Press.

to be characteristic of dissent. But although I am inclined to think this is about as good a definition of the 'political action' as we can get, by narrowing the definition to the extent we have here, we run the risk of overshooting our target. For instance, what can now be said of the conscientious objector who cares little of effecting influence over his government, but merely insists, on personal grounds, on disobeying an order to fight for his country? Is this not a case of political disobedience? If so, we may once again have to begin broadening our definition of 'political' to encompass a wider range of reason than that it aim to effect influence over some future state of affairs of the state. This then leads us back down the familiar road into problems of over-vagueness and/or over-inclusivity. But what if were were to employ a entirely different method to the one we have been using to determine what it is that makes some action 'political'? In particular, what if instead of searching for the definition of such actions through either the *directionality* of the agent's reasons for disobeying (e.g., toward the state), or even his *endgame* (e.g., to effect influence over some future state of affairs of the state), we looked to the *nature* of why the agent has chosen to disobey in the first place?

What might this nature be? Well, there exist a number of different variables one could introduce to explain this nature. Consider, for example, a list drafted by Jeremy Bentham that was originally intended to help one judge the relative value of a particular pleasure or pain. That list included the following variables: intensity; duration; certainty or uncertainty; propinquity or remoteness; fecundity; purity; and, extent.[51] My guess is that we could invoke some or all of these variables to help explain what it is to act on the basis of a political reason. For example, the intensity of feeling surrounding the reason for disobeying could be significant; or perhaps the certainty that the disobedient action would result in successful consequences could be invoked. But although both of these are certainly possible candidates, I doubt either of them will allow us to comprehensively define some action as 'political'. Let me explain why. It is sometimes suggested that for a disobedient action to be politically motivated, it must be done for a *general* rather than specific purpose--that the nature of the motivation supporting the disobedient action extend beyond the direct welfare of the individual committing the act. Kimberley Brownlee, for example, gives nod to this type of approach when she writes of ordinary acts of lawbreaking that, "in most cases, [the offender] wishes to benefit or, at least, not to suffer from her unlawful action."[52] The implication is of course that the politically disobedient action does not contain the same narrow element as do other forms of disobedience. But this approach is not promising. As we have seen above, surely it is a commonplace to regard acts such as conscientious refusal to be 'political' even considering that conscientious refusal is, by definition even, an action motivated by and for the individual alone. So an approach based on 'motivational scope' will not do. The other variable mentioned--the variable based on the 'purity' of the agent's motivation--will again

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[51] Bentham, 2003. 'Selections from Bentham's Principles of Morals and Legislation' in *The Classical Utilitarians: Bentham and Mill*, Troyer (ed.). Indianapolis: Hackett Publishing Company, Inc., p.20.

[52] See Brownlee, 2013. 'Civil Disobedience' in *The Stanford Encyclopedia of Philosophy* (Zalta, ed.), <http://plato.stanford.edu/archives/win2013/entries/civil-disobedience/>. It should be noted that whereas Brownlee only aims to outline the differences between 'ordinary offenses' and 'civil disobedient behavior', I of course am here involved in a much more general distinction--viz., between what she might call 'ordinary offenses' and 'politically disobedient behavior'. Because of this, her approach might be suitable to the limited scope she intends from it. Of course, as I am involved in showing now, it does not work if it is extended to a broader category of politically disobedient behavior.

fall short of the mark. Here, we would define the politically disobedient action as one that is necessarily motivated by moral reasons rather than prudential ones. Such an approach could, for example, quite easily explain why conscientious refusal fits into the category of 'politically disobedient action'. But again here, there exist certain outlier cases that resist the approach being applied across the board. For example, what of the Robin Hood situation where some agent steals from the rich to give to the poor? Clearly here we are faced with an act that is morally motivated, and yet one we would not normally label as 'political' (or at least not as political only--it too would be considered an ordinary act of lawbreaking). It is my feeling that whichever variable we employ to account for the nature of an agent's motivations, we would come to similar results. Each variable would either come up against problems of vagueness or over-inclusiveness, or else would be forced to deal with certain fringe cases that resist being taken into the fold. It would therefore appear that, regardless of the metric we propose to use, we are bound to come up against an inevitable overlap between politically disobedient actions and acts of ordinary lawbreaking. This means that in certain fringe cases, we'll be forced to make a 'judgment call' about the kind of disobedient action we are dealing with. But all of this should not frighten us. Clearly there exists a close family resemblance between political acts of disobedience and acts of ordinary lawbreaking: both are instances of disobeying a mandatory rule issued by the state. Equally clearly however, the paradigmatic cases of each form of action can be distinguished well enough from the other such that, substantively speaking, we can keep the two apart and continue to treat each class differently. A paradigmatic instance of ordinary lawbreaking would invoke the image of the bank robber who not only steals for individual gain, but puts numerous individuals into a very stressful situation to do so. This betrays a blatant lack of concern for the consequences of his action, beyond a personal concern in its successfully bringing about its intended goal. On the other hand, the individual who protests a law she considers to be unjust by illegally blockading a roadway seems to be a paradigmatic instance of political disobedience. There is seemingly little personal gain to be gleaned from this kind of action, which suggests that it has been done with a wider audience in mind, and is based on a normative judgment.[53] When it comes to picking out these paradigmatic differences, all the considerations mentioned above become relevant. Politically disobedient behavior (as distinguished from ordinary lawbreaking) is most often done with a *general* audience in mind, done for *moral* rather than prudential reasons, and, most importantly for our purposes, done as a means of *effecting some kind of influence* over the state. Ordinary lawbreaking (as distinguished from politically disobedient behavior) is just the opposite of this--it is most often done for selfish, opportunistic reasons, and as a means of effecting influence over the person's own welfare. It is on the basis of these paradigmatic differences that it becomes possible to assert that actions of political disobedience may be considered actions of illegal political dissent as well. This is so because, as it turns out, the important distinction between acts of political disobedience and ordinary acts of lawbreaking is grounded in the motivation of the agent who performs the act; and the relevant motivations are those we have already mentioned are characteristic of dissent.

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[53] Of course, in both of these situations, details could be adjusted to make either case less paradigmatic than how I have presented them here. They do however provide a point of reference for the current discussion.

1.6: Conclusion

We have now come to the end of our conceptual analysis of dissent and disobedience. According to the definition I have offered, acts of dissent are group-directed normative expressions of disapproval which typically aim to effect influence over some future state of affairs of the group. Acts of *political* dissent have precisely the same definition, but pertain exclusively to the state. Disobedient actions are normative acts done contrary to a mandatory rule that is issued by an authority that takes itself to be legitimate. Acts of *political* disobedience have precisely the same definition, but: a.) pertain exclusively to the state; and, b.) are generated on the basis of political reasons. It is therefore the case that all acts of political disobedience are also acts of illegal political dissent. Furthermore, the difference between acts of political disobedience and legal acts of political dissent will be exhausted in whether or not the act in question is in contravention of a state-issued directive. In the next chapter, I will more fully engage the topic of legal political dissent. In particular, I will submit an argument for the kinds of activities that should be protected by a citizen's right to legal dissent in the context of a liberal democracy.

Chapter 2: The Right to Political Dissent

Nearing the end of chapter 1, our examination moved from a general concern with the ideas of dissent and disobedience to the way they should be understood in an expressly political context. As was explained, political dissent and disobedience, much like ordinary dissent and disobedience, are dependent on an individual (or group of individuals) intentionally rejecting some settled position held by another individual (or group of individuals) to whom the first individual (or group of individuals) shares some relation. However, unlike ordinary dissent and disobedience, political dissent and disobedience are aimed specifically at a settled position that is *held by the state*. We were furthermore careful to distinguish between these two forms of antagonistic response. Whereas an act of political disobedience is one which stands in contravention of a state issued directive, an act of legal political dissent is one which does not. My interest in this chapter will exclusively be in the latter of these two forms of response. In other words, I will be interested in analyzing the legally-sanctioned, but antagonistic, response by some individual (or group of individuals) to a settled position taken by the state. More specifically, I will submit an argument in favor of the political rights a citizen who belongs to a liberal democracy ought legally be entitled to claim as constituting his right to dissent. The analysis in this chapter will therefore be both general and minimal. I do not presume the list I offer to be the best one possible. Nor is it my intention to discuss the finer details of how each specified right ought to be limited in a practical setting. In what follows, my interest will merely be to enumerate these rights, and to articulate more precisely how securing them to citizens is enough to establish for the citizen a right to political dissent.

The chapter will unfold in the following way. In the first section (section 2.1), I will articulate more precisely what it means for an individual to lay claim to a right of any kind. My approach to rights will be analytic in nature; more specifically, it will employ the familiar framework articulated by Wesley Hohfeld in his 1913 paper 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' to better explain the relational nature of rights. The second section (section 2.2) will attend more directly to the notion of a right to dissent and the function it plays with respect to the individual right-holder. As rights are instruments used to achieve certain ends, it bears asking what exactly the right to dissent sets out to achieve for the individual who claims to enjoy the right. The third section (section 2.3) will be interested in disclosing the content of the right to dissent as that right appears in the context of a liberal democracy. It will be explained that enjoying a right to dissent should not be understood simply as a 'protection of the act of dissenting'--such a definition would at once be both too narrow and too broad to capture the full meaning of the right. Instead, the right to dissent is made up of a complex of other rights and protections which aim to protect a complex of different activities. In particular, these rights include: a.) freedom of expression; b.) freedom of association and assembly; c.) rights to political participation; and, d.) due process protections. Only by examining each of these in isolation may we come to understand in a complete way what it means to possess a legal right to dissent. The fourth and final section (section 2.4) will outline the full Hohfeldian structure of the right to dissent by connecting the content (disclosed in section 2.3) to its intended function (disclosed in section 2.2). By laying out this Hohfeldian

structure, it is my claim that we will be given a full analytic picture of what it means for a citizen of a liberal democracy to possess a right to dissent.

2.1: The Logical Structure of Rights

Rights are relational entities. Like all relational entities, they possess three basic features: a subject, an object, and a content. The subject of a right is typically called the 'right-holder': this is the individual who 'owns' the right, or to whom some duty is owed. The object of the right is called the 'duty-bearer': this is the individual who owes the right-holder some duty of performance. The content of the right connects the subject of the right to its object: it specifies what particular duty the object owes the subject. In this way, the *normative* quality of rights becomes recognizable: rights modify the way agents are to act in given situations. Furthermore, we may extrapolate from this that rights have a *logical* structure: they have a basic anatomy that holds in all possible worlds. What all of this means is that whenever a right is claimed, it may be expressed in logical-relational terms.

The first person to articulate the logical-relational structure of rights was the American jurist Wesley Hohfeld. In his acclaimed 1913 article,[54] Hohfeld laid out in detail the various ways rights were, and had been, employed in judicial reasoning, and set out to ameliorate the confusion that had plagued the topic to that point. Hohfeld separated the different applications of rights into a scheme of 'correlatives' and 'opposites' to better explain the internal structure of rights. Figure 1 gives an account of this scheme.

Fig.1

<u>Jural Correlatives</u>

Claim-Right	Liberty[55]	Power	Immunity
Duty	No-Right	Liability	Disability

<u>Jural Opposites</u>

Claim-Right	Liberty	Power	Immunity
No-Right	Duty	Disability	Liability

The upper table delineates the relation between what Hohfeld called 'jural correlatives'. This is the more influential table of the two, as its interest is in expressing how the kind of right enjoyed by the right-holder affects the other party(s) subject to that right. The four 'incidents' that run along the top line of the upper table pick out the various ways one might designate a right to the subject (S) of a rights relation. For example, S can either: a.) have a claim-right over some thing or action; b.) have a liberty-right to use that thing or to perform that action; c.) have a power to alter the claim-right and/or the liberty-right (in some way); or, d.) have an immunity against that claim-right and/or liberty-right being altered (in some way). The bottom line of the upper table then expresses how each designated incident will affect the object (O) of the rights relation. For

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[54] Hohfeld, 1913. 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' in *Yale Law Journal*, vol.23.

[55] There is some debate over which term best suits Hohfeld's original intention here. Hohfeld himself labelled this incident 'privilege', and some have continued to use that same term. I have opted instead to invoke the term 'liberty' for this Hohfeldian incident, mostly because it seems to best capture the idiomatic nature of the idea.

example: a.) S's claim-right over O will manifest as a correlative duty in O; b.) S's liberty to perform some action ϕ will mean that she owes no duty to O not to perform action ϕ; c.) S's power to alter her claim-right and/or liberty-right will mean that O is liable to that claim-right and/or liberty-right being altered; and finally, d.) S's immunity to her claim-right and/or liberty-right being altered means that O does not himself have the power to alter them (in relation to S).

The second table featured in figure 1--the table termed 'jural opposites'--does not dictate the terms of the rights relations *per se*, but rather the status of the right-holder (S) or duty-bearer (O) with regard to the particular incident each either enjoys or is subject to. For example: a.) If S has a claim-right, then she does not have a no-right (with regard to that claim-right); similarly, if O has a no-right, then he does not have a claim-right (with regard to the no-right); b.) if S has a liberty-right, then she does not have a duty (with regard to that liberty-right); similarly, if O has a duty, then he does not have a liberty-right (with regard that duty); c.) if S has a power, then she does not have a disability (with regard to that power); similarly, if O has a disability, then he does not have a power (with regard to that disability); and, d.) if S has an immunity, then she does not suffer a liability (with regard to that immunity); similarly, if O suffers a liability, then he does not enjoy an immunity (with regard to that liability).

Each of these incidents have been called 'atomic elements' of the Hohfeldian logical structure, and very rarely do they ever appear in this atomic form. Rather, most rights we typically enjoy as members of some group (e.g., the state, certain organizations, the human species, etc.) have a molecular structure built up to form a complex of these Hohfeldian atomic elements. Take, for example, one's right to free movement. Such a right is neither exclusively a claim-right (a duty-imposing claim on others), nor exclusively a liberty-right (allowing the right-holder discretion over action). Rather, to fully grasp what the right to free movement means, the right must be conceived as a complex of these different Hohfeldian incidents which together act to secure whatever it is the right aims to achieve. A full expression of John's right to free movement would look something like this: a.) a claim-right enjoyed by John against all others interfering with his movement; b.) a liberty-right enjoyed by John to move from place to place at his own leisure; and, c.) a power enjoyed by John to alter his claim-right and/or liberty-right status (e.g., by promising Mary he will meet her at the local Starbucks Coffee at noon). Or take the right to be free of bodily harm. Such a right is made up of: a.) a claim-right against others touching one's body; b.) a power to alter that claim-right (e.g., by consenting to be touched); and, c.) an immunity against others (e.g., the state) altering one's claim-right. In both of these cases, it isn't just one element of the right that explains what the right is; it is how the different elements making up the molecular right work together to promote whatever it is that the right is designed to promote. Securing only the 'liberty-right' atomic element of a right to free movement would leave one liable to another's interfering with that liberty-right (since only through a claim-right is a correlative duty imposed on others); securing only the 'claim-right' atomic element of this right would leave one in the uncompromising position of being unable to alter the shape of that right (e.g., by promising to meet Mary for coffee). Most rights we encounter then will be subject to this kind of analytical deconstruction. We can think of this deconstruction in terms of a three-part test. First, a determination is made about what the right is designed to promote (e.g., bodily integrity, individual autonomy, estoppel considerations, etc.). Second, an appraisal is offered on which atomic elements lend composition to the full molecular right. Third, a conclusion is drawn

regarding how the atomic elements within the molecular composition relate to each other to satisfy the right's intended function. This, I propose, is the rubric against which to test the status of any particular rights claim. By answering these three questions, one will be brought to a satisfactory account of what it means for a right-holder to enjoy a particular right, and the various normative consequences that it might imply.

Now, a few more things to note about these Hohfeldian incidents. First, there is an interesting correlation between Hohfeld's incidents and Hart's conception of primary and secondary rules. Recall from chapter 1 (section 1.1) that for Hart, primary rules are action-guiding rules--rules that directly inform the rule-followers of a given system which actions they may and may not perform. Conversely, secondary rules are 'rules about rules'--these are rules that allow for the regulation, administration, and alteration of primary rules. So, for example, in a legal system, a rule against theft would be considered a primary rule (a rule that directly informs members belonging to that system what they are not to do) while a rule allowing law-makers the ability to alter the rule against theft would be an instance of a secondary rule. Likewise, Hohfeld's incidents fall nicely into this Hartian distinction. Claim-rights and liberty-rights are rights that inform the normative space for individuals' actions directly. In the case of claim-rights, a duty is imposed on others that informs those others what they are, or what they are not, to do; in the case of a liberty-right, the right-holder's space of action is itself given some discretionary latitude. These incidents therefore resemble Hart's primary rules: we may call them 'action-guiding incidents'. Conversely, powers and immunities are akin to Hart's secondary rules: they are 'incidents about incidents'. Powers and immunities imbue the right-holder with the ability to regulate, administer, or alter either her claim-right, her liberty-right, or both. Due to this, and as we shall see, powers and immunities become an exceptionally important component of the full picture of rights.

Furthermore, as David Lyons points out, there exist both *active* rights and *passive* rights.[56] Active rights concern the right-holder's own actions, and include liberty-rights and powers; passive rights concern the actions of others (that fall into some relation with the right-holder), and include claim-rights and immunities. Whereas liberty-rights and powers, on the surface at least, can pertain to the right-holder in isolation from other individuals, claim-rights and immunities presuppose another's involvement. This introduces an interesting controversy into rights theory. Some thinkers believe that certain instantiations of rights can be fully active in content--i.e., can exist for the right-holder in isolation from other people. From the way I've explained rights as a consummately relational concept, this idea seems at the very least strained. For example, Leif Wenar gives just such an impression when he offers up a number of examples

[56] See Lyons, 1970, 'The Correlativity of Rights and Duties' in *Noûs*, vol.4.

of what he calls 'single or paired privileges'.[57] A sheriff's liberty to break down a door in hot pursuit of a suspect; James Bond's (alleged) license to kill; a license commonly issued to operate a motor vehicle--all, according to Wenar, are examples of rights that stand alone as active liberties. Other thinkers, including Hohfeld himself no less,[58] disagree with this characterization. For instance, in their paper criticizing Wenar's approach to rights,[59] Matthew Kramer and Hillel Steiner argue that there is good reason to keep the ascription of the term 'right' to the category of claim-rights alone (accompanied by immunities).[60] Their argument is that a liberty or a power (what Lyons classifies 'active rights') without being attached to a claim-right, is in fact no right at all. In fact, the only reason we are so often inclined to label certain liberty-rights as 'rights' in the first place is due to their affiliation in some way to a related claim-right. Upon this approach then, a sheriff's right to break down a door while in hot pursuit of a suspect is less appropriately characterized by his liberty-right to break through the door, as it is by the accompaniment of a duty imposed on other individuals not to interfere with his doing so. Without this claim-right attached, argue Kramer and Steiner, it would be improper to call the sheriff's liberty in this regard a 'right'. Now, the complications of this debate are far more subtle than the treatment offered here would suggest; and it is not my intention to commit firmly to either position (at least in a general sense). I think it is fair to say however that Kramer and Steiner's point, at least insofar as it aims at clarifying the philosophical treatment of various rights claims, is a good one. I will return to this controversy in more detail in the next section (2.2).

Finally, there is a familiar and worthwhile distinction that can be drawn between *negative* and *positive* rights. Negative rights are rights enjoyed by the individual not to be interfered with--rights that protect the individual from being hindered in some activity he chooses to undertake, or to be negatively impacted by some other person. Positive rights, on the other hand, are rights that secure to the individual some kind of provision or service. It is, for example, typical of a libertarian thinker to argue that all rights are by nature negative--that any claim to a 'positive right' is an opportunistic misapplication of the term.[61] Welfarists, on the other hand, tend to think that positive rights have a legitimate and indeed necessary place in any well-ordered society--that certain individuals, due to the position they happen to be in (historical, cultural, or social) merit

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[57] See Wenar, 2005. 'The Nature of Rights' in *Philosophy and Public Affairs*, vol.33. Note that the distinction between single and paired privileges borrows heavily from Hart's distinction between unilateral and bilateral liberties (c.f., pp.166-167 of Hart, 1982. *Essays on Bentham: Studies in Jurisprudence and Political Theory*. Oxford: Clarendon Press). Both distinctions express the possibility that one may have a liberty right to commit action ϕ without having a liberty right *not* to commit action ϕ (presumably, the case of a sheriff breaking down a door in pursuit of a suspect would be this kind of unilateral liberty: due to 'role-requirements', the sheriff does not enjoy a liberty *not* to break down the door) or have the liberty right both to commit action ϕ and the liberty right not to commit action ϕ (the bilateral, discretionary character of which we are more commonly apt to apply to a given liberty right).

[58] C.f., pp.34-35 of Hohfeld, 1913. 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' in *Yale Law Journal*, vol.23.

[59] Kramer and Steiner, 2007. 'Theories of Rights: Is There a Third Way?' in *Oxford Journal of Legal Studies*, vol.27.

[60] C.f., pp.294-299 of *ibid*.

[61] C.f., Narveson, 2001. *The Libertarian Idea*. Peterborough, Ontario: Broadview.

positive rights considerations.[62] I will not engage this debate in any sort of expansive way here. For now, the distinction is interesting due only to what it can tell us about rights more generally: to wit, both negative and positive rights apply exclusively to what we have above labelled 'passive rights'. This then means that only with respect to a claim-right (accompanied by an immunity) does the distinction between negative and positive rights make any sense in the first place. As we will see, this will have certain implications for what we will discuss later on. Is the right to dissent a fully negative right--i.e., a right that no one interfere with one's dissenting activity? Or does it have certain positive qualities--e.g., the positive right to certain resources that make dissent more accessible? I will return to this question in more detail in the final section (2.4) of the chapter.

2.2: The Function of the Right to Dissent

Due to the rubric I earlier recommended we use to determine the status of any particular rights claim, understanding the function of the right to dissent is vital to understanding what it means to have that right. Recall my claim: in order to ascertain the status of a particular rights claim, we must: a.) make a determination about what the right is designed to promote; b.) offer an appraisal of the atomic elements that compose the full molecular right; and, c.) reach a conclusion regarding how the atomic elements within that molecular structure relate to each other to satisfy the right's intended function. This test clearly relies on determining what the intended function of a right is, which further suggests that to fully understand what one means by laying claim to a right, one must first understand what the right is for (or, at the very least, what it is intended for). It is to this question I now turn.

The function of a right to dissent may be more or less broadly construed in two different respects: first, with respect to the interests that might be served by the right; second, with respect to the context in which the right is claimed. Now, concerning the interests of the right-holder specifically, the function played by a right to dissent may derive from one or both of two very closely related considerations: either, a.) the right will help to protect the right-holder's capacity to make autonomous choices (i.e., by giving her a discretionary choice in matters of dissent); and/or, b.) it will help to protect the right-holder's interest in being a participant in decisions that may come to affect her.[63] Each functional description relates in its own way to what in the first chapter we articulated to be certain conceptual conditions that belong to dissent. Recall that one of the conditions for an act to be considered one of dissent is that it derive on the basis of normative reasons. This implied that the dissenting agent was one who could formulate choices

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[62] C.f., Shue, 1996. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. Princeton: Princeton University Press.

[63] It is interesting to note that each of these functions fall quite nicely into the two traditional models used to explain the function of rights generally. To wit, protecting the right-holder's capacity to make autonomous choices is clearly in line with the *Will Theorist's* account of the function of rights (for more on Will Theory, c.f., Hart, 1982. *Essays on Bentham: Studies in Jurisprudence and Political Theory*. Oxford: Clarendon Press; Wellman, 1985. *A Theory of Rights*. Totowa, NJ: Rowman & Allanheld; and, Steiner, 1994. *An Essay on Rights*. Oxford: Blackwell) while protecting the right-holders interest in participating in decisions that may come to affect her lands us squarely in *Interest Theory* territory (for more on Interest Theory, c.f., Kramer, 2001. 'Getting Rights Right' in *Rights, Wrongs, and Responsibilities* (Kramer, ed.). London: Macmillan; MacCormick, 1977. 'Rights in Legislation' in *Law, Morality and Society: Essays in Honour of H.L.A Hart* (Hacker and Raz, eds.). Oxford: Oxford University Press; and, Raz, 1984. 'On the Nature of Rights' in *Mind*, vol.93).

autonomously; or, in the words of Immanuel Kant, could discharge, "the property of the will through which [the will] is a law to itself."[64] What Kant meant by this is that autonomous decisions are decisions which are exclusively the outcome of a rational will freely giving itself a universal rule (or set of rules), rather than being moved by some psychological habit or appetitive desire. Decisions that result from these latter sources, though they emerge *from the agent*, are not autonomous. For a choice to be 'autonomous', the self must freely and rationally choose the principle upon which it acts. This introduces a second feature of autonomous decision-making. As Robert Paul Wolff writes, "being able to choose how he acts makes a man *responsible.*"[65] The free and rational quality of autonomous decision-making implies that the agent may be held responsible for his decision-making and, in so doing, become the seat of the character that develops on the basis of his decisions.

Now, the importance of autonomy extends well beyond the immediate effects any particular autonomous choice made by the agent will have. Indeed, protecting the capacity for the agent to be autonomous seems to be primarily important with respect to its general, rather than to its direct, consequences. What I mean by this is the following. It goes without saying that one of the crucial aspects of the individual having the power of choice is that she then has some influence over the discrete matters that affect her. But just as crucial as this is the aspect that allows the individual to have an influence over the *kind of person she becomes*. It is this general interest in autonomous character development that seems to be the root of the function played by the right to dissent with respect to the right-holder's autonomy. As Joseph Raz notes, "it is the special character of autonomy that one cannot make another person autonomous. One can bring the horse to the water but one cannot make it drink. One is autonomous if one determines the course of one's life by oneself."[66] The function played by the right to dissent will therefore not be merely to protect the right-holder's capacity to make discrete autonomous decisions, but to provide the right-holder with the means to be an autonomous individual, and therefore to become a responsible moral person.

Having said all of this, it is not *only* from this general perspective that the individual will be concerned with his choice-making capacity--he too will be interested in the several minute and successive decisions that on a day-to-day basis come to affect him. For instance, recall from chapter 1 that one of the conceptual conditions for dissent is that the object of dissent must be a position that is both settled and/or carry with it some kind of practical effect. With this condition in mind, it is fair to suggest that one of the functions a right to dissent will carry for the right-holder will be to protect the right-holder's interest in participating in those decisions which may, as settled, come to affect him (something that should come as no surprise given that humans tend primarily to be interested in precisely those decisions that directly affect them). Though it may not be realistic for each individual who belongs to a group to have a direct say in each decision that comes to affect that group (nor is it the case that, even if each member could, would it be

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[64] See Kant, 2002. *Groundwork for the Metaphysics of Morals* (Wood, ed.). Binghamton: Vail-Ballou Press, especially p.58 where he defines precisely the meaning of autonomy.

[65] Wolff, 1970. *In Defense of Anarchism*. Berkeley: University of California Press, p.12.

[66] Raz, 1986. *The Morality of Freedom*. Oxford: Oxford University Press, p.407.

preferable[67]) a right to dissent will protect the individual's means to express his view on those issues that come to be settled by the group and that, by belonging to the group, have a very real possibility of affecting him.

With all of this in mind, a first way we can differentiate between the function a right to dissent is to play for the right-holding agent is to articulate more precisely the interests that will be served by that right. As we have just explained, there will be a double function played by the right to dissent as that right concerns the interests of the right-holder specifically. It will: a.) support autonomy concerns of the right-holder; and, b.) allow the right-holder increased participation in matters that may come to affect him. However, when we move to the interests that belong to the group rather than to the right-holder, the function played by a right to dissent will be a much broader affair. When the right to dissent is observed from a social perspective, it may act as either: a.) a means to improve the social landscape (whether that be epistemically, morally, or otherwise); and/or, b.) a justificatory basis for society to hold certain agents responsible for their actions.

The argument for securing to citizens a robust right of dissent as a means to improve the social landscape is a familiar one. For instance, Cass Sunstein, who primarily takes this tack on dissent in his book *Why Societies Need Dissent*, repeats a sentiment shared by many[68] who argue that the presence and tolerance of dissenting actions is absolutely crucial to the successful functioning of a democratic society. As Sunstein notes in that book: "conformists are often thought to be protective of social interests, keeping quiet for the sake of the group. By contrast, dissenters tend to be seen as selfish individualists, embarking on projects of their own. But in an important sense, the opposite is closer to the truth. Much of the time, dissenters benefit others, while conformists benefit themselves"[69]; and further, "conformists are free-riders, benefiting from the actions of others without adding anything of their own. To say the least, it is tempting to free-ride. By contrast, dissenters often confer benefits on others, offering information and ideas from which the community gains a great deal."[70] Sunstein here borrows heavily from a principle made famous by John Stuart Mill which holds that even if an idea is fallacious, it will add to the improvement of knowledge generally. As Mill writes, "since the general or prevailing opinion on any object is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied."[71] The number of arguments in the literature that share this sentiment go to show that one of the predominant functions played by a right to dissent is to ensure the betterment of society; in this particular case, through improving its standard of knowledge. From this perspective then, the function played by such a right is not

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[67] This is due to what Jeremy Waldron calls 'the circumstances of politics'. C.f., part II of Waldron, 1999. *Law and Disagreement*. Oxford: Oxford University Press.

[68] C.f., Anderson, 2006. 'The Epistemology of Democracy' in *Episteme: A Journal of Social Epistemology*, vol.3; Buchanan, 2002. 'Social Moral Epistemology' in *Social Philosophy and Policy*, vol.19; Gilbert, 1989. *On Social Facts*. Princeton: Princeton University Press; Hayek, 1945. 'The Use of Knowledge in Society' in *American Economic Review*, vol.35.

[69] Sunstein, 2003. *Why Societies Need Dissent*, p.6.

[70] *Ibid*, p.12.

[71] Mill, 2002. *On Liberty*. Mineola: Dover Publications, Inc., p.43.

specific to its role in protecting the interests of the right-holder, but rather is grounded in the beneficial social consequences that will result from that individual protection.

In addition to this, there is a second way a right to dissent may serve a social interest: it may serve to provide society with a justificatory basis to hold agents responsible for their actions. This consideration is directly related to one we encountered above. As we saw, an autonomous choice is one the agent makes freely and rationally, and one that *on that basis* he may be held responsible for. In particular, two possibilities present themselves for the agent who has made a decision in a society with a robustly protected right of dissent. Either: a.) the agent was given a protective sphere to make an autonomous decision, but failed to do so (e.g., by being moved instead by some appetitive motivation); or, b.) the agent's action was in fact based on an autonomous choice. In both cases (the reasoning might go) the agent may be held responsible. He may in case (a) since he was given every opportunity to exercise an autonomous choice, but failed; and he may in case (b) because the action was in fact derived from a choice made autonomously, but the choice made was the wrong one. The kind of instrumental benefit such a justificatory basis will serve for society should be clear, especially considering the high value societies tend to place on things like 'stability' and 'orderliness'. The ability for society to hold individuals responsible for their actions, and to do so based on a principle that is generally regarded as beneficial to the individual himself, gives society a sound basis from which it may 'keep things in order'.[72]

These then are two ways the function played by a right to dissent may be differentially construed depending on whose interests are at stake. If it is the interests of the right-holder, the right to dissent will function to: a.) protect the right-holder's ability to make autonomous choices (and, more generally, to become an autonomous moral person); and/or, b.) allow the right-holder a way to participate in decisions that may come to affect her. If instead the interests are of society at large, the right to dissent will function to: a.) provide a means to improve the social landscape; and/or, b.) allow society a basis upon which to hold individuals responsible for the decisions they make. There is, however, a second sense in which the function of a right to dissent may be differentially construed--one that looks to the *context* in which the right is claimed rather than the interests the right aims to satisfy. What I mean by this is the following. Certainly it is the case that a right to dissent claimed by a sitting Justice of the Supreme Court will serve a different function for her than will one claimed by, e.g., an employee of a corporation, or a citizen of the state. Although each of these contexts allow one to make sense of attributing a right of dissent to the members who belong to a group, it is not the case that the right will in each case serve the very same purpose. For instance, the right to dissent that is enjoyed by a Supreme Court Justice seems to be far more for the sake of *institutional integrity* than for the benefit of the judge who enjoys the right (e.g., it will act as a way to strengthen the authority of the court, both through an increase in the court's transparency, but also as a potential corrective to the specious reasoning that the court may sometimes advance). Only in a very contrived way may one conceive the right's function in this context to act as a protection on the interests of the right-holding judge. Conversely, a right to dissent that is enjoyed by a citizen of the state will see a flip in this

[72] This panoply of functions played by the right to dissent is similar in substance to a list constructed by Thomas J. Emerson on the right to free speech. C.f., Emerson, 1963. 'Toward a General Theory of the First Amendment' in *Yale Law Journal*, vol.73, pp.878-886.

relationship. Here, the right will function primarily as a protection of the right-holder's interests, and only derivatively as a way to ensure the institutional integrity of the group (viz., the state).[73]

We are therefore left with two different respects in which the function of a right to dissent may be differentially understood: a.) according to the interests at sat
ke; and, b.) according to the context in question. Concerning (a), my analysis will for the most part focus on the function the right to dissent will play for the *right-holder*. This is not to say that the social implications of that right will not also play an important role in my analysis, but only that my concern will principally be to investigate the meaning of the right as it serves this function. This decision is not incidental. Since to my mind, the social function played by a right to dissent derives from how that right functions with respect to the right-holder, there is good reason to use the right-holder as the primary locus of investigation. Concerning (b), my analysis will exclusively be interested in what I have in chapter 1 called *political dissent*--namely, the legally sanctioned state-directed expression of normative disapproval by a citizen of the state. Considering the stated intent of my wider thesis, my reasoning for choosing this context rather than another should be obvious.

2.3: The Content of the Right to Dissent

Just like the function of the right of dissent, the content of the right can be more or less broadly defined. However, unlike the treatment just offered, a right to dissent's content should not be understood taxonomically. Rather, the right to dissent will be made up of a cluster of other rights that, through addition or subtraction, will effect how people come to understand the full scope of that right. But before elaborating on this cluster, I should first explicitly state my intentions in this section. My goal here will be limited to *disclosing those rights that together are sufficient to articulate what the normal citizen has justifiable reason to take his political right of dissent to include within the context of a liberal democracy*. The list I present will therefore not be exhaustive. Moreover, as was mentioned in the introduction to the chapter, the list will also be general. I will be satisfied to merely provide an overview of the kinds of rights constitutive of the citizen's right to dissent without venturing too far into the practical application of those rights. As I will now explain, a citizen's right to dissent ought to include a protection over: a.) freedom of expression; b.) freedom of association and assembly; c.) the right to political participation; and, d.) due process protections. I will deal with each of these in the order I have listed them.

2.3.1: *The Freedom of Expression*

The fact that any right to dissent will include at its core the right to freedom of expression is directly correlated to the conceptual nature of dissent. Recall our definition of dissent: it is, 'an expression of (normative) disapproval that is directed at a (settled and/or practically effective) group position, undertaken by a member of that group, that (typically) aims to effect influence

[73] Off hand, this distinction seems to have something to do with the direction of effects that will result from decisions made by the group in question. To wit, the decisions (or verdicts) that are laid down by the Supreme Court are only derivatively affective of the Supreme Court Justices themselves, but are primarily directed to affect individuals *who do not belong to the group*. In the case of the state, precisely the opposite is the case: decisions made by the state directly affect those who *do belong to the group*.

over a state of affairs of the group'. It should therefore come as no surprise that for an action to be called 'dissent', one must at least enjoy a liberty to express one's disapproval.

Now, in rights documents, freedom of expression is often included in a provision alongside a wider list of freedoms. For example, section 2 of the Canadian Charter of Rights and Freedoms outlines the second (of four) 'fundamental freedoms' to be: *freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication*. Similarly, the first amendment of the U.S. Constitution states: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances*. Article 10 of the European Convention on Human Rights reads: *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*. Finally, article 19 of the Universal Declaration of Human Rights states: *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*. Each wording is clear to indicate two important aspects that belong to freedom of expression: first, it outlines the *content* of the freedom--i.e., the freedom to express one's opinions;[74] second, it outlines the *mode* of the freedom--i.e., through the press or other media communication (regardless of frontiers), by petitioning the government, etc. This is how we should minimally understand freedom of expression: it is the uninhibited liberty to communicate one's beliefs and/or opinions through a variety of channels that lay at one's disposal.[75] It bears asking however: to whom is one's uninhibited communication directed? Or better: who is the audience of one's uninhibited expression? Presumably, this could be anyone at all. However, clearly the thrust of one's claim to freedom of expression will be directed toward expression occurring in the public realm. That this is so follows from the practical realities that surround the claim: typically, it is in the public realm that opinions have a tendency to offend, annoy, or even harm; thus, it is in the public realm that the protected freedom is most necessary.

With the foregoing in mind, we can formulate a minimal definition of the basic freedom that will act as the cornerstone for any right of dissent. The freedom to express one's opinion may be defined as: (a) the liberty to express one's opinion; including (b) a protection from external interference impeding one's ability to express that opinion; through (c) a broad but

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[74] I should note here that 'freedom to express one's opinions' is intended to be read broadly. For example, although in some rights provisions freedom to express religious belief is included alongside freedom of expression (e.g., in the first amendment of the U.S. Constitution), in others, the two are sub-divided (e.g., in the Canadian Charter of Rights and Freedoms). Now, to my mind, there are good *instrumental* reasons why the right to religious belief should be made explicit in rights documents. However, from a strictly conceptual standpoint, religious belief would be included in the wider right to free expression.

[75] We may not, however, extend the definition to include just *any* channel that lay at one's disposal. For example, the freedom to express one's anger at the success of a competitor will certainly not include setting that competitor's place of business on fire. [This example is taken from Raz, 1994. 'Free Expression and Personal Identification' in *Free Expression: Essays in Law and Philosophy* (Waluchow, ed.). Oxford: Oxford University Press].

specified[76] variety of channels; such that (d) that opinion may be communicated to a public audience.

2.3.2: *The Freedom of Association and Assembly*

Aspect (d) of the definition of freedom of expression hints at a second freedom connected to the right to dissent. Although not conceptually necessary for that right, the freedoms to associate and assemble are oftentimes considered to be constitutive parts of it. There are good reasons why this is so. Freedom of association has both a positive and a negative character. Positively, it refers to the liberty one has to associate with persons of one's choosing; negatively, it refers to the liberty one enjoys to choose those individuals (or groups of individuals) with whom the agent would rather *not* associate.[77] For example, if one wishes to associate with a member of a race or a religion that may otherwise be seen as socially improper (e.g., a friendly association between a white male and black female, or vice versa, in the Antebellum South; a romantic association between a Protestant male and Jewish female, or vice versa, in pre World War II Germany; etc.), the positive aspect of freedom of association would protect such a relationship. Negatively speaking, the agent will be protected from all those associations he wishes to avoid.

Now, concerning the agent's right to dissent, the importance of the positive aspect of freedom of association should be obvious: were one not to have the freedom to associate with persons of one's choosing, one could presumably be kept from those associations which might strengthen and/or promote one's dissenting action or cause. Furthermore, by limiting this sense of freedom of association, the dissemination of ideas that might resonate with certain factions of society could be kept to a minimum.[78] Of course, the negative aspect of this particular freedom is similarly important. Were the agent not protected in the exclusion of those with whom she did

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[76] Precisely how these channels are to be specified will be more fully investigated in chapter 4.

[77] This particular aspect of the freedom has caused widespread and ongoing debate, both from a legal and a moral standpoint. The basis of the debate is straightforward enough: if one's freedom of association involves a freedom to exclude, then it seems to be a freedom that encourages--or at the very least tolerates--discriminatory practices. I will not engage this debate here. For more on the legal debate: c.f., *Terry v. Adams,* 345 U.S. 461 (1953); *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984); *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000); *Cal. Democ. Party v. Jones,* 530 U.S. 567 (2000). For more on the moral debate: c.f., Wellman, 2008. 'Immigration and Freedom of Association' in *Ethics*, vol.119; and Fine, 2010. 'Freedom of Association is Not the Answer' in *Ethics*, vol.120.

[78] The historical list of this kind of anti-association state activity is as long as it is notorious. Section 98 of the Criminal Code of Canada reads, "Any association...whose professed purpose...is to bring about any governmental, industrial or economic change within Canada by use of force, violence or physical injury to person or property, or by threats of such injury, or which teaches, advocates, advises or defends the use of force, violence, terrorism or physical injury to person or property...in order to accomplish such change, or for any other purpose, or which shall by any means prosecute or pursue such purpose...or shall so teach, advocate, advise or defend, shall be an unlawful association." The problem of course is not with the law as such (surely states are justified in protecting themselves against things like treason and sedition) but with its historical application. For example, on August 11, 1931 Tim Buck, then secretary-general of the Communist party of Canada, (along with eight others) was arrested under s.98 for, "...doing nothing [different] than what they had been doing for years." (Berger, 1982. *Fragile Freedoms: Human Rights and Dissent in Canada*. Toronto: Irwin Publishing, p.137). In addition to this Canadian example, here are a few others: German Basic Law of 1949 (Article 21) states that political parties with certain ideologies (read: Nazi sympathizers) are prohibited from appearing on the ballot; in the United States, the term McCarthyism (named for Republican Senator Joseph McCarthy of Wisconsin) has come to mean the making of accusations of disloyalty or subversion without the proper supporting evidence. Some of the victims of McCarthyism in the United States (which were later overturned) were: *Yates v. United States*, 354 U.S. 298 (1957) and *Watkins v. United States*, 354 U.S. 178 (1957).

not wish to associate, she could seemingly be forced to associate with individuals who might: a.) attempt by various means to inculcate her away from her dissenting opinions; and/or, b.) monopolize her time to the point where dissent would become an unreasonable burden for her.[79] Either one of these invasions would be an affront to the enjoyment of one's right to dissent.

Turning now to freedom of assembly, we encounter a much narrower freedom than freedom of association. Whereas one's freedom of association may mean 'the liberty to associate (or not associate) with whomever one pleases', one's freedom of assembly does not mean 'the liberty to assemble wherever one pleases'. Indeed, the entire subject of property law makes such a notion preposterous. But freedom of assembly does imply the existence of 'protected spaces'; and, what's more, of protected 'public' spaces. Here is why. There are a number of ways one could distinguish between association and assembly. One could, for example, think of assembly as but a more formalized kind of association. And yet, in the context of rights, understanding the distinction on this basis would lead to ambiguity. It would because those who profess to have a right to these activities would then be unsure whether it was one right or the other right that was being infringed in any particular case. Questions such as, 'how formalized must a union of persons be to constitute an assembly?' would surely crop up; and, moreover, would be almost impossible to answer. It is for this reason that the clearest way to differentiate between association and assembly (for the purposes of rights attributions) is on the basis of *space*.[80] Whereas freedom of association is the right to engage with other individuals in non-spatial ways (e.g., the sharing of ideas or beliefs), freedom of assembly protects the agent's liberty to engage with them spatially.[81] Understanding the distinction on this basis has two clear advantages. First, we get a much crisper sense for why these two kinds of rights are oftentimes discussed in tandem: to wit, since it is categorically true that all non-spatial association happens in space, the right to assembly becomes a necessary component of freedom of association. Second, we may more narrowly understand the kind of space that is at stake when we lay claim to an assembly right. In the context of private space alone, freedom of assembly adds very little (if anything at all) to the protection already guaranteed by freedom of association. This is so because, once it is determined that individuals may associate with whomever they like, it becomes trivially true that they may do so within their own private space. But it is not similarly true that they may associate with these persons publicly. Indeed, from the bare fact that the agent is to be protected in choosing her associates, it does not follow that she may then choose *where* she wishes to assemble with those associates. This second feature of association demands a separate protection--one supplied by the agent's right to assembly. It is therefore my claim that anytime

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[79] Consider in this regard the idea of a filibuster in political proceedings.

[80] I hesitate to write 'physical space' here, as there is an ongoing debate in the literature surrounding whether assembly rights apply to things like the internet (c.f., Morozov, 2011. *The Net Delusion: The Dark Side of Internet Freedom*. New York: Public Affairs, esp. chapters 8 and 9; and, Saco, 2002. *Cybering Democracy: Public Space and the Internet*. Minneapolis: University of Minnesota Press). My use of the term here is to be understood as broadly as possible, without extending to sentient association.

[81] This way of understanding the relation fits well with the U.S. Supreme Court's reasoning for interpreting association rights (not explicitly mentioned) into the first amendment. As the Supreme Court wrote in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984): "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."

the agent declares an infringement on her assembly rights, it is to an infringement in the *public realm* that she is referring.

2.3.3: *Political Participation*

That my investigation into dissent focuses on the liberal-democratic political context suggests that political participation would naturally play a part in that investigation. And yet interestingly, in modern parlance, the terms 'dissent' and 'democracy' are oftentimes set up as antagonistic forces. Indeed, dissenting activities are oftentimes thought to be the *correctives* of possible deficiencies within the democratic process, and thus are understood to stand apart from that process itself. As I will now attempt to show, this is the wrong way to understand the relationship. In principle at least, the mechanism of democracy offers citizen's one of the most accessible and determinative ways to express their dissent.

To speak of democracy is to speak of a form of governance. In particular, it is to speak of a form of governance in which 'the people' have the authority to govern themselves. Its fundamental principle is that decisions made by a group are to be made by the *whole* group, which oftentimes gets expressed by the majority opinion determining a particular course of action.[82] It was John Stuart Mill who most famously articulated a problem with this majoritarian system of democratic governance.[83] As he argued, the majority, "may desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power."[84] It is with respect to the concern of 'the tyranny of the majority' that the idea of a *liberal* democracy has developed. Through bills and charters of rights, which are then interpreted through a practice of judicial review, individual liberties may be protected against the outcome of a majority decision-making procedure. In a sense then, it is no surprise that many hold dissent and democracy to be naturally antagonistic. In its common majoritarian manifestation, dissenting actions that extend beyond the democratic process often act as a stop-gap for democracy drowning out the voices of the few. But it would be a mistake to push this interpretation too far. In a very important way, our democratic rights to political participation themselves play a vital role in the overall shape of our right to dissent.

Perhaps the best way to demonstrate the importance of the democratic system with regard to our right to dissent is to draw an analogy to something already discussed. Recall from section 2.2 that one of the functions a right to dissent will play is to protect the autonomous decision-making capacity of the right-holder. Recall further what characterized this autonomous decision making capacity: it was a facility enjoyed by the agent to choose some course of action on the basis of his own rational will as opposed to being forced to choose it, either through an external force, or by way of an internal compulsion. This is all well and good on the level of individual decisions. However, when the decision to be made is placed instead within the context of a *collective* of individuals, the autonomy of each individual becomes compromised. A collective

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[82] There are a number of ways a democracy could work. It could work on a bare majority (50% + 1); on a super-majority (e.g., 2/3 of the population); or by a unanimous decision made by the entire group. I am not committed to any of these ideas in particular, but will most often refer to the 'bare majority' expression of democracy.

[83] Although the problem is now most often referred to Mill, it was Alexis de Tocqueville who first introduced the problem in de Tocqueville, 1835. *Democracy in America*. Cambridge: Cambridge University Press.

[84] Mill, 2002. *On Liberty*. Mineola: Dover Publications, Inc., p.3.

decision is a decision made by, or on behalf of, a number of individuals, that will carry an effect for these individuals. The whole notion of collective decision-making therefore flies in the face of autonomy. We are left with a tension: on the one hand, collective decisions are a natural byproduct of individuals living in community with others; on the other hand, the nature of these collective decisions tend to undermine the individual's role in the decision-making process. How then are we to navigate through this tension? One explanatory course lies in the notion of 'the will of the people'. Just as on an individual level, autonomy is concerned with the individual deciding in accordance with a rational will, on a social level, the autonomy of the group as a whole is only possible if the group decides in accordance with the 'will of the people'--or, in the language of Jean-Jacques Rousseau, in accordance with 'the general will'.[85] All things equal, what we as a social group would prefer would be for group decisions to be made by all group members with one, unified will (i.e., all individuals willing the same thing for the same reasons) in a way similar to how the autonomous individual comes to make a decision on the basis of his one, unified will. But of course, problems arise when we attempt to carry the theory of a general will into practice. In practice, the conformity and integration of a group of discrete individual wills is at best unlikely; at worst, it is downright unrealistic. Indeed, there is good reason to believe that the level of disagreement among individuals within society is something that simply cannot be reasoned away.[86] We are therefore left with the next best option, which many consider to be majoritarian democracy.[87]

Democracy is not a categorical idea--it takes many different forms and is practically implemented in many different ways.[88] The general idea supporting all democratic forms of governance is a republican one: 'the people'--or, to be more precise, 'all eligible citizens' (e.g., citizens of a certain age)--are responsible for making their own decisions. The democratic procedure is one in which each eligible citizen may cast a vote for the option (or set of options) he or she would most like to see implemented with respect to a particular issue or set of issues. Theoretically, this kind of voting can occur on each decision made by the collective; or, what is more common,[89] may occur indirectly by way of elected officials. We call this latter kind of democracy 'representational democracy'. Now, there are two initial ways one might understand

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[85] C.f., Rousseau, 2011. *The Basic Political Writings* (2nd edition) (Cress, ed.). Cambridge: Hackett Publishing Company, Inc., pp.126-135. To be sure, Rousseau's idea of the general will does not exactly square with democracy (c.f., pp.198-200), but the analogy is instructive.

[86] This is an idea well covered in the literature--most notably perhaps by John Rawls in *Political Liberalism*. Rawls calls this kind of disagreement 'the fact of reasonable pluralism', by which he means to imply that not only do individuals in society hold differing views on topics of policy, morality and law, but that each view is reasonable. C.f., p.24 (note 27) and elsewhere of Rawls, 1993. *Political Liberalism*. New York: Columbia University Press.

[87] Some fervent advocates of democracy are: Alexis de Tocqueville (c.f., de Tocqueville, 1835. *Democracy in America.* Cambridge: Cambridge University Press); Robert A. Dahl (c.f., Dahl, 1989. *Democracy and its Critics*. New Haven: Yale University Press); Thomas Christiano (c.f., Christiano, 1996. *The Rule of the Many: Fundamental Issues in Democratic Theory*. Boulder: Westview Press); and, Philip Petit (see Petit, 2013. *On the People's Terms: A Republican Theory and Model of Democracy*. Cambridge: Cambridge University Press).

[88] For example, democracy may come in the form of a presidential republic (United States); a parliamentary constitutional monarchy (Canada); a parliamentary republic (Germany); a semi-presidential system (France); etc.

[89] The only political system currently in existence that even resembles a direct democracy is the Swiss system. For more on Switzerland's democratic system, c.f., Kobach, 1993. *The Referendum: Direct Democracy in Switzerland*. Dartmouth: Dartmouth Publishing Co.

the idea of 'representation' as it occurs in a representational democracy. The representative is either: a.) a mediary through which individual citizens may directly influence matters of government; or, b.) a proxy that is given surrogate powers of choice on behalf of a subset of the citizenry.[90] The former of these two options does not seem to pose much of a problem for how the individual can be understood to be involved in the collective decision-making process. If the individual has a way to consult his representative directly, and to therefore influence her decision-making in an immediate way, the relation between the individual and the decision-making process becomes explicit. But here, we seem to have lost the idea of democracy altogether. According to this interpretation, collective decisions are likely to be made on behalf of the loudest, or the most eloquent, or the most well-connected individuals who have the power to influence their representative. Such an interpretation seems to in fact be antithetical to the idea of democracy.[91] So it is the latter of the two approaches that seems to be more conducive to democratic values. Unfortunately, because the representative is only acting as a surrogate in this case, it is also an approach that makes it difficult to understand the exact place the individual has within the collective decision-making process. And this of course brings us back to our problem. As it is my goal to demonstrate the importance political participation rights carry in the fuller conception of an agent's right to dissent, it seems essential to articulate just how the agent's role in political participation is meaningful. On the surface at least, the agent's mitigated role in collective decision-making, filtered as it is through a solitary vote cast for an official making decisions on her behalf, seems to leave that agent in a very removed or weak position with respect to those decisions. But a second look may uncover certain considerations that will help to show why this first impression may not be altogether correct.

To begin, the various elements that make up one's right to political participation are not specific to one's democratic right to vote for representation. In addition to this, one may in fact stand as a representative candidate himself--i.e., may put himself in a position to become a representative who will have a direct voice in the collective decisions. This kind of openness inside the representational scheme goes a long way toward closing the gap between the agent's role in the democratic decision-making process and the process itself. In addition to this, a right to political participation will generally include a length-of-term provision or limit on how long a sitting government may hold office between elections, which ensures that particular representatives may be held accountable for the kinds of decisions they make. This will have two consequences: first, representatives will be more likely to make decisions in ways that conform to their constituent's desires; second, citizens may influence in regular intervals the kind of

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[90] These two conceptions of representational democracy have a loose relation to what have (reversely) been called 'the juridicial conception' (i.e., "...treats representation like a private contract of commission" - p.21) and 'the political conception' (i.e, "...the activation of a communicative current between civil and political society" - p.24). See Urbinati, 2006. *Representative Democracy: Principles and Genealogy*. Chicago: University of Chicago Press.

[91] Note that this problematic can be clearly seen in the case of powerful lobby groups. On this issue, c.f., Kaiser, 2010. *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government*. New York: Vintage Books.

representative they consider will best serve them.[92] These then signal two ways in which the rights attached to political participation secure realistic avenues for the citizen to pierce through the collective clamor that inevitably accompanies the democratic process.

But there is something more to be said here--something about the democratic form of decision-making itself that, even above these considerations, bears relevance to the point at hand. Thomas Christiano offers a justification of the democratic form of collective decision-making on the basis of equality of resources. His argument takes the following line: a.) there are certain collective interests that affect all equally (e.g., roads, healthcare, air quality, etc.); b.) the only fair way to address these collective interests are through procedures which apply to all; and c.) to make a collective decision on these procedures must involve the equal consideration of those affected. Here, we see that what is important for Christiano is the *procedure* through which collective decisions are made. In other words, for him, if the procedure to bring about a decision is fair, then it stands to reason that the outcomes of that procedure will, more often than not, be fair as well. Now, although Christiano's reasoning is not altogether bulletproof, his underlying premise is sound.[93] What democracy allows is a procedural means through which each individual gains an equal access to the resources that will effect the outcomes of collective decisions. One of these resources is of course voting, and is of vital importance because, "[a] vote is a kind of instrument or resource for achieving one's aims. A vote by itself is not intrinsically desirable; it is not a piece of happiness or well-being itself. But it might help us achieve what is intrinsically worthwhile to us. If we have a vote in a decision, this vote will help us to get the decision that we think best."[94] Nowhere is Christiano's sentiment so clearly evidenced as it is in the words of those who were historically denied the right to vote. Emmeline Pankhurst, in her famous speech 'Freedom or Death', and after explaining the several benefits that come along with the right to vote, offers up the alternative: "But let the men of Hartford imagine that they were not in the position of being voters at all, that they were governed without their consent being obtained, that the legislature turned an absolutely deaf ear to their demands, what would the men of Hartford do then? They couldn't vote the legislature out. They would have to choose; they would have to make a choice of two evils: they would either have to submit indefinitely to an unjust state of affairs, or they would have to rise up and adopt some of the antiquated means by which men in the past got their grievances remedied."[95] The point should be clear: not only is the democratic right to vote consistent with individual liberty; it in fact strongly supports it. It is the nature of collective decisions that they affect a number of individuals--a fact that immediately eliminates the option of any single individual being the fair choice to make these kinds of decisions on behalf of all the others. Instead, as we have seen, the democratic form of decision-making

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[92] For example, sections 3-5 of the *Canadian Charter or Rights and Freedoms* include (among other things): a.) "...the right to vote in an election of members of the House of Commons or of a legislative assembly"; but also, b.) "[the right] to be qualified for membership therein"; as well as, c.) a term limit on how long a particular representative (or group of representatives) may remain in power before consulting the voters and standing for re-election.

[93] I will scrutinize this idea further in section 3.2.4.

[94] Christiano, 1996. *The Rule of the Many: Fundamental Issues in Democratic Theory*. Boulder: Westview Press, p. 63.

[95] See Part I of Pankhurst's speech at <www.theguardian.com/theguardian/2007/apr/27/greatspeeches>.

through voting offers a fair way to ensure that each affected individual has at least some influence over how collective decisions are made, which in turn goes a long way toward securing a meaningful place for democracy with respect to an agent's right to dissent. What political participation rights afford the agent is a secure means to express her disapproval on a given state of affairs. In particular, she may express such disapproval through a well-defined, equitable procedure that, by definition even, is open to all who may similarly be affected by that state of affairs. Of course, this means that she will not have the kind of influence over these collective decisions that she would over decisions that affect her independently. But then, as we will see more and more as the examination unfolds, were she to have this kind of influence, she would be completely unjustified in having it.

2.3.4: *Due Process of Law*

The final right I will discuss in relation to the citizen's right to dissent is the right to due process of law. What due process protections generally ensure is that agents be safe-guarded against the arbitrary and unfair deprivation of certain other rights. In particular, this safe-guarding can be accomplished by the state implementing certain procedural rules that authorities must follow when: a.) determining whether someone's liberty ought to be restricted in some way (e.g., rules against unreasonable search and seizure[96]); and, b.) determining whether the state was justified in restricting that liberty in the first place (e.g., rules of habeas corpus[97]). Now, two initial points about how due process protections relate to the right to dissent. First, these protections are not in any *special* way related to dissent. The role it plays with respect to the right to dissent is the same role it plays with respect to securing *any* legal right that is attributed to the citizen. But its role in this respect is an essential one. Second, it would be erroneous to claim that due process protections are, in some strong way, protective of the *act* of dissenting itself. To be sure, an act of dissent is neither protected, nor unprotected, by due process of law in any direct way. Instead, what due process protections ensure is that there exists some impartial apparatus through which an act of dissent may be *evaluated*. In other words, it isn't that the agent's opportunity to dissent is compromised without a due process protection, but that her chance at receiving an impartial evaluation of some dissenting action is.[98] In this respect as well however, the protection due process rights ensure is an essential element belonging to the right to political dissent. As will become clear momentarily, my claim is that without the protection afforded by due process

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[96] Section 8 of the Canadian Charter of Rights and Freedoms reads: "Everyone has the right to be secure against unreasonable search or seizure." For more on what constitutes unreasonable search and seizure in Canada, c.f., *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *R. v. Feeney*, [1997] 2 S.C.R. 13 (search); and, *R. v. Dyment*, [1988] 2 S.C.R. 417 (seizure).

[97] Section 10 of the Canadian Charter of Rights and Freedoms reads: "Everyone has the right on arrest and detention, a.) to be informed promptly of the reasons therefor; b.) to retain and instruct counsel without delay and to be informed of that right; and, c.) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful."

[98] For example, the dissenting action of the Russian punk group 'Pussy Riot' was possible even despite Russia's tenuous due process protections. But this is of course an entirely different question than asking whether 'Pussy Riot' had the *right* to dissent in that case (which, considering the lack of due process they enjoyed after committing the act, would make answering this question in the affirmative difficult. C.f., Masha Lipman's article in the New Yorker, 'The Pussy Riot Verdict' at <www.newyorker.com/online/blogs/newsdesk/2012/08/the-pussy-riot-verdict.html>).

rights, all other protections become inconsequential.[99] This follows directly from two ideas that help give content to due process: a.) the idea of rule of law; and, b.) the procedural nature of such rights (also called 'procedural justice'). I will consider these in turn.

Rule of law is a natural adjunct to the discussion of political participation just offered. There, we noted that democratic values (such as the right to vote, the right to run for elected office, and the right that elections be held at regular and timely intervals) were all important to the agent's right to dissent. We noted as well that this was due to the facts surrounding collective decision-making. As collective decision-making is by nature a trans-individual process, principles of fairness and a respect for autonomy would seem to require that each individual who is subject to the outcomes of those decisions have an equitable role in effecting such decisions. Of course, this democratic ideal would be somewhat groundless if it weren't supported by a recognized rule of law. According to the principle of rule of law, it is the law itself that has final authority on matters--not one particular individual, nor even a group of individuals. Aristotle summarizes the idea nicely when he writes, "rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement."[100] Idiomatically then, rule of law means that 'no one individual or group of individuals is above the law', and the benefits of the rule are almost too numerous to mention. Rule of law: a.) provides stability and predictability concerning individual action and plan-making; b.) introduces efficiency for the ability to solve various co-ordination problems between divergent action; c.) allows individuals to hold each other responsible for illicit or unacceptable social behavior; d.) ensures that some individual, or group of individuals, is kept from imposing their will on the rest of a collective; etc. A.V. Dicey, who outlined the idea in (perhaps) its the most influential form, defines rule of law as consisting of three characteristics: a.) that ordinary law have supremacy over arbitrary power; b.) that all persons (including government officials) be subject to ordinary law; and, c.) that the law include certain constitutional protections on individual liberties.[101] In addition to these, three more are now among the typical formulations you might find elsewhere in the literature: d.) that ordinary laws must be prospective in nature; e.) that any rule prescribed by law implies that the citizen can in fact abide that prescription; and, f.) that similar cases be treated similarly.[102] Together, these six characteristics give shape to the fact that it will be fixed and realizable rules, clearly outlined and available to all, that are to govern human interaction. It should therefore be clear just how important this idea is with respect to the agent's right to dissent: all constitutive rights belonging to the right to dissent take for granted the existence of the rule of law. Without such an operative principle, those constitutive rights would be subject to

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[99] It is most likely for this reason that the due process clause (clause 39) of what is considered to be the first bill of rights (viz., the Magna Carta) was such a central part of that doctrine.

[100] Aristotle, 1946. *The Politics* (Barker, trans.). Oxford: Oxford University Press, p.127.

[101] C.f., pp.183-201 of Dicey, 1915. *Introduction to the Study of the Law of the Constitution*. New York: The MacMillian Company.

[102] These additions, e.g., are found in Rawls' treatment of the subject. C.f., Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press, pp.206-213.

the whims of whichever authority assigned the protections in the first place. In this way, it would merely be an accident for any of the protections to be observed in any given instance.

This aspect of the citizen's due process protections is not the only role it will play for a right to dissent. Just as important as this is the procedural nature of due process. Legally speaking, due process protections have either been treated in terms of their substantive character, or in terms of their procedural character. Substantive due process considers certain freedoms that might adhere in due process guarantees that go beyond a purely procedural application. For example, the Fifth Amendment of the U.S. Constitution asserts that no person shall, "be deprived of life, liberty, or property, without due process of law;"[103] Section 7 of the *Canadian Charter of Rights and Freedoms* guarantees to everyone, "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice;"[104] finally, Article 8 of the *Universal Declaration of Human Rights* gives everyone, "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Each of these wordings demonstrate the kinds of items due process provisions aim to protect--and almost always, these will extend beyond the right to a fair (procedural) hearing. In addition, there exist a number of substantive ideas--ideas such as liberty, property (in the U.S.), or security of the person (in Canada)--that may be included in a legal interpretation of due process rights.

Procedural due process, unlike its substantive analogue, is concerned with ensuring that certain procedural guidelines be followed both upon and during the coercive restriction of an individual's actions by the state and/or other party. As was outlined earlier, these guidelines ensure that certain impartial rules be followed when: a.) determining whether someone's liberty ought to be restricted in some way; and, b.) determining whether the state was justified in restricting that liberty. With respect to the citizen's right to dissent, the importance of these procedural protections is two-fold. First, notice that there exists a natural commensurability between the rule of law aspect of due process and its procedural character. Indeed, without the idea of rule of law, the idea of procedural justice wouldn't make any sense. At any of the stages in the due process procedure, the individual(s) who were regulating that procedure could remove any or all of the procedure's protections at a whim. And yet, without the idea of procedural justice, the principle of rule of law wouldn't have a venue to express its authority. Second, it is only through the guidelines laid out by the procedural nature of due process that one may combat unfair or exploitative treatment by the state (or other individuals) *within the framework of the law*--and this goes a long way to securing a ground for the rights that make up the citizen's right to dissent. Dissent is an antagonism; it is by nature a position of conflict. Two general ways to resolve a conflict are: a.) that one of the competing sides be victorious (through force, coercion, a better argument, etc.); or, b.) that a compromise is struck between each competing side in the conflict (through negotiation, mediation, diplomacy, peace-building, etc.). Clearly option (b)

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[103] This amendment deals only with the powers of the federal government. State powers are restricted with regard to due process rights under the Fourteenth Amendment.

[104] These 'principles of fundamental justice' have been interpreted to include both natural justice (viz., due process rights) as well as some substantive principles (e.g., rights against unreasonable search and seizure; rights against cruel and unusual punishments; etc.). For a clear summary of the Supreme Court's interpretation of this idea, c.f., *Re B.C. Motor Vehicle Act [1985]*.

would in many cases be preferable.[105] However, realistically speaking, compromise is not always a viable option; nor is it even always the best option.[106] What the procedural nature of due process guarantees is that the dissenting agent will always, in principle at least, have access to a fair and impartial hearing regarding her side of a particular conflict. This is surely the reason so many individuals who live in liberal democracies, and who have become embroiled in some kind of conflict, relish 'their day in court'. For them 'the court'--the most salient locale of procedural due process--represents an opportunity to 'tell their side of the story' and to debate their interlocutor in an objective setting (i.e., one that has been proscriptively laid out). At the very least then, the dissenting agent will have had an opportunity to express the facts that pertain to the conflict as she recognizes them. In this way, and in a very real sense, procedural due process offers the right to dissent a concrete ground. As mentioned, without a consistent, reliable, and fair procedure of evaluation, all rights--including of course those that comprise the right to dissent--would be rights in name only. Without the impartial, disinterested authority offered by the law, rights would either become completely inconsequential, or else would be dependent on the whims of individuals who just so happen to be in positions of power.

Summary

What I have outlined in this section are the four political protections the normal citizen ought to be guaranteed if she is understood to enjoy a right to dissent. I first examined the freedom to express one's opinion, and argued that this was the sole conceptually necessary protection belonging to a right to dissent. As dissent is a form of expression, if one were unable to express oneself, it would follow that she would similarly be unable to dissent. Next, I turned to the freedoms of association and assembly. These freedoms work in tandem to protect the agent. Whereas association allows the agent a choice over the persons with whom she wishes to associate, assembly protects the space in which that association occurs. Third, I discussed political participation rights, and claimed that, despite certain intuitions to the contrary, these rights are crucial to what it means to have a right to dissent. This, I argued, is due not only to the context in which I am investigating the right to dissent, but also to the importance these rights carry with respect to dissent itself. By way of our rights to political participation, we are afforded an efficient and fair way to dissent from decisions that are made by a wider collective (a reality that is impossible to circumvent in our modern world). Finally, I closed the section by examining our right to due process, and claimed that, were it not for the protections offered by this right, all other rights constitutive of the right to dissent would be groundless. Indeed, through both the rule of law and the procedural nature of due process, our dissenting actions (in principle at least) are guaranteed to be judged according to rules we know in advance and by which we can abide, but

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[105] Consider in this regard Martin Luther King, Jr.'s approach to dissent in 'Letter from Birmingham Jail'. The second of "four basic steps [in any nonviolent campaign]", King says, is *negotiation*. C.f., King, Jr., 1992. 'Letter From Birmingham Jail' in *I Have a Dream: Writings and Speeches the Changed the World* (Washington, ed.). San Francisco: Harper.

[106] C.f., Chapter 2 of Sharp, 2011. *From Dictatorship to Democracy: A Conceptual Framework for Liberation*. Pontypool, Wales: Green Print.; and, Bazerman, 2005. 'The Mind of the Negotiator: The Dangers of Compromise' in *Negotiation* (February edition).

also ensure that any judgement rendered will be the outcome of a procedure the agent herself has a part in.

2.4: The Structural Composition of the Right to Dissent

With the foregoing discussion of both the function and the content of the right to dissent in mind, we are now equipped to complete the three-part test outlined in section 2.1. Recall first the aim of that test: it was to be used to gain insight into the status of a particular rights claim; more to the point, it was to be used to help us discern what is in fact being claimed when an individual lays claim to a particular right. Recall next the substance of the test. It asked us to: a.) make a determination on what the right in question is designed to promote; b.) offer an appraisal regarding which atomic elements lend composition to the full molecular right; and, c.) return a conclusion on how the atomic elements within the molecular composition relate to each other to satisfy the right's intended function. I will now implement this test with respect to what it means for an individual right-holder to enjoy a right to dissent in the context of a liberal democracy.

2.4.1: *What is the right to dissent designed to promote?*

As was expressed in section 2.2, the function a right to dissent carries may vary depending on both the interests which are to be protected, as well as the context in which the right is claimed. And again, as was expressed in that section, my concern in this treatise is primarily to disclose how that right functions: a.) with respect to the interests of the individual right-holder; and, b.) as it is claimed in the context of a liberal-democratic political situation. With this in mind, two functions were offered to account for the right: first, as a means through which the right-holder might better actualize herself as an autonomous individual; and second, to protect the right-holder's interest in participating in decisions that may come to affect her. This means that the right to dissent is designed to promote both the autonomy of the right-holder, as well as any participation interests she may have. Heretofore, I will abbreviate these functions as 'autonomy' and 'participation', respectively.

2.4.2: *Which atomic elements lend composition to the full molecular right to dissent?*

Before answering this question, we must be careful to understand precisely what it is asking. Despite some linguistic overlap, the goal of section 2.3 was to disclose the constituent rights that make up the right to dissent--not to disclose the Hohfeldian elements belonging to those constituent rights. We are therefore restricted from simply transmuting our conclusions in that section to address the present quandary. Instead, what we are after here are the specific Hohfeldian elements that belong to the four protections we explained comprised our full right to dissent. I will assess these elements in the following order: a.) claim-rights; b.) liberty-rights; c.) powers; and, d.) immunities.

A. Claim-Rights

Recall an argument that was introduced in section 2.1. In response to Leif Wenar's claim that some rights can and should be considered fully active (i.e., for the right-holder alone), Kramer and Steiner argue that to do so would be to introduce unnecessary confusion into the language of rights. Indeed, for Kramer and Steiner, *all* rights claims will necessarily include a claim-right

element--which is to say that all rights claims will at the very least include some element that imposes a duty on some other or group of others.[107] Now, as I explained in that section, it is not my intention to take a stand on whether or not Kramer and Steiner's assertion applies to *all* rights claims. However, concerning the right to dissent in particular, their assertion appears to be sound. This is so for two reasons. First, as a matter of common linguistic usage, I suspect that what individuals *in fact* mean by claiming a right to the various protections constitutive of a right to dissent are for those protections to act as a shield from external interference. Anything less than this would, at the very least, be idiosyncratic. Second, and more importantly, it is my assertion that this is what individuals *should* mean when making this claim. Without a claim-right element being involved in the cluster of rights making up the right to dissent, a shielded protection of the agent's dissenting activities would be compromised (since it is only through having a claim-right over something that others receive a duty of non-interference with respect to what that claim-right designates). The citizen's right to dissent would then be but a liberty to perform certain dissenting actions (i.e., she would have no duty not to perform them) all of which however would be liable to obstruction. At best then, the citizen would be left with a highly emaciated version of her right to dissent. Again, I suspect this is neither what individuals *do* mean by claiming to possess a right to dissent, nor is it what they *should* mean. It is therefore my contention that, in all instances in which an agent invokes the term 'right' in relation to a dissenting activity, we should take her to mean that, at the very least, she expects her activity to be protected from external interference (through a claim-right element). Of course, this is seldom all that will be meant by invoking that term--but it will at least imply this much.

B. Liberty-Rights

I just suggested that dissenting activities protected only by a liberty-right element would be a highly emaciated conception of a right to dissent. This of course does not imply that such activities should not *include* a liberty-right element. As a matter of fact, in addition to possessing a claim-right element, most constituent protections of the right to dissent will also share in common a liberty-right element. Recall what a liberty-right accomplishes for the right-holder. A liberty-right is an active right (i.e., concerns the right-holder's own actions) which ensures the right-holder is under no duty to either perform or not perform some action.[108] In other words, the right-holder has *discretionary latitude* with respect to actions over which she has a liberty to perform. Furthermore, the liberty-right element of a right will aid the role played by its claim-right element. That a right-holder is not 'restricted' from performing some activity is certainly an important protection offered through the claim-right element; but just as important as this is the right-holder's assurance that she be immune from any adverse legal effects that might result as a consequence of performing that activity. This concern is as much addressed by the right-holder herself not having a duty with respect to the activity in question (through her liberty-right) as it is by the duty imposed on others not to interfere with that activity (through her claim-right).

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[107] This is not to say that the claim-right element will alone suffice to explain all rights.

[108] The sense of 'liberty-right' I am invoking here is therefore more particularly characterized as what Hart called 'bilateral liberties'.

It is however not true that all protections constitutive of the right to dissent will include a liberty-right element. For instance, a component of the right-holder's right to political participation is that elections be held at regular and timely intervals. It would be misleading to suggest that this right is somehow informed by a liberty enjoyed by the right-holder. That the activity of holding elections does not belong to the right-holder himself, but to others the right-holder has a claim over, implies that this particular right will be exhausted by its claim-right element alone (i.e., one that puts specific individuals--namely, state officials--under a duty to organize and execute these regular and timely elections). Furthermore, certain activities involved in the right-holder's due process rights will be subject to the same kind of analysis. For instance, though one is at liberty to either speak at her own trial or not, and is at liberty to either appeal an initial court's decision or not, she is not at liberty to forego a trial altogether. Again here, the right-holder will have a liberty-right over those aspects of her due process protections that demand action on the part of the right-holder herself, but will not enjoy this kind of right over those aspects of her due process protections that belong to the procedural nature of that right.[109] Over these kinds of non-performative activities then, the right the right-holder enjoys will not include a liberty-right element.

C. Powers

As for powers, only with respect to the freedom to express one's opinion, and to associate and assemble with persons of one's choosing, may it be said that the right-holder's right includes this element. Furthermore, even in these cases, the power is severely limited. A power is the ability to alter one's own claim- and/or liberty-right (e.g., one may alter one's right not to be touched if consent is given to participate in some contact sporting event) or to alter the claim- and/or liberty-right belonging to some other person (e.g., a judge may invoke the power to compel a witness to speak, altering the bilateral liberty the witness would normally enjoy). In this way, it is possible that the agent alter the freedom she enjoys to express herself (e.g., by signing a confidentiality agreement) or to assemble and associate with persons of her choosing (e.g., by agreeing to the terms of a peace bond). But these will almost always be negligible modifications, leaving the substantive quality of her freedoms in tact.

Concerning the various protections that make up the citizen's political participation and due process rights, there will be no power element involved at all. On this matter, it is important

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[109] The exact list of due process protections is not precise, but one often referred to is that developed by Judge Friendly in his 1975 paper 'Some Kind of Hearing' in *University of Pennsylvania Law Review*, vol.123. For clarity, I have divided Friendly's list into performance rights and non-performance rights (belonging to the right-holder):

Performance Rights

1. Opportunity to present reasons why the proposed action should not be taken
2. The right to present evidence, including the right to call witnesses
3. The right to cross-examine adverse witnesses
4. Opportunity to be represented by counsel
5. The right to know opposing evidence

Non-Performance Rights

6. A decision based exclusively on the evidence presented
7. An unbiased tribunal
8. Notice of the proposed action and the grounds asserted for it
9. Requirement that the tribunal prepare a record of the evidence presented
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision

to keep in mind the distinction between *altering* a claim- and/or liberty-right and *choosing not to exercise* a claim- and/or liberty-right. While the former is proper to the power element of a right, the latter is proper to its liberty-right element. Take Judy's right to vote as an example. That Judy *chooses* not to vote in an election is not a power exercised by Judy, but a liberty she has decided to invoke. For Judy to exercise a *power* with respect to her right to vote, she would have to alter the actual shape of that right (either temporarily or permanently), such that, for example, she no longer possesses even a choice in the matter (her liberty-right being made inoperative). But Judy does not possess any such power--nor do any of us. This is of course not to say that Judy may *choose* not to vote or run for office; or that she may *choose* to forego a number of the legal protections she enjoys via her due process rights. As was explained above, this kind of liberty is essential to what it means for Judy to have a right to dissent. But this does not imply that she may then *modify* these rights in any way (either temporarily or permanently); which implies further that it cannot be said of Judy that her right to these activities includes a power element.

D. *Immunities*

We come finally to immunities. Immunities are perhaps the trickiest of the elements to discuss, as it is both true that citizens will (legitimately) claim that the various protections constitutive of their right to dissent include an immunity element, but not technically true that they do. Immunities are the opposite of powers: whereas a power gives one the ability to alter a claim- and/or liberty-right, an immunity signals a protection against one's claim- and/or liberty-right being altered. Now, as is well understood, in liberal democracies the various constituent rights that together help to compose our right to dissent are, generally-speaking, constitutionally protected through charters or bills of rights.[110] In fact, in many respects, these kinds of constitutional protections define what it means for a society to be 'liberal' in the first place. In some sense then, the right-holder does possess an immunity from his rights being altered: constitutionalizing rights, in principle at least, restrict other individuals (including the government) from altering the rights enjoyed by citizens. But in a more technical sense, and especially in Canada, it is questionable how far we can read the immunity element into the rights comprising our right to dissent. This is so because: a.) constitutions almost always espouse amendment clauses;[111] and, b.) at least in Canada, they may even espouse clauses that officially

[110] This is generally true, but not exhaustively so. For example, in Britain individual rights have generally evolved from the concept of 'parliamentary sovereignty' (ensured under the 1689 Bill of Rights) which, among other things, restricts its government to only those activities that are explicitly laid out in the law. So whereas charters and bills of rights typically attribute rights *to* individuals, Britain's Bill of Rights goes at it from the other way around--viz., it restricts the liberty of government, essentially opening up an undefined but relatively large space of liberty for the individual. C.f., on this topic, Feldman, 2002. *Civil Liberties and Human Rights in England and Wales*. Oxford: Oxford University Press.

[111] The exception is the case of 'entrenchment clauses' which act as restrictions on certain aspects of a constitution being amended. For example, article 79(3) of the German Basic Law restricts abolition or alteration to both articles 1 (dealing with fundamental rights) and 20 (dealing with the democratic form of government). Similarly, article 139 of the Constitution of Italy holds that the government's Republican form is above amendment.

allow the government to suspend these protections.[112] Although this is true, since the interest of our investigation is primarily to disclose what the citizen ought to be able to take his right to dissent to include rather than to give a black letter law description of that right, we may leave to one side the technical issue of whether or not, and to what extent, the constituent protections making up the citizen's legal right to dissent *actually* include an immunity element. It is simply the case that, in many respects (not least of which is the reasonable expectation of the citizen) the various rights making up the citizen's right to dissent can be thought to include an immunity element (established as it is by way of particular constitutional provisions). In other words, these rights should include an element that, at the very least, makes it exceptionally difficult for the state (or others) to either alter and/or eliminate the rights that constitute the citizen's right to dissent.

Summary

We therefore have at our disposal the necessary resources to delineate the Hohfeldian elements involved in the composition of the right-holder's right to dissent. The chart below offers a snapshot of this designation (figure 2).

Fig.2

Constituent Rights of the Right to Dissent	Claim	Liberty	Power	Immunity
Freedom of Expression	✓	✓	✓	✓
Freedom of Association and Assembly	✓	✓	✓	✓
Political Participation Rights A. Actions Performed by the Right-Holder B. Actions Not Performed by the Right-Holder	✓ ✓	✓ ✗	✗	✓
Due Process Rights A. Actions Performed by the Right-Holder B. Actions Not Performed by the Right-Holder	✓ ✓	✓ ✗	✗	✓

[112] The clearest case of this is certainly Section 33 of the Canadian Charter of Rights and Freedoms (the 'notwithstanding clause') that allows both the federal and provincial governments to enact legislation which would otherwise be in contravention of either the fundamental freedoms (section 2) and/or the legal and equality rights (sections 7 through 15) that are constitutionally secured to Canadian citizens; but it is not the only case. Section 31 (the 'override declaration') of the Victorian Charter of Human Rights and Responsibilities Act (2006) states that, "Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter." As well, some of the articles of Israel's Basic Laws (1992) would suggest something similar to what you find in Canada's notwithstanding clause (e.g., article 8 states that, "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required;" and again, article 12 reads, "This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations; notwithstanding, when a state of emergency exists, by virtue of a declaration under section 9 of the Law and Administration Ordinance, 5708-1948, emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required.")

In a liberal democracy, the right-holder's right to dissent will include four constituent rights: a.) freedom of expression; b.) freedom of association and assembly; c.) rights to political participation; and, d.) due process protections. Both the right-holder's right to *freedom of expression* and her right to *freedom of association and assembly* will include: i.) a claim-right element; ii.) a liberty-right element; iii.) a power element; and iv.) an immunity element. The right-holder's *performance right to political participation* (viz., voting rights and the right to run for office), as well as her *performance right to due process protections* (e.g., the right to act as one's own counsel; the right to offer a defense; the right to appeal an original court decision; etc.) will include: i.) a claim-right element; ii.) a liberty-right element; and, iii.) an immunity element. These rights will not include: iv.) a power element. The right-holder's *non-performance right to political participation* (viz., the right to regular and timely elections) and her *non-performance right to due process protections* (e.g., right to a trial; right that the trial occur within a reasonable duration from the time of arrest; right to be informed of the nature of the charge; etc.) will include: i.) a claim-right element; and, ii.) an immunity element. These rights will not include: iii.) a liberty-right element; and, iv.) a power element.

2.4.3: *How do the atomic elements together help to bring about the right's intended function?*
The final piece of the analytic puzzle will have us relate the Hohfeldian atomic structure just disclosed to the dual functionality of the right to dissent as discussed in section 2.2. Let us once more recall that dual functionality. The function played by the right to dissent, with respect to the right-holder, will be to both: a.) provide a means through which the right-holder might better actualize herself as an autonomous agent; and, b.) offer a protection on the right-holder's interest in participating in decisions that may come to affect her. I will continue to abbreviate these functions as 'autonomy' and 'participation'. Now, in some ways, each constituent right belonging to the right-holder's right to dissent will engage both functions simultaneously. Our analysis will therefore once again call for a taxonomic approach. This is so because, in order to understand how the atomic elements making up the right to dissent relate to each of its functions, we must explain more minutely how each of the incidents proper to the cluster of rights making up the right to dissent themselves relate to these functions. My response to the above question will therefore proceed as follows: first, I will deal with the activities that are protected through our political participation rights, and explain how each of those activities relate to the dual functionality of the right to dissent; I will then turn to expression, association, assembly, and due process activities respectively, to do the same.

A. Political Participation
As has been articulated in a number of different places, what a claim-right element accomplishes for the right-holder is to impose certain correlative duties on others with respect to the activities the right is designed to protect. Of course, without knowing: a.) which correlative duties the claim-right imposes; or, b.) the group of 'others' that will incur these duties, we in fact know very little about the claim-right in question. Our questions therefore become: a.) what duties are imposed by the claim-right element of a right-holder's political participation rights; and, b.) on what group of others are they imposed? The most straight-forward answer to (b) is that such political participation rights impose a duty on 'all others', by which I mean to suggest that they

impose duties on 'both the state's officials, as well as all other individuals who belong to, or else are currently within the geographical boundaries of, the state'. The most straight-forward answer to (a) is that 'all others' acquire a duty of *non-interference* with respect to the activities making up one's political participation rights. In both cases, these straight-forward answers would be inaccurate. Recall from section 2.1 that a distinction can be drawn between positive and negative rights: whereas negative rights define spaces of non-interference, positive rights confer certain provisions on right-holders. In terms of duties then, negative rights will enforce duties of non-interference while positive rights will enforce duties of beneficence or provision. Turning now to our present concern, the question becomes: what kind of duties are enforced through the right to political participation--are they negative, positive, or both? Right off the bat, we can be sure they won't all be negative duties. Since the activities that belong to our right to political participation include activities that both belong to the right-holder (i.e., the right to vote and to run for elected office) as well as activities that do not belong to the right-holder (i.e., the right that elections be held at regular and timely intervals), at least one of these activities takes the comprehensive-negative-duty response off the table. The right that elections be held at regular and timely intervals is indisputably a positive right; moreover, concerning (b), it is one that is incurred by the state alone.[113] As this aspect of the right is not an activity which is performed by the right-holder herself, it would make no sense to attach a negative element to it. Instead, the right is fully characterized through the positive duty incurred by the state to both organize and execute elections according to the intervals that have prospectively been laid out in the constitution and/ or by some other statutory device.[114] Of course, on the other side of the spectrum is the claim-right element of the right to run for elected office, which does appear to almost fully be generated through its negative character. Here, all others have the negative duty not to prevent the right-holder from running for elected office, but no others have a positive duty to assist in the right-holder's decision to run for that office. Located somewhere in between these two extremes is the claim-right element of the right to vote, which will consist of both positive and negative aspects. The right to vote will of course include protections from any external interference keeping the right-holder from performing the activity, but will far more interestingly include certain positive duties the state alone will incur to ensure that the act of voting not become overly burdensome for the right-holder. This can be done in any number of ways: e.g., by distributing a wide-range of voting centers throughout the voting district; by offering a variety of times for the citizen to vote; by ensuring transportation services to those centers; etc.[115] In this regard then, the right to political participation will impose a wide range of duties through its claim-right element:

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[113] In some sense, all (eligible) citizens can be argued to share in this duty via the tax revenue the state collects on their behalf. For the purposes of the current point, this consideration can be left aside.

[114] It is possible for term limits to be set in either of these ways. For example, Section 4 of the Canadian Charter of Rights and Freedoms sets a maximum term of five years between elections; however, Bill C-16, passed on November 6, 2006, requires instead that a general election take place every four calendar years.

[115] The Canada Elections Act even ensures that, "every employee who is an elector [be] entitled, during voting hours on polling day, [to] have three consecutive hours for the purpose of casting his or her vote and, if his or her hours of work do not allow for those three consecutive hours, his or her employer shall allow the time for voting that is necessary to provide those three consecutive hours." (Section 132). This demonstrates that positive duties attached to the right to vote extend even past the state itself.

positively, it will impose duties on the state (and maybe even some others); negatively, it will impose duties on 'all others'.[116]

The liberty-right elements of the constituent activities of the right to political participation are directly related to their respective claim-right elements. For instance, the right that elections be held at regular and timely intervals, being fully exhausted by the positive duties of the state, means that the right-holder possesses no liberty with respect to that right. In other words, the right-holder himself has no discretion over whether the action in question be performed or not performed, which means further that this particular component of the right does not include a liberty-right element. This was noted above in figure 2 (on p.57). Concerning now the right to vote and to run for elected office, the part played by the liberty-right element will in these cases be isomorphic. For both, the liberty-right element affords the right-holder full discretion over whether to perform the activity or not. However, the extent to which the liberty-right element will be of *practical* importance to the right-holder will shadow the extent to which the claim-right element of each is characterized negatively. For example, the liberty a right-holder possesses over voting will be assisted by the positive duties incurred by the state through its claim-right element. Here, the positive claim on the state will take some of the pressure off the right-holder's choice; or, more clearly, will help to positively activate the right-holder's liberty. On the other hand, the liberty to run for elected office, being accompanied by no positive duties, will be activated by the right-holder's liberty-right aspect alone.

What all of this reasoning indicates is a cleaner way to understand how the right to political participation helps to bring about the dual functionality of the right to dissent. First, the participation function of that right is satisfied directly through the right to vote and the right to run for elected office. Indeed, it wouldn't be too much of a stretch to suggest that the right-holder's interest in participating in decisions that may come to affect her is what provides a grounding for these activities in the first place. That being said, neither the right to vote nor the right to run for elected office would be of any effect if not for a concomitant assurance that elections be held at regular and timely intervals. In this way, the positive duty incurred by the state with respect to this final activity is what gives content to the liberty-right aspects of the other two activities.

Similarly, concerning the autonomy function of the right to dissent, having the right to in fact participate in political matters will offer a platform for the agent to better develop her autonomous character. She will feel empowered by the opportunity to enact her will on decisions that quite clearly affect her. Of course, having the right to run for elected office, for the reasons mentioned in an earlier section (section 2.3), will further entrench this same line of reasoning. Even more explicit than these considerations however is that having the bilateral liberty to either vote or not vote, and to run for elected office or not run for elected office, and having a claim over others that they not interfere with that bilateral liberty, is a way for the agent to express her autonomy directly. A right-holding individual may indeed vote 'to get the decision she thinks

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[116] It should be noted that the scope of application of charters or bills of rights depends on the particular charter or bill of rights in question. For instance, section 32 of the *Canadian Charter of Rights and Freedoms* dictates that the provisions within the charter obligate only Parliament and the provincial legislatures (which means that it does not obligate the normal citizen). On the other hand, section 49 of the *Quebec Charter of Human Rights and Freedoms* declares that the provisions therein obligate both the government of Quebec, as well as its citizens.

best', or she may instead choose to abstain from voting, deciding that there are better and more important ways to develop her character.[117] The same argument applies *mutatis mutandis* with respect to the right to run for elected office. In both cases, the agent is given a means to express her autonomy directly by having the protected liberty to decide for herself how much she would like to participate in those decisions that may come to affect her.

B. Freedom of Expression

Turing now to freedom of expression, the claim-right element belonging to this freedom seems at first glance to be heavily weighted toward a negative characterization--to wit, the duty imposed by the right to express oneself is that 'all others' not interfere with the right-holder's choice of expression. But is this intuition correct? There is at least one reason why we shouldn't think so. As a number of thinkers have convincingly argued, autonomous character development is not something that happens in a vacuum. Instead, as these thinkers claim, autonomy is an activity that is as much informed by others as it is by the self.[118] As Susan Brison notes in her paper 'Relational Autonomy and Freedom of Expression': "an agent's autonomy is dependent on her having an adequate capability to function...[one that is] determined in large part by her relations to others and the functionings they enable or prevent her from achieving. On this theory, whether and to what extent we are autonomous depends on our relations to other people."[119] Brison's argument is that without a relationally determined capability set, the agent would simply not be able to actualize whatever capacity she may possess to act autonomously. Things as specific as adequate nourishability, and as obscure as a general feeling of self-worth, will all have a direct effect on both the possibility, and the effectiveness, of an agent becoming autonomous.[120] What the argument from relational autonomy would seem to suggest is that the claim-right element belonging to freedom of expression cannot be characterized through its negative aspect alone. Since, as I have argued, expression is conceptually necessary for dissent, and as one of the functional aims of dissent is to support autonomy, the same conditions that attach to a realization of autonomy will, in relation to the right to dissent, attach *mutatis mutandis* to expression. To put it another way: if autonomy can only be realized through certain positive considerations, and if

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[117] Some countries enforce voting through punitive measures (e.g., Argentina, Australia, Brazil, Peru, etc.). The argument that I have presented here is at least one reason a country might opt *not* to adopt this practice. For more on compulsory voting systems, c.f., Birch, 2009. *Full Participation: A Comparative Study of Compulsory Voting*. Manchester: Manchester University Press.

[118] C.f., Oshana, 1998. 'Personal Autonomy and Society' in *Journal of Social Philosophy*, vol.29. For a good summary of different applications of this kind of argument, c.f., Mackenzie and Stoljar (eds.), 2000. *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*. New York: Oxford University Press.

[119] Brison, 'Relational Autonomy and Freedom of Expression' in Mackenzie and Stoljar (eds.), 2000. *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*. New York: Oxford University Press, pp.282-283.

[120] We have encountered this line of reasoning before. Recall from chapter 1 (section 1.2) that there exist two necessary conditions, not for the conceptual possibility of dissent, but for its *practical realization*. Those conditions were: a.) resource requirements; and, b.) environmental considerations. Just as it was argued there that one cannot practically realize dissent without having access to a minimally adequate resource base--one which, in many ways, is dependent on the environmental conditions surrounding the dissenting action--the argument for relational autonomy follows a similar tack. Indeed, one cannot practically realize the goal of acting autonomously without certain resource and environmental considerations first being met.

realizing autonomy is a function of the right to dissent, then these same positive considerations will apply to the means to bring about autonomy (which in this case will fundamentally be through protected expression). For example, it may be the case that the state has a duty to educate right-holders in a way that ensures each right-holder is given an equal opportunity to hone their skills of expression; or, it may be that the state has a duty to fund agencies whose goal it is to promote various kinds of expression. In fact, I take both of these suggestions to be quite reasonable. But such approaches to things like expression rights are not without their problems. Most generally, the problem is this: the moment we begin to calcify any particular positive rights attribution into a general theory of freedom of expression, it becomes difficult to draw a theoretical limit on how much positive rights attribution will be enough. Since there always seem to be more and better ways to encourage things like autonomy and expression, it becomes quite difficult to conceive of any non-arbitrary limits we can put on positive rights attributions to address these kinds of activities.[121] This is of course not to say that limits regarding these matters cannot be substantively drawn; nor is it to say that there won't be very good reasons in particular cases for choosing one limit rather than another. In fact, considering the validity of both the argument from relational autonomy, as well as for the practical realizability of dissent (as it was outlined in section 1.2), I am even comfortable claiming that, as a general principle, liberal democracies will be better off if they are to secure to right-holders a robust range of positive rights attributions concerning freedom of expression. My point here is simply that, as part of a conceptual analysis of the right to dissent, I am hesitant to note any specific positive duties that will, under all circumstances, be correlative of the claim-right element of this freedom. In other words, since my interest here is only to present a *minimal* report of the duties that are imposed through the claim-right element of the freedom to express oneself, this report, for the reasons just articulated, will be fully exhausted by the negative enforcement of a duty of non-interference.

The liberty-right element belonging to freedom of expression is much easier to map out than its claim-right element. As we have seen in some detail above, not only does this element give discretion to the right-holder to choose to express himself or not, it more importantly ensures that the right-holder is protected from any adverse legal consequences that might result from engaging in such acts of expression. This is a vitally important component of the agent's right to express himself, especially as that right pertains specifically to his right to dissent.

How then do the constituent elements of the right to freedom of expression help to bring about the dual functionality of the right to dissent? The autonomy function will primarily be addressed through the liberty-right element belonging to this freedom, and reinforced through its claim-right and power elements. Having the bilateral liberty to express himself ensures the agent is, in principle at least, the seat of that decision. As we saw above (section 2.2), attributing this kind of discretion to the agent results in that agent being *responsible* for his expression. This kind of responsibility will allow the agent to both enact his autonomy, and to recognize it by demonstrating the central role he is to play in the development of his own moral character. This could of course not be fully accomplished without an assurance that he not be punished for his acts of expression which, as we have seen, is secured through both the liberty-right element (he

[121] A similar argument is made by Frank Cross in Cross, 2001. 'The Error of Positive Rights' in *UCLA Law Review*, vol.48 at p.901; and broadly by Robert Nozick in Nozick, 1974. *Anarchy, State and Utopia*. Oxford: Blackwell Publishers Ltd. at chapter 7. Heretofore, I will refer to this problem as *the positive rights limit problem*.

has no duty not to express himself) as well as the claim-right element (he is protected from interference of that expression) of this freedom. Furthermore, the power element belonging to freedom of expression allows the agent an even more direct way to express his autonomy. By way of that power, he has discretion over how he wishes to shape his freedom: to wit, he is not 'bound to be free' in any invidious sense, but has the ability to modify his expression rights to, e.g., further other goals he may possess.

As for the participation function, it will again be the mutually reaffirming relationship between the liberty-right element and the claim-right element of freedom of expression that will together lead to its successful implementation. Having a protected sphere of expression allows the right-holder an increased number of options to participate in political matters that might come to affect her, over and above the options that are explicitly protected through her political participation rights. Indeed, ensuring the protection of the right-holder to express herself will help to stabilize certain anxieties she might otherwise experience, even in a liberal democratic political situation. For instance, if the right-holder were to become disillusioned with the political process--or worse, if the political process were itself to become only nominally participatory--the agent would still have a protected means available to express her discontent. Alternative means of expression gives the right-holder a sense of participation that far exceed the 'one-of-many' rights ensured specifically through the democratic process.

C. Freedom of Association

Freedom of association will receive an almost identical treatment to freedom of expression. Just like expression, the claim-right element of association ensures that all others acquire a duty of non-interference with respect to the persons one chooses to associate with. And just like expression, the claim-right element of this freedom will be minimally explained as being exhausted by the enforcement of the negative duty of non-interference. But this parity brings us to a slight wrinkle in the explanation I have been offering to this point. In both the case of freedom of expression and freedom of association, I have argued that we are only conceptually justified in providing a minimal account of the duties imposed by these rights. Furthermore, I have suggested that this minimal account is exhausted by the negative duty of non-interference. When assessing our political participation rights however, I assumed instead that the duties established through certain aspects of that right had either a full or a partial positive characterization. Is there an inconsistency here? Or is there a reason I have allowed for more than a minimal treatment when discussing our rights to political participation, but not when discussing our rights to expression and association? As I will now argue, there is no inconsistency in treating these cases differently as such differential treatment is based on relevant distinctions that exist between the rights in question.

One immediately relevant difference has to do with *who* is performing the activity designated by the right. As was explained above, the only activity within the family of political participation rights whose claim-right element was subject to a full positive characterization was the right to regular and timely intervals between elections. And as was explained there, this is due only to the fact that it is not an activity that is in any way performed by the right-holder himself. On the other hand, both the right to free expression and the right to association are made up of activities performed by the right-holder, and thus signal a relevant distinction between the

two cases. There is then no reason to suppose that these rights would even provisionally receive a similar treatment to the right to regular and timely elections. And yet, this same distinction cannot be reproduced with respect to the second aspect of the citizen's political participation rights whose claim-right element received some degree of positive characterization (his right to vote). As that activity belongs as much to the right-holder as do the activities of expression and association, the differential treatment between these rights must be explained on some other basis.

Recall my concern with attributing a positive characterization to the claim-right element of expression. On matters such as expression--and, more particularly, how expression is to better bring about autonomy--I argued that we encounter a 'positive rights limit problem'. In other words, there always seem to be more and better ways to promote autonomy through an improvement of the means of expression, and thus any general principle we land on concerning expression will almost surely be open to an *ad hoc* and arbitrary termination point. My further argument is that this same result follows with respect to freedom of association. Indeed, concerning both expression and association, a certain obscurity permeates matters such that each resists being definitively pinned down in any uniform framework. Consider the following facts: some people choose to express themselves more often than do others, and some choose to associate with fewer people; some people are disposed to being loud and social, while some prefer to be reflective and private. All of these natural differences among persons indicate that a positive assignment of duties concerning any of these activities would almost surely lead to an unequal distribution of benefits among individuals within society. A government that made it easier for individuals to express themselves would be far more beneficial to those who were naturally disposed to do so than it would to those who were more inclined to being private. A government that instituted a more accessible way for individuals to associate with others of their choosing would far more benefit the social types among us than it would the introverted types. And herein lies the rub: the disparities in conferred benefits mentioned would be grounded on nothing more substantial than the *natural differences that exist between persons*. This would imply that such an unequal conferral of benefits could not be mitigated through certain regulatory vehicles. In the end then, it seems the only general approach to positive rights attributions (as those pertain to expression and association rights) that may be fairly applied across the board would be to remove them altogether.[122]

Applied now to the act of voting, the same kind of obscurity I claim is elemental to expression and association does not follow. Indeed, voting is by its very nature a *resolvable* activity. Whereas there will always be more and better ways to promote autonomy and/or participation through both acts of expression and/or acts of association, there is a definitive terminus point to how well a society can be democratically represented through a system of voting. To wit, it will reach that point if each eligible member of society casts a ballot. Now, as was mentioned, it would of course be a diminishing characteristic of the right to political participation if members of society were *made* to vote (specifically with respect to the autonomy function), but the point here is that, in theory at least, it is possible for each member to *in fact*

[122] I am very careful to use the term 'general' here, since there are certainly relevant distinctions between persons or groups of persons that provide sound bases for differential treatment. As my analysis is conceptual in nature--and therefore general--I am leaving these kinds of considerations aside.

vote. This means that certain positive duties can relevantly be assumed by the state to ensure all members have positive access to the act of voting. My claim is that the same cannot be said with respect to acts of expression and/or association.[123]

With an explanation of the differential treatment of the various claim-rights behind us, let us now return more specifically to freedom of association, and articulate how this freedom in particular helps to bring about the dual functionality of the right to dissent. As has just been argued, the claim-right element of freedom of association will be exhausted through its negative character alone--namely, through the duty imposed on others that they not interfere with the right-holder's choice of association. This again puts great emphasis on the liberty-right element of the freedom, since it is this element that allows the right-holder discretion over the matter, as well as ensures that she has no particular duties with regard to her choice of association. Of course, how each of these then relate to the two functions of the right to dissent will be in much the same way as with freedom of expression. It will primarily be through its liberty-right element, reinforced by its claim-right and power elements, that freedom of association helps to bring about the autonomy function of the right to dissent. By giving the agent discretion over her choice of association (something, once again, supported by the power element of the right) the agent may act autonomously on that choice, in turn fostering a deeper sense of autonomy generally. Consider an example as innocuous as choosing a childhood friend. If parents were to heavily censor their children's friendships, those children could presumably neither be said to have autonomy over those friendships, nor would they feel responsible for any circumstances that might arise as a consequence of them. On the other hand, if parents were to allow their children to freely choose their own friends, the responsibility of any behavior resulting from those friendships would land squarely on those children. In this latter case, the children, being given full autonomy to construct their own network of relations, would become responsible for those relations (and, at least to an extent, the consequences thereof).

Similarly, the participation function will be addressed through the interplay between the claim-right element and the liberty-right element of freedom of association. Consider the following. Oftentimes individuals are too weak to act on certain convictions by themselves--they stand in need of a mutual or shared conviction to be moved to action (it is not, for instance, a

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[123] This line of reasoning fits nicely into an important distinction that is often drawn in democratic theory--namely, the distinction between *deliberative* democratic ideals and *aggregative* democratic ideals. As Joshua Cohen writes of deliberative democracy: "democracy, on the deliberative view, is a framework of social and institutional conditions that facilitates free discussion among equal citizens--by providing favorable conditions for participation, association, and expression--and ties the authorization to exercise public power (and the exercise itself) to such discussion." (Cohen, 1996. 'Procedure and Substance in Deliberative Democracy' in *Democracy and Difference* (Benhabib, ed.). Princeton: Princeton University Press, p.97). The deliberative democratic model is one that attempts to understand the values of democracy through what Jurgen Habermas calls 'the public sphere' (c.f., Habermas, 1964, 'The Public Sphere: An Encyclopedia Article' in *New German Critique*, vol. 3. (Autumn, 1974)); and, Anderson, 2003. 'Sen, Ethics, and Democracy' in *Feminist Economics*, vol.9). Aggregative democratic models instead consider democratic decisions only from the perspective of the aggregation of different individual self-preferences rather than from a deliberation about how those preferences may be discussed between free and reasonable persons (c.f., Knight and Johnson, 1994. 'Aggregation and Deliberation: On the Possibility of Democratic Legitimacy' in *Political Theory*, vol.22; and, Sanders, 1997. 'Against Deliberation' in *Political Theory*, vol.25). Concerning the current point then, since aggregation is what I have called 'a resolvable process', and deliberation is not, positive duties can attach non-arbitrarily to the former, but not to the latter. In other words, voting (an aggregative process) may reach a natural *terminus*, whereas expression and association (deliberative ideals) may not.

mere accident that dictatorial regimes tend to disallow free association). Indeed, there exists a wealth of empirical evidence confirming the fact that individuals who share similar ideas with others tend to be more participatory than individuals who do not.[124] As Doug McAdams and Ronnelle Paulsen note: "[s]trong or dense interpersonal networks encourage the extension of an invitation to participate and they ease the uncertainty of mobilization."[125] By protecting the right-holder's choice of associating with individuals who may share similar convictions, the agent's chances of participating in decisions that may come to affect her increase in turn[126]--this protection is explicitly secured through the claim-right element of that freedom. And yet, without the right-holder enjoying the liberty to in fact associate with persons of her choosing (e.g., if she were somehow to incur a duty of non-association), this protection would be of little consequence.

D. Freedom of Assembly

Turning now to freedom of assembly, things are somewhat different. Although the right to freedom of assembly, like the right to freedom of association, was seen to include all four Hohfeldian incidents, it is not the case that these elements play the same role with respect to each right. Recall what it was that distinguished association rights from assembly rights: whereas association rights aim to protect the right-holder against restrictions on *the persons* with whom she wishes to associate, assembly rights protect the right-holder against restrictions on *the places* those associations may occur. And it was my claim that, on the basis of this distinction, the right to freedom of assembly pertains *exclusively to the public realm*, which in turn effects the way each Hohfeldian incident functions with respect to that right.

Where there is a public space, and where the regulations surrounding that public space have been more or less crystalized, the citizen enjoys the legal right to the protected use of that space--including of course the right to assemble with others in it. In particular then, even though the claim-right element of freedom of assembly will be a heavily regulated matter,[127] it is one that is characterized by a strong positive duty incurred by the state (the state has a duty to designate certain space as 'public space') as well as by a strong negative duty incurred by 'all others' (others have a duty not to interfere with the range of activities within public spaces that have been deemed permissible). The liberty-right element of the freedom will then shadow its

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[124] C.f., McAdam, 1986. 'Recruitment to High-Risk Activism: The Case of Freedom Summer' in *The American Journal of Sociology*, vol.92; Heinrich, 1977. 'Changes of Heart: A Test of Some Widely Held Theories of Religious Conversion' in *American Journal of Sociology* vol.83; and, Zurcher and Kirkpatrick, 1976. *Citizens for Decency: Anti-pornography Crusades as Status Defense*. Austin: University of Texas Press.

[125] McAdam and Paulsen, 1993. 'Specifying the Relationship Between Social Ties and Activism' in *The American Journal of Sociology*, vol.99, p.644.

[126] There is a worry among some theorists that 'group-think mentality' is a diminishing characteristic of social productivity--and the evidence shows that this is certainly true to an extent. But a good argument can be made that the liabilities of allowing heavy association among individuals are far outweighed by its benefits. For an argument to that effect, c.f., Sunstein, 2003. *Why Societies Need Dissent*. Cambridge: Harvard University Press. For more on the idea of 'group-think', c.f., Janis, 1982. *Groupthink* (2nd edition). Boston: Houghton Mifflin.

[127] For more on the regulation of public space, c.f., Nemeth and Hollander, 2010. 'Security Zones and New York's Shrinking Public Space' in *International Journal of Urban and Regional Research*, vol.34; Mitchell, 2003. *The Right to the City: Social Justice and the Fight for Public Space*. New York: The Guilford Press; and, Banerjee, 2001. 'The Future of Public Space: Beyond Invented Streets and Reinvented Places' in *Journal of the American Planning Association*, vol.67.

claim-right element exactly: whatever range of activity the state has deemed to be permissible within public space, the citizen acquires the liberty to perform (i.e., she does not have a duty not to perform activities within that range).

With these points in mind, we may now more clearly demonstrate how the citizen's right to assembly helps to bring about the dual functionality of the right to dissent. As was argued in section 2.3.2, the right to assembly should be thought of as a natural correlate to the right of association. Since all association happens in space, the right to assembly becomes essential to what that right aims to protect. If this much is true, then the way in which association rights can be said to protect the agent's right to dissent in particular will be further solidified through her assembly rights. Consider, for instance, the fact that, as we just noted, individuals tend to participate more readily when belonging to a group than they do by themselves. This means that, were there heavy restrictions on the use of public spaces in which these groups could assemble, participation would greatly suffer in general. This then signals one important respect in which the right to assembly helps to bring about the participation function of the right to dissent: it offers a place for groups to congregate so that they may participate in matters that pertain to the state. But this is not the only way assembly rights relate to the dual functionality of that right. Much more important than this is that possession of such a right will allow agents protected spaces in which they may *express themselves as a group*. Recall that earlier (section 2.3.1) I argued that most often a citizen's claim to free expression will be directed to expression occurring in the public realm. This is so because it is within the public realm that certain types of expression are likeliest to annoy, offend, or harm. However, without a concomitant assembly right in place, protected expression might not secure a space in which it can become manifest. Assembly rights make the opportunity for individuals--and, more importantly, for groups of individuals--to communicate their message to a public audience much more accessible. This then of course directly relates to both the autonomy function of the right to dissent (the right-holder is at liberty to freely express himself to the public), as well as the participation function of that right (the right-holder may more accessibly express his discontent on some matter that may come to affect him). It is thus in these two mutually coordinative ways that assembly rights help to bring about the dual functionality of the citizen's right to dissent: not only do they protect the spaces in which associations may occur, they also allow associates a protected space to express themselves (e.g., their ideas, beliefs, etc.). We may therefore now more clearly recognize how protections on the citizen's freedom to express himself, to associate with persons of his choosing, and to assemble in public places, each as they are constituent of the citizen's broader right to dissent, become a mutually supportive enterprise, neither one being fully effective without the others.

E. Due Process

We come at last to due process protections. It has already been explained that due process protections are primarily important with respect to the citizen's right to dissent in the same way they are important for the security of any legal right. Indeed, one's protected expression, his protected rights to association and assembly, and his liberty to vote and to run for elected office, are all dependent on a system of law that has the authority to enforce these rights by holding those who infringe them accountable. In one sense then, we need not even consider the distinction between the performative and non-performative aspects of the right-holder's due

process protections--in both cases, these protections help to bring about both the autonomy function and the participation function of the right to dissent *vis a vis* offering a ground for all its other constituent rights. For instance, that freedom of expression helps the agent to actualize her autonomy will depend on due process protections ensuring that that freedom is secured; or, that the right to vote offers the agent a better means to participate in decisions that may come to affect her is dependent on due process protections ensuring that the right is upheld. It is in this generalized but fundamental way that due process protections help to secure the dual functionality of the right to dissent. But there is a second sense in which the distinction between the performative and non-performative aspects of due process protections is relevant. Just as we saw in the case of the right to regular and timely elections, all of the due process protections that do not aim to protect the performance of the right-holder will: a.) receive positive claim-right statuses; that, b.) impose duties on the state in particular. Certain aspects of the citizen's due process rights--such as the right to a speedy trial, or the right to be informed of the reasons for the laying of some charge--demand that the state ensure appropriate mechanisms are in place such that these rights may be upheld. Generally speaking, the state will have to supply the proper funding to allow for the administration of justice in the first place (e.g., the system of public defenders must have the necessary means to handle its caseload); more specifically, it will have to ensure things like the proper training of government officials. Of course, how these positive claim-rights will relate to the binate functionality of the right to dissent is in just the way explained above: they will provide a reliable ground for all the rights that comprise the right to dissent, which will then more directly secure its two functions.

Immunities

Before closing the section, one final matter should be addressed. As *figure* 2 makes clear, all constituent rights belonging to the right to dissent ought to include in their molecular structure an immunity element. And yet, I have said nothing on how this particular element relates to the dual functionality of the right to dissent for any of its constituent rights. This explanation has been left to the end of the section intentionally since how the immunity element relates to the dual functionality of the right to dissent can be treated in exactly the same way regardless of which of the two functions we are discussing, or which of the four constituent rights we have in mind. As Kramer and Steiner note: "to count as a genuine right at all"[128] all claim-rights must be accompanied by an immunity. This is so because, without an accompanying immunity, each claim-right (one that imposes a correlative duty on another) would be liable to being divested at any instant. Therefore, a claim-right without an immunity would result in the right-holder enjoying the right in a nominal sense only. She would, in other words, not enjoy the right in the genuine sense desired. In this way, the practical security the right-holder enjoys with respect to all of the freedoms and protections constitutive of her right to dissent come *vis a vis* the immunity element of that right. Thus, such an element goes a long way to promoting both the autonomy and the participation function of the citizen's right to political dissent.

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[128] Kramer and Steiner, 2007. 'Theories of Rights: Is There a Third Way?' in *Oxford Journal of Legal Studies*, vol. 27, p.297.

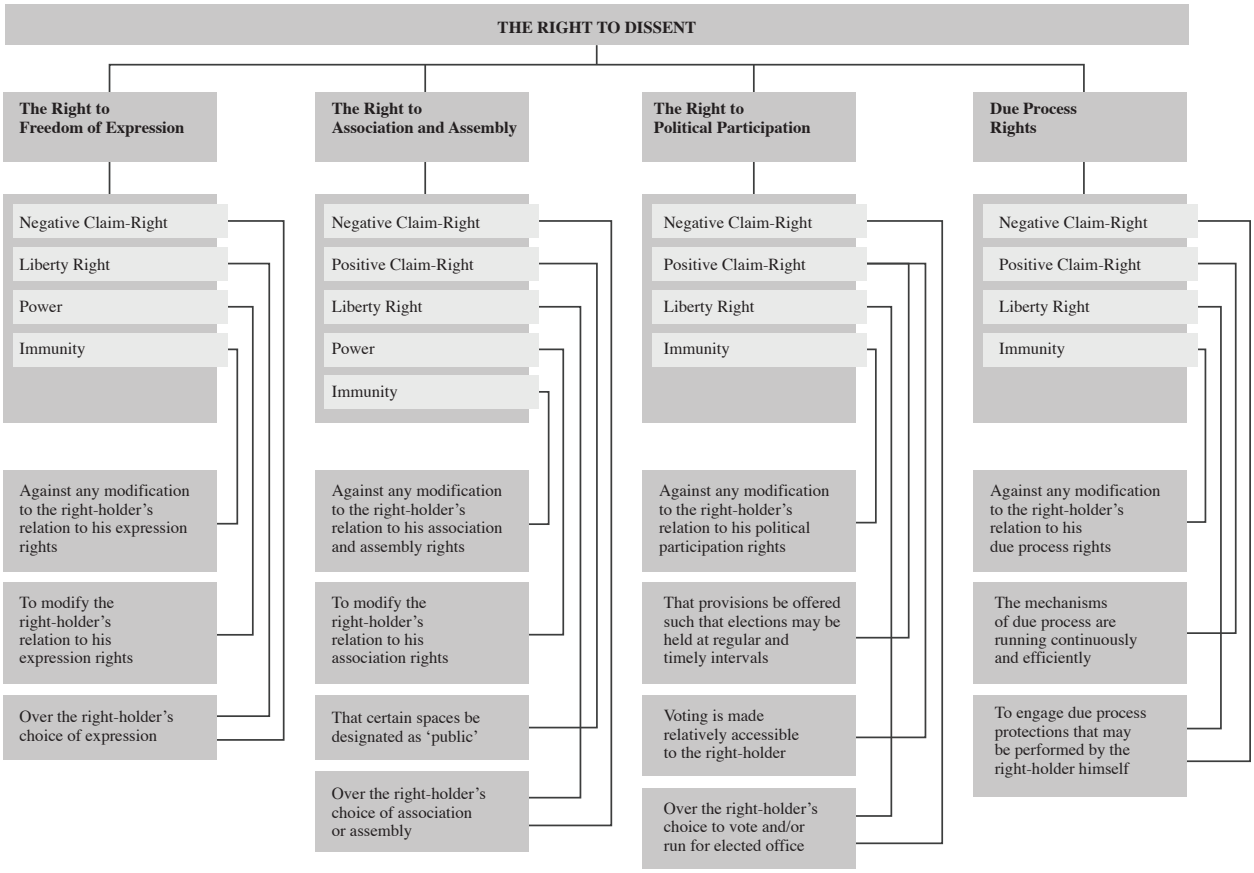
2.5: *Conclusion*

It is now possible to comprehensively detail what it means for an individual to have a right to dissent in the context of a liberal democracy. Having the right to dissent means the individual will: a.) have the freedom to express himself; b.) have the freedom to associate and assemble with persons of his choosing; c.) have the right to political participation; and, d.) have the right to due process protections. More particularly, it means that the right-holding individual has: a.) a negative claim over others not to interfere with: i.) their choice of expression; ii.) their choice of association or assembly; iii.) their choice to vote and/or run for elected office; or, iv.) their choice to engage in the many due process protections that may be performed by the right-holder himself; b.) a positive claim over the state that: i.) certain spaces be designated as 'public'; ii.) provisions be offered such that elections be held at regular and timely intervals; iii.) voting is made relatively accessible to the right-holder; and, iv.) the mechanisms of due process (e.g., the court system) are running continuously and efficiently; c.) a liberty enjoyed by the right-holder to perform all those activities on which he also enjoys a negative claim of non-interference; d.) a power to modify his relation to both his expression and association rights; and, e.) an immunity on all rights constitutive of his right to dissent. A full visual representation of this composition is offered in *figure* 3 on the next page.

It is my assertion that this is enough to adequately capture what the normal citizen is justified in claiming will constitute his legal right of dissent in the context of a liberal democracy. Among other things, what this means is that dissenting activities that are normally understood to be legally protected within the context of a liberal democracy *should* in fact be so protected. These include, but are not limited to: public speeches (protected by free expression and assembly rights); group or mass petitions (protected by free expression and association rights); group lobbying (protected by free expression and association rights); picketing (protected by free expression and assembly rights); marches (protected by free expression, association and assembly rights); teach-ins (protected by free expression and association rights); boycotts (protected by free expression rights); withdrawal from social institutions (protected by free expression rights); strikes (protected by free expression, association and assembly rights); casting a 'blank vote' (protected by free expression and political participation rights); etc.[129]

[129] For an extended list of both legal and illegal (but non-violent) acts of dissent, c.f., Appendix One (pp.79-86) of Sharp, 2011. *From Dictatorship to Democracy: A Conceptual Framework for Liberation*. Pontypool, Wales: Green Print.

Fig.3



The examination undertaken in this chapter was intended to improve our understanding of why the dissenting activities on this list ought legally to be secured to citizens; more generally, it was intended to reinforce the nature and importance of securing rights to citizens at all. But this is as far as the analysis in this chapter has taken us. At this point, we have yet to address the question of whether, and under what conditions, the citizen can be said to be justified in acting on his legal right to dissent. I will return to that question in chapter 4. But before I do so, I will first take a short detour in chapter 3 to examine the nature of the citizen's relationship to the law. My claim is that in order to fully appreciate the justificatory status of our right to dissent, we must first understand whether a legal recognition of the permissibility of certain acts by the state bears any relevance to an act's being justified. If it does, there is a prima facie argument in support of acts of legal dissent that does not extend to acts of political disobedience. If it does not, then a justification of each act is, at least in theory, on par. As we will see shortly, my argument rests on the latter of these two options.

Chapter 3: Our Moral Relation to the Law

Individuals obey the law for a number of different reasons. They may obey it simply to avoid getting punished; or, they may have loftier reasons to obey. Importantly, in any particular case, many of the reasons an agent has to obey the law will go unacknowledged by him, or not in any way figure into his practical reasoning. This of course does not suggest that the reasons the agent has for obeying the law do not then exist--only that they have not, in that particular case, contributed to his decision to obey or not obey. From the perspective of the law, none of this matters. As a number of authors have been keen to point out,[130] the law is not interested in why subjects comply with its dictates--its only interest is that they so do comply. In this respect then, whether an agent obeys the law on the basis of moral reasons, or for some other reason beside, is incidental from the perspective of the law. For the purposes of our investigation however, this distinction is anything but incidental. Since our interest in the next chapter (chapter 4) will be to examine the justificatory conditions for dissenting from the state both legally and illegally, our interest in this chapter will be to investigate the conditions under which the citizen may be said to have a moral duty to obey the state's directives. Three possible conclusions are in the offing. Either it is the case that: a.) in every situation citizens have a moral duty to obey the law, which would imply that the agent always needs a special reason to disobey; b.) in no situations do citizens have a moral duty to obey the law, which would imply that the agent need never have a special reason to disobey; or, c.) only under certain conditions do citizens have a moral duty to obey, meaning the reasons the agent has for disobeying must in these cases be weighty enough to defeat some pre-existing moral obligation. The argument in this chapter will make a case for the third conclusion.

Much theorizing in political philosophy has been dedicated to the issue to which I have here alluded. In its most general form, the issue is this: under what conditions do citizens have a moral duty to obey the law? Responses to this question have ranged from one extreme to the other. Some have argued that under almost every conceivable condition, citizens have a duty to obey the law;[131] others disagree, arguing that almost never do citizens acquire this duty.[132] Over the past half century, the consensus seems to have landed somewhere between these two alternatives. Although a growing number of scholars no longer accept that there is a general duty to obey the law (even if that duty is framed in prima facie terms),[133] few would argue that there is never a duty to obey. As mentioned above, I count myself among this contingent. I agree with

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[130] C.f., chapter 3 of Green, 1988. *The Authority of the State*. Oxford: Clarendon Press; or, part I of Kelsen, 1945. *General Theory of Law and State*. Cambridge, MA: Harvard University Press.

[131] E.g., Hobbes famously asks persons to transfer virtually all of their natural rights to the state (Leviathan) such that they may live in peace with one another (c.f., Hobbes, 1994. *Leviathan* (Curley, ed.). Cambridge: Hackett Publishing Company, Inc., esp. parts 1 and 2).

[132] Robert Paul Wolff is perhaps the strongest advocate for philosophical anarchism (c.f., Wolff, 1970. *In Defense of Anarchism*. Berkeley: University of California Press).

[133] Among this ever-growing contingent, perhaps the most notable are: A. John Simmons (c.f., Simmons,1979. *Moral Principles and Political Obligations*. Princeton: Princeton University Press and Wellman and Simmons, 2005. *Is There a Duty to Obey the Law?* Cambridge: Cambridge University Press); Leslie Green (c.f., 1988. *The Authority of the State*. Oxford: Clarendon Press); and, Joseph Raz (c.f., chapter 12 of Raz, 2009. *The Authority of Law* (2nd edition). Oxford: Oxford University Press).

those who contend that the nature of the claim made by political obligation theories is not one that can generate a *general* moral obligation for the citizen, but hold that on some laws, depending on how the law relates to the agent in a given context, the citizen can be said to acquire a moral duty to obey. In particular, in this chapter I will examine the following four approaches to grounding a citizen's duty to obey the law: a.) consent-based reasoning; b.) practical-authority-based reasoning; c.) fairness-based reasoning; and, d.) justice-based reasoning. For reasons that will become clear in time, I am skeptical that (a) can be said to establish for the citizen a moral obligation to obey, but argue that all of (b), (c) and (d) have the necessary resources to do so. None of my responses will be offered without a caveat. The theories I will claim have the means to establish a moral duty for the citizen to obey will all be argued to have in-built limitations which keep them from being generally applicable to each of the state's laws. In this respect then, what I will disclose are the morally relevant features that derive from certain directives issued by the state; not an argument that shows why citizens always have a duty to obey.

3.1: Prudential Reasons to Obey

Before examining arguments in support of the idea that citizens have a moral duty to obey the law, we must first be careful to distinguish another category of reason that tends sometimes to obscure the matter. Generally speaking, philosophers use the term 'prudential reason' to connote an agent's *self-regarding* reasons for action: reasons that motivate the agent to further his own self-interest. It should come as no surprise then that many of the reasons a citizen will have to obey the law will turn out to be prudential in nature. For example, if Michael's reason for obeying the speed limit regulations within his community is due exclusively to avoid getting fined by the authorities, then Michael is obeying the law for prudential reasons. Put slightly differently, were it the case that no fine would result for driving in excess of the posted speed limit, or were Michael to be in relatively good knowledge that no authorities were in his vicinity, he would be unmotivated to abide by that limit. In his notorious defense of absolute authority in *Leviathan*, Thomas Hobbes derives an especially strong conception of a duty to obey the law on the basis of prudential reasons. For Hobbes, the alternative to citizens giving up almost all of their natural rights to the state is to live together in a state of nature, which he famously diagnosed to be marked by, "...continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short."[134] For Hobbes, the only reason a person would originally contract to give up her 'right to all things' in the first place would be to further her own self-interest. Furthermore, by giving up her 'right to all things', the agent bestows upon the state the moral power to keep all individuals in line through punishment, meaning that her reasons to continue to abide by that contract will also be exhaustively prudential. In this way, Hobbes creates a political model in which near absolute obedience[135] to the state is derived on no other basis than the self-interested reasons of each individual citizen.

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[134] Hobbes, 1994. *Leviathan* (Curley, ed.). Cambridge: Hackett Publishing Company, Inc., p.76.

[135] I say 'near absolute' since it is not true that the subject transfers *all* natural right to the sovereign. It would, for instance, be incompatible for Hobbes to argue that the subject gives up his right to self-defense (since the entire reason he agrees to contract with the state in the first place is to avoid being injured). C.f., chapter 21 of *ibid* (pp. 136-145).

Now, although few today would grant Hobbes this stark picture of obedience, his analysis does seem to be relevant to much of our acting in accordance with the law. It is widely agreed that a general function of the law is to regulate human interaction, such that individuals may with more confidence predict certain behaviors of others, and plan according to those predictions.[136] If this much is true, then much of Hobbes' insight is sound. That each of us have different, and oftentimes divergent, goals means that it will be in all of our prudential interests to erect some regulatory vehicle that will allow us to better execute those goals. The law just is this regulatory vehicle, and it carries out its function in a variety of ways. For example, it will: a.) prevent undesirable behavior and secure desirable behavior (through criminal and tort law); b.) provide facilities for private arrangements between individuals (through private law); c.) redistribute goods and provide services to society (through tax law); and, d.) settle unregulated disputes.[137] What is clear is that, on each of these functions, certain prudential interests of the individual are being satisfied. By preventing undesirable behavior (a), the law affords the individual more security in his day to day activities, especially with respect to the expected fulfillment of those activities; furthermore, by both facilitating private arrangements between individuals (b), as well as by settling unregulated disputes (d), the law establishes a fair means for individuals to adjudicate their issues; finally, by providing services and redistributing goods (c), the law ensures that the individual have the requisite means to accomplish certain justifiable goals she may have. Much of our relationship to the law will therefore be captured by the prudential reasons agents have for obeying it. Not only is it the case that we will oftentimes act in accordance with the law to avoid the sanctions we will face by not obeying; but also, if the law is functioning well, it may also assist us in achieving a number of the prudential goals we might have. But there is another possible interpretation for why citizens obey the law: they may do so on the basis of moral reasons, which is another category of reason altogether. In this chapter, I am primarily interested in examining this second category of reason. I will therefore dedicate the remainder of my analysis to a discussion of when the agent can be said to be morally obligated to abide by the directives issued by the state.

3.2: Moral Obligations to Obey

Although it would be possible (and sometimes even appropriate) to engage the justificatory question of disobedience from the perspective of an agent's prudential reasons for obeying, such an engagement would naturally result in a much narrower, and much less interesting, exercise than one that focused on the agent's moral reasons for acting in this way. This is so for the following reason. If we were to consider the agent's prudential reasons for obeying the law alone, then a justification of her disobedience would, in any instance, be exclusively a matter of articulating why, in that instance, it was more prudentially beneficial for her to disobey the law than to obey it. This then would turn out to be far more an exercise in learning about the subject's own personal goals and aspirations than it would an interrogation of the general conditions for

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[136] An especially direct account of this 'planning' feature of law is offered by Shapiro, 2011. *Legality*. Cambridge, MA: Harvard University Press.

[137] This summary is taken from chapter 9 ('The Functions of Law') of Raz, 2009. *The Authority of Law* (2nd edition). Oxford: Oxford University Press.

the justification of obedience. This may be a worthwhile experiment for the sociologist, but it is only tangentially important to the philosopher. My focus will therefore narrow on the conditions under which citizens can be said to have obligations to obey the law. If it can be shown that they have such obligations, then justifying acts of disobedience will demand more than a mere balancing of the agent's prudential reasons for and against engaging in the act.

A natural place to begin an analysis of when citizens have a moral obligation to obey the law is to examine situations in which the law overlaps with pre-existing moral requirements. Nearing the end of *The Concept of Law*, H. L. A. Hart introduces an idea he calls 'the minimum content of natural law', by which he means to suggest that, in every society governed by law, there is bound to be a minimal overlap between the rules outlined by the legal system of that society and certain moral norms the society has come to adopt. This is due strictly to empirical facts about human beings. In particular, it is due to the fact that humans are: a.) physiologically vulnerable; b.) approximately equal in strength, agility, and intellectual capacity; c.) prone to varying degrees of altruistic feeling; d.) subject to limited resources; and, e.) limited in both understanding and strength of will.[138] It seems to be a truism that many of the laws we enact will mirror the kinds of standards enforced by moral codes: both are devices used to regulate human behavior, and both are responses to certain empirical facts about our human condition. The clearest examples fall within the category of criminal prohibitions, such as those against murder and theft. These laws will derive from very similar (if not the same) grounds as will our moral standards against committing these kinds of acts: both are due (at least in part) to the physiological vulnerability of humankind, the limited resources we have access to, and the natural infirmity of our individual wills. Now, due to this, our moral reasons for complying with a number of state-issued directives might turn out to be merely coincidental: the source of our moral obligation against killing might derive not from the law itself, but merely from the fact that the law directs us to the same behavior that is covered by an independent moral obligation. In fact, in well-ordered, reasonably just societies, I think it is fair to suggest that the overlap between laws and moral norms will be quite extensive indeed. But this overlap will not play a meaningful role in the fuller justificatory analysis I will offer. Since that analysis is specific to the justificatory nature of disobeying *the law*, to argue that it is wrong to disobey a law *because of* a standing and independent moral obligation would be to confuse the sources upon which we are making our evaluation. To wit, although it is morally wrong to commit murder, it does not from this fact alone follow that it is wrong to *disobey the law* against committing murder. To argue this latter claim, something more than the wrongness of the act in question must figure into our explanation. Specifically, we would have to show that it is somehow wrong to disobey the law *regardless of its content*.

Notice that we have encountered this idea before. Recall from chapter 1 (section 1.3) that to disobey some order is not equivalent to a failure to conform one's behavior to that order. One cannot, for example, disobey unintentionally, or even coincidentally. It is the nature of obedience (and disobedience) that one can only obey (or disobey) as an affirmation (or challenge) to the source that is issuing the directive. Consider the following anecdote. If John were to decide, independent of his committee's instructions to do the same, that he will submit a full version of

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[138] See Hart, 1961. *The Concept of Law*. Oxford: Oxford University Press, pp.193-200.

his dissertation by June 15, John would not, by the mere fact that he actually does submit his dissertation on that date, be said to 'obey' his committee's instructions. In order to obey those instructions, John must take the fact that the committee had issued the instructions to be a *content-independent reason* to abide by them. In other words, John would have to take those instructions as a reason to submit his dissertation *regardless of the date by which the committee had in fact instructed him to do so*. In a similar way, acting in accordance with the law on the basis of pre-existing moral requirements would more properly be considered an instance of 'conforming one's behavior to the law', rather than 'obeying the law'. With this in mind, what we are looking for in this chapter are arguments that can support the idea that citizens have a reason to obey the law *precisely because it is the law*. Put slightly differently, we are looking for arguments that can ground these reasons in the *source* that issues the directives rather than in the *content* of the directives themselves.

3.2.1: Obligations from Consent

Although it is not altogether unchallenged that having a moral reason to ϕ is distinct from having a moral obligation to ϕ, the general consensus seems to be that these two things can be pulled apart.[139] For the most part, in what follows I will be interested in arguments that can establish for the citizen a moral obligation to obey the law. This is so because, if we can argue for this stronger thesis, the weaker claim that the agent merely has moral reason to abide by the law will be relatively uncontroversial. This is not, however, to suggest that the notion of a moral *reason* to obey--one that exists apart from a full-fledged moral *obligation* to obey--will not play any role in my analysis. As we will see nearing the end of the chapter, there are considerations, specifically for those who live within liberal democracies, that, although not strong enough to generate a full moral obligation in the citizen to obey the law, give her moral reason to approach the law in a special way. In this respect, the idea will be shown to have some purchase. But more on that later. For the time being, my examination will be interested in articulating only those arguments that attempt to generate for the citizen a moral *duty*[140] to obey the law. I shall begin that examination by looking at the idea of consent.

It is natural to think that one can acquire a moral duty to perform (or not perform) some action on the basis of one's voluntarily agreeing to do so. The salient image here is of promise-keeping. Despite some notorious uncertainty as to how a promise can be said to bind an individual to action,[141] it is among the most intuitively accepted moral notions available to us. There are a number of ways philosophers have attempted to explain the normative power of

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[139] C.f., Portmore, 2008. 'Are Moral Reasons Morally Overriding?' in *Ethical Theory and Moral Practice*, vol.11; and, Kamm, 1985. 'Supererogation and Obligation' in *Journal of Philosophy*, vol.82.

[140] For some thinkers, the terms 'duty' and 'obligation' are used to connote different kinds of moral relations. For them, 'obligations' must be voluntarily undertaken, while 'duties' need not be (c.f., Brandt, 1964. 'The Concepts of Obligation and Duty' in *Mind*, vol.73; and, Hart, 1958. 'Legal and Moral Obligation' in *Essays in Moral Philosophy* (Melden, ed.). Seattle: University of Washington Press). In what follows, I will treat the terms as interchangeable.

[141] David Hume famously wrote, "since every new promise imposes a new obligation of morality on the person who promises, and since this new obligation arises from his will; it is one of the most mysterious and incomprehensible operations that can possibly be imagined, and may even be compared to *transubstantiation* or *holy orders*, where a certain form of words, along with a certain intention, changes entirely the nature of an external object, and even of a human creature." (Hume, 2003. *A Treatise of Human Nature*. Mineola: Dover Publications, Inc.. p.373-374.)

promising: some ground it in the particular interests we as humans have;[142] others on a set of conventional practices a group has come to accept;[143] still others locate the moral force of promising in the expectations they tend to engender in others.[144] For our purposes, it matters not where the moral force of promising comes from, but that promises can be said to have this moral force, and that it can be shown that consent is, in the relevant ways, like promising.

Wherever it comes from, promises have a moral force. If I make a promise to Jennifer to meet her at a local coffee shop at noon, I have made a commitment to do so through nothing other than the performative act of promising. My obligation to meet her does not depend on certain conditions obtaining (e.g., whether or not it's raining); or on either one of our states of mind when the time comes to meet (e.g., that I no longer feel like meeting her when noon rolls around). This is evidenced by the fact that, even if I break my promise for very good reasons, I am still obligated to explain to Jennifer why I had to do so. Were the moral force of my promise not contained in the promise itself, it stands to reason that no moral residue would be left over from breaking that promise. But such is not the case. Furthermore, agreeing to something does appear to be like promising in the relevant ways. By giving one's voluntary consent on some matter, the agent normatively changes the expectations of both himself and of other parties, leading one to believe that his consent contains the same kind of moral force as would a promise.

Now, although it is well documented that any attempt to secure a general obligation to obey the law from consent is doomed to failure,[145] it seems pretty uncontroversial that it is possible for some to acquire a moral duty in this way. The most typical examples are the obligations assumed by state officials upon taking office. Few (if any) would argue that state officials do not acquire obligations to obey certain laws (ones, for example, that attach to the lawful performance of their duties), and it is my feeling that these duties can at least partially be explained on the basis of the oaths they take upon filling some position.[146] This of course does not mean that there are no other bases upon which the duties officials acquire when taking office can be explained (e.g., the associative obligations that are generated by the role itself)--only that, unless we take the practice of oath-taking by our officials to be nothing more than political window-dressing, it seems reasonable to assume that the voluntary consent offered by these officials with respect to the oaths they take accounts for at least some of their official obligations. If this much is true, then it shouldn't be too far of a stretch to suggest that the normal citizen can undertake certain obligations in this way as well. For instance, it could be argued that an immigrant to a country who, without coercion, has given his consent to abide by the laws of that country, may acquire a moral obligation to carry out the terms of that consent. But although arguments like this have been made in the past,[147] I am hesitant to accept it as it stands. Here is

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[142] C.f., Shiffrin, 2008. 'Promising, Intimate Relationships and Conventionalism' in *Philosophical Review*: vol.177.

[143] C.f., Gauthier, 1986. *Morals by Agreement*. Oxford: Clarendon Press (esp., chapter 5).

[144] C.f., Scanlon, 1990. 'Promises and Practices' in *Philosophy and Public Affairs*: vol.19.

[145] C.f., chapters 3 and 4 of Simmons, 1979. *Moral Principles and Political Obligations*. Princeton: Princeton University Press; and, chapter 6 of Green, 1988. *The Authority of the State*. Oxford: Clarendon Press.

[146] For a good argument for why officials have duties to obey the law, see Postema, 1982. 'Coordination and Convention at the Foundations of the Law' in *The Journal of Legal Studies*, vol.11, esp. section 4 (pp.186-197).

[147] C.f., Beran, 1987. *The Consent Theory of Political Obligation*. London: Croom Helm.

why. Oaths of citizenship are almost always framed in vague and generalized terms;[148] and thus, inferring an obligation from them would be to overlook a very important feature of consent: there are certain substantive limits that attach to the various objects one may consent to.[149] Binding oneself to an agreement for which the terms are severe, but only generally outlined, is in many respects tantamount to contracting oneself to slavery. John Locke surely had this substantive tension in mind when he wrote that, "a Man, not having the Power of his own Life, cannot, by Compact, or his own Consent, enslave himself to anyone, nor put himself under the Absolute, Arbitrary Power of another..."[150] Now, there are of course a number of more innocuous ways normal citizens can (and do) legally bind themselves through consent--indeed, most elements of contract law deal with obligations begat from this form of interaction. But in these kinds of cases, the moral obligations that are acquired through some contract cannot be said to be generated from the legal nature of the contract itself, but, like promising, are rather generated through the performative act of consenting. To put the point more bluntly: when the terms of consent are overly generalized, the agent will be under no moral obligation to carry out those terms (in these cases, the consent would be considered *void ab initio*). Conversely, when the terms of consent are overly narrow, the moral obligation one acquires should be understood to develop on the basis of the performative act itself, rather than on the basis of the law.[151] In light of this dichotomy then, it is my feeling that to say a citizen can acquire a moral obligation to obey the law on the basis of her consent is to misunderstand a vital moral feature of the act of consenting.

3.2.2: Obligations from Practical Authority

The analysis of consent just offered suggests that the kind of argument required to establish in citizens a moral obligation to obey the law must derive from non-consensual grounds. In what follows, I will examine three arguments that fit this criterion. The first looks at obligations acquired through directives that have been issued by a justified authority; the second and third turn to 'fairness' and 'justice' respectively, and discuss the role the law plays in bringing about these ideals. I will discuss each of these arguments in turn.

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[148] The Oath of Citizenship in Canada reads: "I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen." Much less vague, but still overly generalized is the United States Oath of Allegiance, which reads: "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God."

[149] For a good account of some of these substantive limits, c.f., Epstein, 1988. 'Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent' in *Harvard Law Review* vol.102.

[150] Locke, 1988. *Two Treatises of Government* (Laslett, ed.). Cambridge: Cambridge University Press, p.284.

[151] For an argument on the theoretical conditions that must be present for a performative act of consent to become law, c.f., Barnett, 1986. 'A Consent Theory of Contract' in *Columbia Law Review* vol.86.

A famous argument fashioned by Joseph Raz is that authoritative directives are justified when they are, "based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive"[152] (Raz calls this the 'dependence thesis') and when, "the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly"[153] (Raz calls this the 'normal justification thesis'). For Raz, when an authority issues a directive that gives subjects a reason to perform (or not perform) some action they had independent reason to perform (or not perform) anyway, and when following that directive will help those subjects to better comply with those independent reasons, then the authority is justified in issuing that directive, and the subjects in turn acquire a moral obligation to abide by it. As Raz explains:

> through the acceptance of rules setting up authorities, people can entrust judgment as to what is to be done to another person or institution which will then be bound, in accordance with the dependence thesis, to exercise its best judgment primarily on the basis of the dependent reasons appropriate to the case. Thus the mediation of authorities may, where justified, *improve people's compliance with practical and moral principles*. This often enables them better to achieve the benefits that rules may bring...and other benefits besides.[154]

For the purposes of our analysis, what is important to note is that there are certain situations in which the citizen will fare better, morally speaking, by complying with the directives issued by the state than she will by following her own reasons for action. One particular situation in which this will be the case is consequent upon the unique position the state occupies in its ability to solve coordination problems. A coordination problem occurs when a number of agents have to choose between several different ways to coordinate their behavior in order to bring about beneficial results for all.[155] A typical example is the decision facing a community of whether to drive on the right side of the road or the left. Importantly, it matters not which decision the community actually lands on (the right or the left), but that it *make a decision*, and that all who belong to the community are made *aware* of that decision. Under the circumstances of a coordination problem, the need for authority, and indeed the need for community members to follow the directions of that authority, becomes plausible. As the state's directives will be both salient (for those to whom the directive is issued) and lead to stable results, an argument can be made that citizens acquire a duty to adhere to those directives on the basis that others will likewise guide their behavior according to them. Consider, for instance, a situation that requires an agent to transport some kind of hazardous material from one place to another. In such a case, we may assume that: a.) the agent has (moral) reason to ensure the safe transportation of the hazardous material; b.) the law will offer guidance on how to transport that material that

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[152] Raz, 1986. *The Morality of Freedom*. Oxford: Clarendon Press, p.47.

[153] *Ibid*., p.53.

[154] *Ibid*, pp.58-59, emphasis added.

[155] C.f., Lewis, 1969. *Convention: A Philosophical Study*. Cambridge, MA: Harvard University Press.

conforms to more general directives others in the community are likely to follow; and thus, c.) (in the normal case) the agent will be able to better execute that safe transport by adhering to the state-issued regulations surrounding the activity than she will by attempting to take the problem on herself. Taken together, what we have here is an instance where, according to Raz, the authoritative regulations surrounding the transportation of hazardous materials are justified, and therefore a moral duty to comply with those regulations may legitimately be said to be engendered in the agent.

One of the upshots of this argument is that, unlike in cases of coincidental overlap between certain legal pronouncements and pre-existing moral norms, the moral obligation acquired by the agent does not merely *coincide* with the legal directive, but emerges from the directive itself. Take the above example as a case in point. That the agent would fare better by following state-issued regulations for the transport of hazardous material is not because by doing so she coincidentally discharges a range of pre-existing moral duties, but because, of the numerous ways that exist for her to discharge these pre-existing moral duties, none are as effective as adhering to the state-issued regulations. The point can perhaps be put more clearly if we consider a more common coordination problem. It is presumably true that all citizens have an independent moral duty to avoid causing harm to others while driving. Furthermore, this moral duty may be discharged in a number of ways (e.g., by driving incredibly slowly; by using roadways seldom used; etc.). Raz's argument suggests that the best, or most effective, way for citizens to discharge this kind of duty is by simply adhering to the state-issued directives that cover the activity in question. In such cases, citizens can be said to have a moral duty to act specifically in the ways the law directs (e.g., to drive on the right side of the road) *that they wouldn't have if the law had not so directed them*. What all of this suggests then is that, on the logic of Raz's argument for practical authority, agents may be said to acquire a moral obligation to obey the law in precisely those situations where the law will help them to better conform with moral reasons that apply to them anyway.

This is a convincing argument; but we cannot rest on our laurels yet. There is a natural and internal limit to how far Raz's line of reasoning may take us in securing a theory of political obligation. The limit is this: what happens in situations where an agent can be reasonably sure she is in possession of better (moral) knowledge on some matter than is the state? Is the agent still morally obligated to follow the state's directives on the matter in these situations, or may the agent forego adhering to its directives altogether? On the basis of Raz's theory of practical authority alone, the answer would have to be 'yes'. A fundamental aspect of Raz's account of practical authority is the 'normal justification thesis': namely, that the agent would normally do better conforming with reasons that apply to her anyway by following the directive issued by the authority than she would by following those reasons directly. Therefore, where the normal justification thesis is inapplicable, Raz's theory of practical authority, and thus its extension to a moral duty to obey, is inoperable. Now of course, Raz is not unaware of this complication. To address the concern, he posits a third condition for justified authority--a condition he calls, 'preemptiveness'. According to Raz, "the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when

assessing what to do, but should exclude and take the place of some of them."[156] Part of the reason Raz needs to invoke this condition is conceptual in nature. It would be conceptually awkward (if not absurd) to posit that, "when considering the weight or strength of the reasons for an action, the reasons for the rule...be added to the rule itself as additional reasons."[157] And it also seems true that, as we have seen (in section 1.3), as a descriptive matter, this is one of the criteria that can assist us in coming to a better understanding of the idea of authority more generally.[158] But a more valuable consideration for including this condition in his overall account of justifiable authority is in fact *practical*. As Raz argues, "[t]he advantage of normally proceeding through the mediation of rules is enormous. It enables a person to consider and form an opinion on the general aspects of recurrent situations in advance of their occurrence. It enables a person to achieve results which can be achieved only through an advance commitment to a whole series of actions, rather than by case to case examination."[159] Raz's interest is to utilize the role exclusionary reasons, on the basis of the condition of preemptiveness, are to play in the practical reasoning of the agent. It is both in the (moral) interest of the agent, as well as in the interests of the wider society,[160] that she have a mediating vehicle for her reasoning. Authoritative directives, when justified, will act as this mediating vehicle. But is this good enough? Can Raz simply side-step situations in which the normal justification thesis does not hold by introducing the condition of 'preemptiveness'? I do not think he can.[161] For although Raz may count his dependence thesis as one of the conceptual conditions for *justified* authority, it is not a conceptually necessary feature of purported authority *per se*. Thus, if an agent can be sure that acting on her own reasons for action will lead to a more successful discharging of some independent moral requirement than will adhering to the directives of some authority, one would be hard-pressed to find the required resources in Raz's theory to support her not doing so.[162] In fact, the point may be put even more strongly. Not only is it the case that the agent may deviate from a legal directive when she is relatively certain that following her own reasons for action

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[156] Raz, 1986. *The Morality of Freedom*. Oxford: Clarendon Press, p.46. Recall that we have encountered this idea before. In chapter 1 (section 1.3), 'exclusionary reasons' were explained as 'reasons that are to take the place of a range of first-order reasons for performing (or not performing) some action'. It is this same notion that Raz leans on when introducing the condition of preemptiveness into his account of authority.

[157] *Ibid*, p.58. In the literature, this kind of conceptual mistake is called 'double counting'.

[158] In *The Authority of Law*, Raz explains that the metaphysics of authority should be understood on the basis of 'protected reasons' (i.e., when, "...the same fact is both a reason for an action and an (exclusionary) reason for disregarding reasons against it." - Raz, 2009. *The Authority of Law* (2nd edition). Oxford: Oxford University Press, p.18). At this point, he is not yet concerned with the justifiability of authoritative directive.

[159] Raz, 1986. *The Morality of Freedom*. Oxford: Clarendon Press, p.58.

[160] Raz continues (from the quotation above), "[m]ore importantly, the practice allows the creation of a pluralistic culture. For it enables people to unite in support of some 'low or medium level' generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or in Liberalism, etc. I am not suggesting that the differences in the foundations do not lead to differences in practice. The point is that an orderly community can exist only if it shares many practices, and that in all modern pluralistic societies a great measure of toleration of vastly differing outlooks is made possible by the fact that many of them enable the vast majority of the population to accept common standards of conduct." (*Ibid*.)

[161] To be fair, Raz also does not think this is possible.

[162] A similar argument to this is offered by Leslie Green in his *The Authority of the State* (c.f., Green, 1988. *The Authority of the State*. Oxford: Clarendon Press, pp.111-117).

will allow her to fare morally *better* than adhering to that directive, but upon the logic of Raz's argument, she may deviate in all those cases when she is relatively certain *not to do worse* by following her own reasons for action. This is so because, as was explained above, the basis for the moral obligation offered by Raz's theory of practical authority is that the agent will better comply with moral reasons that apply to her anyway by following the state's directives than she will by following her own reasons for action. This means that if her own reasons for action can reasonably be thought to bring about *at least as good* moral results as would acting on the state's directives, her acting on her own reasons will be perfectly legitimate.

In light of the foregoing, though Raz's theory of practical authority may explain why in some situations citizens acquire a moral duty to obey the law, it is not a theory that extends to all possible situations. In particular, there appears to be no good reason for the citizen, when relatively certain to fare at least as well by following her own reasons for action as she would by following the directives of the state, to obey the state's directives. In fact, on the logic given, it can even be said that in times when the citizen is fairly certain to do no worse by following her own reasons for action, she may in fact acquire a moral duty to *disobey*.[163] We must therefore look to another argument to establish why the citizen, even when she knows she will do no worse by following her own reasons for action than she will by adhering to the directives of the state, can be said to have a moral duty to adhere to those directives anyway. This argument, as I will now show, relies on the idea of 'fairness', and thus is not confined to the moral expertise of the different actors in the authoritative relationship.

3.2.3: Obligations from Fairness

The argument from fairness develops on the premise that those who accept the benefits that come along with being part of some scheme acquire a moral obligation to contribute their fair share to the ongoing success of that scheme. In this sense, it is not the state to which the agent owes a moral duty of obedience, but to those others from whose contribution she has benefited. Intuitively, this argument makes a lot of sense. There is something morally abhorrent about the free-rider--the individual who exploits the fact that her own contribution to a mutually beneficial enterprise is insignificant, and thus decides to receive the benefits conferred by that enterprise without absorbing any of the costs. Examples of such behavior are common, and range from the very small act to the very large one: the commuter who decides not to pay the fee for using public transit; the company that fails to abide by anti-pollution regulations; the citizen who surreptitiously hides her taxable income in international shelters.[164] All of these instances are bound to bring about feelings of moral disgust because the actor(s) in question are benefitting from an enterprise that can only function if enough contribute their fair share.[165] What is more,

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[163] This is so for reasons concerning the intrinsic value of autonomy. For more on this argument, c.f., chapter 1 of Wolff, 1970. *In Defense of Anarchism*. Berkeley: University of California Press. For more on the idea of an obligation to disobey, c.f., Walzer, 1970. 'The Obligation to Disobey' in *Obligations: Essays on Disobedience, War, and Citizenship*. Cambridge, MA: Harvard University Press.

[164] For more on the free-rider problem, see Hardin, 2013. 'The Free-Rider Problem' in *The Stanford Encyclopedia of Philosophy* (Zalta, ed.) at <http://plato.stanford.edu/archives/spr2013/entries/free-rider/>.

[165] C.f., Olsen, 1965. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, MA: Harvard University Press.

the disgust seems to be warranted. As H. L. A. Hart notes, "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission."[166] This is the nature of the argument from fairness as it pertains to political obligation. The joint enterprise in question is the functioning of the state; and the state would not be able to function properly without at least a good number of its citizens adhering to its rules. Thus, those who have restricted their liberty by in fact adhering to the state's rules deserve a similar submission from all who have benefitted from the proper functioning of the state (which is, presumably, everyone belonging to the state).

Now, two things are important to note about Hart's formulation of the argument from fairness. First, the enterprise in question is conducted on the basis of *rules*. Hart of course does not specify what kind of rules these must be (whether they must be, e.g., institutional rules rather than conventional rules) and thus we may assume that any kind of rule will be enough to establish the duty in question. Second, the relation between a prior submissive act and an act that, on the basis of benefitting from that prior submission, the agent is morally obligated to perform, is only roughly symmetrical. What this means is that there need not be a precise equivalence between the two acts. For example, if I have benefitted from the widespread observance of a community rule that restricts any excess noise after 11 p.m., but wish to throw a party for my wife's 30th birthday one Saturday night (which I expect will run long past 11 p.m.), I may discharge the duty I owe to my fellow community-members in some other way than by shutting the party down at 11 p.m. (e.g., by offering to pay for a night's stay in a hotel, or some other such alternative). What is important to note is that I still have a duty to those others; and, what's more, that I have this duty on the basis of the argument from fairness. The point to take away here is that the duty I owe to those others need not be discharged by following the precise rule upon which the original benefit was enjoyed.

Taken together, these two considerations help to fill out the argument from fairness. They state that: a.) the basis upon which a duty of submission is acquired are the rules that, having been followed by others, have benefitted the duty-bearer; and, b.) there is a range of actions that, outside of following the rule in precisely the way that led to the benefit received, may suitably discharge the duty owing.[167] We will return to these considerations in more detail in the next chapter. More directly connected to our present concern is the fact that this kind of reasoning can help us address the limit we just encountered when assessing Raz's theory of practical authority. Recall that, on the resources offered by the Razian thesis alone, it does not seem to follow that the citizen can be said to acquire a moral duty to obey the law if she would not fare morally worse by acting on her own reasons for action than she would by obeying the law directly. It is my claim now that, if we append the logic of the argument from fairness, there may be cases in which the citizen can be said to have a duty to obey the law even though she is certain not to fare morally worse were she not to do so.

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[166] Hart, 1955. 'Are There Any Natural Rights?' in *Philosophical Review*, vol.64, p.185.

[167] It should be noted that these kind of 'alternative ways' of discharging one's duties of fairness will greatly diminish as the community in question increases in size. In other words, the smaller the community in question, the more likely one will be able to discharge one's duty of fairness by not exactly following the rule to the 't'.

As we've seen, *pace* the argument from fairness, there are a number of situations in which an agent may acquire a moral obligation to adhere to a rule *for no other reason* than because they have benefitted from the prior submission of others to that rule. This means that, despite the agent's personal expertise on some matter, there may be situations in which she will acquire a duty to adhere to a rule that covers the same content as does her expertise. Take, for example, the decision facing a trained race car driver of whether or not to follow the posted speed limits on the highway. We may concede that the driver in question is equipped with both the physical stature, as well as the skills of anticipation and reaction, to ensure the safe passage of all drivers on the road while exceeding the posted speed limits. According to the logic of Raz's theory of practical authority then, the driver has no reason to adhere to those limits. But if we were to import the logic of the argument from fairness to the example, we may come to a different result. The argument is this: since it is surely the case that, at other times, the driver in question will have benefitted from others adhering to the posted speed limits (or, what is perhaps more probable, that the driver, being related to a number of loved ones who regularly benefit from the posted speed limits, herself *indirectly* benefits from that general submission) an argument can be made that the driver then owes a duty to those others to similarly adhere to the posted speed limits, *even if she has competing reasons not to do so*. This is so for two reasons: a.) she has benefitted from the general submission to a rule; and, b.) there is no reasonable alternative to discharging her duty by means other than by following the rule itself.

Now at this point, an objection could be raised that, even according to the logic of the argument from fairness, unless the driver's choice to travel at excess speeds could be said to pose a *risk* to the wider collective, the driver does not withhold any benefits from others, and thus the argument from fairness does not apply to the case. If this much is true (the argument would continue), then there is no reason to assume that the driver, based on the argument from fairness, has a moral duty to adhere to the posted speed limits (since our example concedes that her driving at excess speeds would in fact pose no risk). M. B. E. Smith, in his famous article 'Is There a Prima Facie Obligation to Obey the Law?' states this objection most concisely. His argument is that, "fairness requires obedience only in situations where noncompliance would withhold benefits from someone and harm the enterprise."[168] To my mind, this is not a convincing objection. Here is why. As stated above, there is something inherently reprehensible about the activity of free-riding, quite apart from the potential consequences that might result from it. If John fails to contribute to a mutually-beneficial enterprise undertaken by Mary, Kevin, and Beth, his explanation to the other three members that his own contribution would really have made no difference to the outcome of that enterprise would surely not be enough to alleviate their moral outrage. If this much is true, then simply removing Mary, Kevin, and Beth's knowledge that John engaged in this exercise of free-riding shouldn't make much difference at all to a moral evaluation of the situation (unless, I suppose, one's moral position is strongly utilitarian). In fact, if anything, John's actions could be viewed as doubly morally questionable since not only did he free-ride, but he was covert in doing so. Indeed, the mere fact that all others have restricted their liberty by submitting to the rule, and that their submission benefitted the driver (in what is most likely ways too varied and numerous to count) means that a unilateral

[168] Smith, 1973. 'Is There a Prima Facie Obligation to Obey the Law?' in *Yale Law Journal*, vol.82, p.957.

decision made by the driver that, in this case, she need not similarly restrict her own liberty, is to shirk the moral obligation of fair play she has to those nameless others. This is the axis around which the entire argument from fairness revolves.

Now admittedly, locating the normative basis for such an obligation is a notoriously difficult task--one that would take us far afield of our present concern.[169] But one very clear indication of that normative basis comes in the form of the moral response by others to actions of free-riding. Such moral responses will likely take the following rough form: 'why is it that *you* get to decide when to follow the rules, when I do not similarly get to decide when *I* should follow the rules?'. And the sentiment only becomes stronger when we consider the crux of the argument from fairness: namely, that it is only in light of others' submitting to the rules that the race car driver sets up her argument in the first place. Of the utmost importance is the fact that the argument offered by the race car driver is not: 'anyone should drive at any speed they feel comfortable driving at'--for she presumably appreciates (and benefits from) the need for the regulation of speed on highways. Rather, her argument is that, 'because I am specially positioned in relation to this rule, the rule should not apply to me (or, presumably, to anyone in a similar situation to that driver)'. The argument from fairness is a way of showing that such unilateral reasoning is unfair to others who participate in that mutually beneficial scheme, and thus is enough to demonstrate that all participants of that scheme, regardless of the particular relation they might have to the rule, will acquire a duty to abide by the rule.[170]

Three things should be noted about the conclusion offered to this point. First, we should avoid confusing any of the arguments thus far submitted for ones that are able to establish a *general* obligation in citizens to obey the law. In both the case of Raz's argument for practical authority, and in the case of the argument from fairness, there are too many counter-examples of laws that will not fit the required criteria to generate such a broad application. We have already gone over the limitations of the Razian argument, and the argument from fairness will similarly be restricted from applying to all of the state's laws. In particular, any law the contravention of which does not take unfair advantage of others who have contributed to the scheme in question, cannot be said to be a violation of a duty to obey based on the argument from fairness alone.[171] Joel Feinberg gives us a few examples of these kinds of laws--"running a red light on empty streets late at night under perfect conditions of visibility, or exceeding the speed limit on an

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[169] The literature on this topic is vast, and cannot be easily be summarized. For a good, general introduction to the genesis of moral obligations, c.f., Shoemaker (ed.), 2013. *Oxford Studies in Agency and Responsibility* (vol.1). New York: Oxford University Press; and, Zimmerman, 1996. *The Concept of Moral Obligation*. Cambridge: Cambridge University Press.

[170] The argument from fairness is so intuitive that even small children tend quite naturally to draw on its resources (this, of course, does not mean that it is correct--only that it is intuitively plausible). For instance, when a child is reprimanded for not following a rule, one typical reply she will have is that 'person x broke the rule as well'. Here, the child is legitimizing her own rule deviation on the basis of another's deviation.

[171] There is a subtle, but important, difference between the limiting condition mentioned here and the one examined earlier made famous by M. B. E. Smith. Whereas Smith's critique of the argument from fairness is aimed at the burdens (i.e., consequences) that might arise on the basis of some action, the present consideration is aimed at the action itself (viz., at the 'kind' of action it is). This modifies how we should respond to each argument. In the case of Smith's critique, my argument was that, regardless of the consequences that arise from some free-riding action, the act may be considered to *itself* be morally questionable. If, however, the act does not take unfair advantage of anyone (i.e., the act cannot be considered a free-riding action at all), then this argument is removed.

empty stretch of highway that is perfectly safe to do so"; and, "so-called victimless crimes like smoking marijuana or cohabitation which abound in almost all penal codes"[172]--all of which I think do well to get the point across. Next, it must be kept in mind that the status of the obligation a citizen will acquire *vis a vis* the argument from fairness--or with respect to any political obligation for that matter--will have *pro tanto* force only. It is not the case that, for instance, the race car driver who, based on the argument from fairness, acquires an obligation to obey the posted speed limits for her community, *will never* have duties that override that obligation. Indeed, there will be a number of moral considerations weighty enough to override her pro tanto duty to abide by the posted regulations (e.g., ensuring a wounded individual get to the hospital as quickly as possible). Nevertheless, that she has this duty at all implies that it must at least be defeated by significantly weighty reasons; which, practically speaking, is no small matter. Finally, and most importantly, in addition to the many situations in which the argument from fairness can be said to engender an obligation in the citizen to obey the law *directly*, my claim is that it also contains the necessary resources to ground a more general obligation for the citizen: namely, that she give due deference to the law in situations of uncertainty; or, more precisely, that she defer to the law anytime acting on her own reasons would only questionably lead to better moral results than would acting in accordance with the law. This principle--one I will call 'the principle of due deference'--follows directly from the argument from fairness. Since the citizen can be said to benefit from a situation in which others defer to the law in times of uncertainty, it follows, *pace* the argument from fairness, that she thereby acquires a duty to similarly defer in times of uncertainty. The principle is of course not meant to suggest that the citizen can then be said to have a *general* duty to obey the law--indeed, there will be many cases in which the agent will be certain both that: a.) acting on her own reasons will lead to at least as good moral results as acting on the state's directives; and, b.) there is no fair play consideration that she must account for. In situations where these two criteria are met, the agent will not have a duty to obey the state's directives. But the principle of due deference does accomplish something: it lends a good deal of support to the plausible claim that the law can legitimately be said to have at least some degree of preemptive force over the citizen in ordinary situations.

3.2.4: Obligations from Justice

I will now consider one last argument in favor of grounding a citizen's moral obligation to obey the law. In rough form, the 'argument from justice' takes the following line: a.) if justice is a respect for, or satisfaction of, the moral rights of others; and, b.) if we all have a natural (moral) duty to respect, and satisfy, the moral rights of others; and, c.) the best way to fully respect, and satisfy, the moral rights of others is through the apparatus of the state; then, d.) we have a (moral) duty to uphold the apparatus of the state; that, e.) may be accomplished in large part by following its laws. As many authors have pointed out, the argument from justice has much to

[172] Feinberg, 1979. 'Civil Disobedience in the Modern World' in *Humanities in Society*, vol.2, p.56. It should be noted that Feinberg's example of 'exceeding the speed limit on an empty stretch of highway' does not upset the conclusion that was offered by my earlier example. Since the example of the 'expert race car driver' was based on a exceptional case (an individual who was *specially* positioned to contravene a law), and Feinberg's example is not (it refers rather to a rule that could be implemented *across the board*), there is no inconsistency in accepting both conclusions.

recommend it.[173] Since it is reasonable to assume that we both have a natural duty to support justice, and that justice is best administered through certain institutional mechanisms, proposing that we have a natural duty to support the institutional mechanisms through which justice is best administered appears to be a sound conclusion. But the weakness of the argument lies in the vagueness of its claim. As A. John Simmons (among others) has famously identified, it is far from certain that a citizen's natural duty to support just institutions is best discharged by following the laws of his particular state.[174] Moreover, even if it could be argued that such a duty is best discharged in this specified way,[175] it is equally far from certain that it would then require the citizen to do anything more than only *occasionally* adhere to the law. This is so because surely it is the case that the law, and other justice-promoting-institutions besides, are equipped to withstand a great deal of disobedience before they come to experience any adverse and/or damaging effects.[176] This then means that only in times when some act can reasonably be assumed to cause adverse harm to a justice-promoting-institution like the law can the citizen be said to acquire a moral obligation to obey it on the basis of the argument from justice. But it is my suspicion that very seldom will discrete acts have this damaging effect.

There are, however, two other approaches to this kind of argument that might help us to further establish the grounds upon which citizens can be said to have a duty to obey the law. The first approach is to weaken the argument. Instead of trying to generate a direct moral obligation for the citizen to obey the law, what the reasoning of the argument from justice might help to entrench is the principle of due deference discussed at the end of the last section. Recall that the principle of due deference does not require the citizen defer to the law *on all matters*, but to do so only when she is uncertain whether acting on her own reasons will lead to morally better (or not worse) results than acting in accordance with the directives of the state. We may now similarly apply the principle of due deference to the conclusions reached with respect to the argument from justice. In particular, it will apply any time the agent is uncertain whether her action will cause harm to some justice-promoting institution (such as the institution of law). In just those situations, the agent can be said to owe her fellow citizens, by way of the principle of due deference, a duty to defer to the law. To put the point another way: on the basis of the principle of due deference, the agent is morally restricted from gambling on actions the

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[173] Proponents of this kind of reasoning include (but is not limited to): John Rawls (c.f., chapter 6 of Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press); Immanuel Kant (c.f., Kant, 1991. 'On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice' in *Kant's Political Writings* (Reiss. ed.; Nisbet, trans.). Cambridge: Cambridge University Press, p.296); Ronald Dworkin (c.f., chapter 6 of Dworkin, 1986. *Law's Empire*. Cambridge, MA: Harvard University Press); Philip Soper (c.f., chapter 7 of Soper, 2002. *The Ethics of Deference: Learning from Law's Morals*. Cambridge: Cambridge University Press); Jeremy Waldron (c.f., Waldron, 1993. 'Special Ties and Natural Duties' in *Philosophy and Public Affairs*, vol.22); and, Christopher Heath Wellman (c.f., Wellman, 1997. 'Associative Allegiances and Political Obligations' in *Social Theory and Practice*, vol.23).

[174] Simmons, 1979. *Moral Principles and Political Obligation*. Princeton: Princeton University Press, pp.31-35.

[175] An attempt at this argument was made by Jeremy Waldron in Waldron, 1993. 'Special Ties and Natural Duties' in *Philosophy and Public Affairs*, vol.22.

[176] A fully articulated version of this argument is offered by David Lyons in Lyons, 1965. *Forms and Limits of Utilitarianism*. Oxford: Clarendon Press. For a good analysis of the idea, albeit in a much narrower context, c.f., part 2 of Brand-Ballard, 2010. *Limits of Legality: The Ethics of Lawless Judging*. Oxford: Oxford University Press. For a contrary take on the matter, c.f., Honore, 1981. 'Must We Obey? Necessity as a Ground of Obligation' in *Virginia Law Review*, vol.67.

consequences of which she cannot predict with reasonable certainty. Again here, although this principle is not nearly strong enough to establish a *general* duty for the citizen to obey the law, it does go a long way toward strengthening the claim that in situations where her practical reasoning skills are either internally or externally limited, she ought to defer to the law.[177]

There is a second alternative approach to the argument from justice to the one just mentioned. Some have submitted that in order to generate a duty to obey, we ought to shift the focus of the fundamental claim made by justice-based theories away from just institutions in general to democratic institutions in particular. Of course, it hardly bears noting how relevant this second approach is within the wider context of our project: since the analysis of dissent we are offering is limited to the liberal democratic context, it stands to reason that, if it can be argued that those living within a democratic society have a duty to obey the law *on just those grounds*, then it is a consideration we must account for.

In *Political Anarchism and Political Disobedience*, Chaim Gans helpfully divides the argument from democracy into two threads. According to the first thread, one can be said to have a duty to obey the outcome of a democratic procedure on the grounds that it represents a fair distribution of political power among members of a community; the second thread focuses more on the participatory aspect of democracy, in essence claiming that participation in a democratic system of voting is in the relevant respects tantamount to giving one's consent to abide by its results. Now, to my mind, the second thread is *ab initio* defeasible, and thus I will spend most of my time addressing the first thread. Nevertheless, a short explanation for why I consider the second thread to be deficient should be offered.

The argument that is often put forward for why political participation should not be considered a form of consent leans on the fact that it is not necessary--and maybe not even typical--for those who vote to do so intending to abide by the outcome of the voting procedure.[178] This may be true--but I do not take it to be the most damaging aspect of the argument. To my mind, the fundamental problem with taking a citizen's participation in a democratic voting system to be a sign of his full consent to abide by its outcome is that it is most often the case in modern democracies citizens do not vote on an issue-by-issue basis, but on the basis of entire mandates.[179] This means that, under the normal circumstances anyway, even a good faith vote will most likely fail to address each and every important stance the individual voter will discretely have. To suggest that the voter then, by his sheer act of voting, consents to

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[177] Leslie Green toys with this idea to an extent, but not in the same way I have explained it. Green's interest in chapter 9 of *The Authority of the State* is to further flesh out the Rawlsian idea that it is virtuous for the citizen to tolerate a degree of injustice as a way to ensure the system as a whole does not fail (c.f., Green, 1988. *The Authority of the State*. Oxford: Clarendon Press, pp.260-261). Although this may be true, it is not the point I am trying to make here. My point is not that one should tolerate a degree of injustice, but that one should recognize the limitations of one's own practical reasoning capabilities. It is in this latter respect that one can be said to owe a duty of deference to the law.

[178] This argument is offered, e.g., by Peter Singer (c.f., Singer, 1973. *Democracy and Disobedience*. Oxford: Oxford University Press, pp.47-53) and Joseph Raz (c.f., Raz, 2009. *The Authority of Law* (2nd edition). Oxford: Oxford University Press., p.242).

[179] This is due, as we saw in chapter 2, to the fact that modern democracies are paradigmatically representational in form.

all elements of the results of the vote would be, at the very best, to stretch the idea of consent very thin.

The first thread of the argument from democracy has much more to recommend it than does the second. Peter Singer famously adjusts the conditions for a fair distribution of political power from a conception of fairness-as-equality to one of fairness-as-compromise.[180] For Singer, the importance of the democratic method is not (primarily) that it distributes power equally among persons, but that it ensures a fair compromise can be struck between rival, and oftentimes incompatible, demands. Gans outlines three ways to interpret Singer's proposal. First, one might argue that there is something instrumentally valuable about a democratic system of compromise, and that by disobeying its results, an agent threatens to harm the integrity of that system. We have already explained in some detail the problems related to this kind of reasoning (e.g., that institutions can generally put up with a great deal of resistance before being adversely affected) which both Singer and Gans ultimately come to accept.[181] A second way to interpret Singer's argument, according to Gans, is to hold that, as democratic processes connote a fair compromise between incompatible and rival demands, the results of those processes will be fair as well. Thus (the argument would go), based on considerations of fairness, one is bound to abide by those fair results. Now, recall that earlier (in section 2.3.3) we used reasoning similar to this to explain why a democratic system of voting is a favorable way for a collective to reach a decision.[182] But there we failed to mention the notorious problem that accompanies an over-reliance on this line of reasoning. The problem is this: it is quite simply untrue that a decision reached through a fair procedure will necessarily produce a fair result. The most egregious case would be a decision made fairly (e.g., by acquiring the genuine consent of all parties) that a particular subset of persons were to be treated unfairly--but the example need not even be this stark. The important point is that nothing in the logic of a fair procedure precludes the results from being completely unfair. Thus, we must be weary of too hastily appropriating this kind of reasoning into our fuller argument. Finally, Gans offers a third interpretation of Singer's proposal--a deontological interpretation--which suggests that, "the force of democracy's inherent value...is at times sufficient to override the faults of decisions which might have been prevented had other procedures been employed."[183] Here, Gans asserts that there is good reason to believe the democratic method has intrinsic value (insofar as it is a way to ensure that no one or few persons unilaterally take on the role of making decisions for an entire group) and thus that the results of that method deserve to be obeyed on the basis of this intrinsic value. In other words, the very fact that the democratic form of decision-making is inherently a (morally) good way to make decisions implies that citizens acquire a moral obligation to abide by its results. How salient is this point with respect to our present quandary? Well, although I think the argument, generally speaking, outlines something that is vital to keep in mind as we move forward, I doubt it is

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[180] C.f., Part I of Singer, 1973. *Democracy and Disobedience*. Oxford: Oxford University Press, esp. pp.30-42.

[181] C.f., *ibid*, p.36.

[182] This same argument was made in reference to Thomas Christiano's defense of the democratic method. C.f., section 2.3.3 above.

[183] Gans, 1992. *Philosophical Anarchism and Political Disobedience*. Cambridge: Cambridge University Press, p. 111.

enough to ground a *duty* for the democratic citizen to obey the law. Here is why. Similar to the problem explained above, what seems to be missing from this interpretation of the argument from democracy is any indication of the exact laws the citizen must obey to discharge his duty. Even if we were to concede that the democratic method does have intrinsic value, it is surely not enough to become the *supreme* value for action. In many cases, circumstances will have it that certain decisions produced by the democratic method should expressly *not* be obeyed (e.g., a democratically produced decision to discriminate against some group of people). If this is the case, then there is no prospective way to determine (unlike in cases of justified authority and fairness) when one should, and when one should not, obey the law due explicitly to considerations of democracy.

This does not mean however that we should simply disregard Gans' suggestions. Indeed, as was just intimated, there is something deeply important to take away from the final interpretation Gans offers on Singer's proposal. What that interpretation does well to express is the special value the law acquires when it is decided by way of a democratic procedure. Indeed, "the power to alter the law or deviate from it, being a power to solve the community's practical problems, is a social good. The democratic principle is an answer to the question who should possess this good. According to this principle, it should be distributed equally among all members of the community."[184] Although as a general matter, and for the reasons outlined above, this principle is not equipped to impart a full-fledged moral *obligation* on citizens of a democracy to obey the law, it does give them additional reasons to *respect* the law, as those laws are the outcome of a fair and just procedure. This respect for the law, though not a duty, may certainly be counted as a moral reason for the citizen to approach the law with what Leslie Green calls, "a conservative [commitment] to self-restraint."[185] Such self-restraint is exhibited when the agent treats the law as providing a special reason to conform her behavior on the basis of a recognition of its pedigree. In other words, even if she is relatively certain that, according to her own sense of justice, the law falls short on some matter, the agent's commitment to self-restraint will have her at least entertain the possibility that her own sense of justice might be just that--her own. In this respect, she may come to realize that, when balanced against the way in which the law came to a definitive conclusion on some matter, the moral reasons she takes herself to have in favor of disobeying it are defeated.

3.3: Conclusion

Citizens oftentimes obey the law for purely prudential reasons. They might, for example, want to avoid the sanctions that result from not obeying it; or they might desire certain accolades that go along with being considered 'a law-abiding citizen'; or, it may just be easier to comply with the law than to not. But these are not the only reasons for citizens to obey. In addition to these, there are moral reasons for them to do so. One set of moral reasons to comply with the law will come in the form of overlapping instances between what the law dictates and what morality dictates. When there is such an overlap, one will have dependent moral reasons to conform his behavior to the dictates of the law--not because the law has so dictated, but because the law directs the

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[184] *Ibid*, p.112.

[185] Green, 1988. *The Authority of the State*. Oxford: Clarendon Press, p.265.

agent to the same kind of activity as does morality. As we have seen, these are not instances of obedience--obedience requires that the agent have reasons to obey the law *that would not exist had the law not so directed him*. Four arguments were considered with respect to grounding this kind of moral obligation. It was first argued that consent-based reasoning could not be used to ground a duty to obey, as the consent given would either be too general to impart a genuine obligation for the citizen, or too specific to rely on the content-independent nature of law's claim. We next examined Raz's argument for practical authority, and found that such an argument could be invoked to establish an obligation to abide by a number of legal directives--in particular, those which would, through the directive itself, help the citizen to better comply with moral reasons that apply to him anyway. It was not, however, enough to establish a general duty to obey. Specifically, the argument could not account for the many cases in which the citizen could be relatively certain not to do worse by acting on his own reasons than by following the directives of the state. To account for a number of these cases, we then turned to fairness-based reasoning, arguing that considerations of fairness preclude the citizen in many situations from disobeying the law, even if he is relatively certain not to do worse by following his own reasons for action. In addition to this, the argument from fairness allowed us to introduce the principle of due deference, which claims that the citizen has an obligation to defer to the law whenever he is uncertain whether or not he would do worse by acting on his own reasons for action. The final argument we examined came in the form of justice-based reasoning, from which we concluded that, on the resources offered by its reasoning alone, the citizen could only be said to acquire a very thin obligation to obey (in times when his action could reasonably be thought to damage an existing justice-promoting institution, such as the law). This was even the case when we narrowed the scope of the argument to democratic societies in which the democratic procedure appears to give us additional reasons for obeying the law. Nevertheless, it was argued that the argument from democracy (on the reasoning offered by the argument from justice) is enough to establish a moral reason for the citizen to defer to the law in those cases when the law has been decided democratically. Following Rawls, we may call this a 'duty of civility'; or we may merely call it a 'respect for the law'. Either way, what is important is that the citizen living within a liberal democracy has been shown to have a special moral reason to treat the laws of his society as having some degree of preemptive force over him. In other words, although he does not have a moral obligation to abide by the law just because it was produced through a democratic procedure, there is a presumption in favor of the law that the onus is on the agent, and not the law, to account for reasons in favor of his disobedience.

In the next chapter, we will put the foregoing reasoning into effect. In particular, we will look at whether or not the agent is justified in engaging in both acts of political disobedience and legal acts of dissent. From the arguments expressed in this chapter, we can be sure that, at least in some situations, the agent will have a moral obligation to obey the law, and that therefore disobeying in those situations will call for a justificatory explanation. However, a further argument will be made that suggests the same kinds of considerations disclosed through the course of this chapter may also have application outside the context of legal directives. What all of this suggests is that the very same moral reasons the agent has to obey the law may also become reasons she has not to act on her legal right to dissent.

Chapter 4: The Justification of Acts of Political Dissent

Let us take stock of our analysis to this point. We began our investigation by engaging the idea of dissent on a conceptual level. In chapter 1 our goal was to reveal the conditions that must be present for an act to be considered one of dissent. We explained that dissent is: a.) an expression of normative disapproval, that is b.) undertaken by a member of a group, and c.) directed at a settled and/or practically effective position belonging to that group, that d.) typically aims to have some ongoing effect over the normative structure of the group. We took care to distinguish between acts of dissent and acts of disobedience, claiming that the latter, unlike the former, is both by necessity a response to something required of the agent, and need not be directed toward a group position. We then narrowed our analysis to the political realm, where disobedience became expressly group-oriented. We explained that the difference between legal and illegal acts of political dissent is exhausted in whether or not the act in question is in contravention of a state-issued directive. If it is, the act is one of illegal political dissent; if it is not, it is one of legal political dissent. In chapter 2 we engaged the topic of legal dissent further. In particular, we turned our attention to the notion of the right to dissent, and submitted an argument for what that right should include in the context of a liberal democracy. Our claim was that the right to dissent should at the very least include some form of protection over a citizen's: a.) freedom of expression; b.) freedom of association and assembly; c.) political participation rights; and, d.) due process rights. We then fleshed out what these rights mean within the Hohfeldian analytic framework. Finally, in chapter 3 our investigation turned to an examination of the conditions under which citizens of a liberal democracy can be said to have a moral duty to obey the law. We looked at four possible arguments in favor of this idea, which included: a.) an argument from consent; b.) an argument from practical authority; c.) an argument from fairness; and, d.) an argument from justice. Our conclusion was that arguments (b), (c), and (d) were able to establish the relevant kind of moral duty in the citizen, but that in each of these cases, the duties imposed are limited to a particular set of laws and the way those laws relate to the agent.

Taken together, these arguments allow us to address the chief and final question of our analysis. That question, in its most basic form, is this: under what conditions are acts of political dissent justified? The chapter will unfold in the following manner. I will first (in section 4.1) engage the question of justifiability as it pertains specifically to acts of *illegal* political dissent (i.e., what I have called 'political disobedience'). As the existing literature on dissent is almost exclusively concerned with studying acts of political disobedience, there is a far larger resource pool to draw from than is the case with legal acts of dissent. I will first examine (in section 4.1.1), in a general way, considerations the agent must address when practically deliberating about disobeying the law in circumstances in which she has a duty to obey. The justificatory framework I will employ throughout the chapter is the familiar one that asks the agent to weigh competing reasons for and against disobeying, arguing that when her moral reasons to disobey outweigh the moral reasons she has to obey, she may on that basis be said to be justified in disobeying. Of course, as will clearly be outlined in that section, such practical moral reasoning is anything but straightforward. I will therefore propose a few general considerations the agent ought to keep in mind to ensure her moral reasoning avoids some of the more common pitfalls that tend to result from this process. Next (in section 4.1.2), I will more discretely examine the

different types of politically disobedient actions (as disclosed in chapter 1) and discuss the likelihood that they may be justified in the context of a liberal democracy. In the second part of the chapter (4.2), I turn the analysis to the justification of acts of legal political dissent. I explain first (in 4.2.1) the reasons why the justificatory question for acts of legal dissent is not one of determining what the justifiable limits of the right should be, but rather the conditions under which an agent is justified in acting on her legal right to dissent. The general claim is that the former question is overdeterminate of acts of dissent in particular, and thus somewhat off target. The final three sections of the chapter (4.2.2 to 4.2.4) engage the latter question, and somewhat controversially contend that as the same kinds of reasons that oppose the agent's disobedient action apply also to her acting on her legal right to dissent, each kind of action calls for the same justificatory analysis. Put another way, my claim will be that the same kinds of considerations the agent ought to take into account when deciding whether or not she is justified in politically disobeying should also be taken into account when deciding whether or not she is justified in acting on her legal right to dissent.

4.1: Justifying Acts of Political Disobedience

Arguments in support of the justification of political disobedience have increasingly broadened through time. Whereas the idea was once approached with caution,[186] it is now generally accepted that acts of political disobedience, far from being unacceptable, may even in some instances be morally required.[187] Now, to be sure, I think it a pretty uncontroversial suggestion that in some political regimes--e.g., those characterized by the morally repugnant behavior of its leaders (e.g., a kleptocracy), or even those that invest state decision-making in the hands of one or a few discrete individuals (e.g., a despot or dictatorship)--political disobedience may be considered a morally justifiable course of action for the citizen to take. But since our analysis is not interested in these kinds of political regimes, but is instead specified to the liberal democratic context, we may not so quickly accept the justifiability of politically disobedient actions. Indeed, if the system of government in place is one of democratic rule, and is further supported by certain liberal protections on individual rights, then at best what we seem to have is a situation in which political disobedience may only be tolerated when the normal political processes either run out, or break down altogether. This argument certainly had its proponents at one time, but very few still accept the picture as constitutive of the truth about political disobedience. In what follows, we will evaluate a range of responses to this difficult question with the hope that we may get clearer on the kinds of considerations that effect the justifiability of acts of political disobedience, even as they are undertaken in the context of a liberal democracy.

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[186] E.g., in the *Crito*, Plato gives us an especially robust explanation for why citizens always have a duty to obey the laws of their state (c.f., Plato, 1948. *Euthyphro, Apology, Crito* (Church, trans.). New Jersey: Prentice-Hall, Inc.).

[187] Michael Walzer wrote a famous article outlining a case for the moral duty to disobey (c.f., Walzer, 1970. 'The Obligation to Disobey' in *Obligations: Essays on Disobedience, War, and Citizenship*. Cambridge, MA: Harvard University Press). More recently, Candice Delmas has written a series of articles outlining various ways an obligation to disobey can be generated (c.f., Delmas, forthcoming. 'Samaritanism and Civil Disobedience' in *Res Publica*; Delmas, 2014. 'Samaritanism and Political Legitimacy' in *Analysis*, vol.74; Delmas, 2013. 'Political Resistance: A Matter of Fairness' in *Law and Philosophy*, vol.33).

4.1.1: Disobeying When One Has a Duty to Obey

In chapter 3 we articulated three arguments that could establish for the citizen a moral duty to obey the law. These three arguments, once again, were based on considerations of justifiable authority, fairness, and justice, and by no means were they able to account for a general obligation for the citizen to obey. The Razian argument for practical authority proposed that if by acting in accordance with a legal directive the agent would conform better with moral reasons that apply to her independently of that directive, the agent can on that basis be said to have a moral obligation to obey the law. A second reason to obey was said to develop on the basis of a duty begat by considerations of fairness. In particular, whenever the prior submission by a set of citizens to some (legal) rule can be said to have benefitted the agent, the agent then owes that set of citizens a similar submission, oftentimes by adhering to the very same (legal) rule. A consequence of this reasoning then led us to propose 'the principle of due deference' from which it was possible to establish two further moral reasons for the citizen to obey: first, that whenever a citizen is uncertain whether the moral consequences of acting on her own reasons will be at least as good as acting on the state's directives, she has reason in those cases to defer to the state; second, that whenever the agent is unsure whether her actions will cause harm to some justice-promoting institution (such as the law), she will similarly have a reason to defer. Finally, there is a weighty moral reason in favor of the agent exhibiting a degree of self-restraint with respect to disobeying the law in cases when the law is decided by way of a democratic procedure. Although it cannot be said that, due to the law's pedigree, the agent has a moral obligation to obey, it is at least the case that the agent has a moral responsibility to take that pedigree into account when arriving at a final decision about some disobedient action. In each of these cases then, the agent can be said to have a pro tanto moral reason to obey the law. This implies that, in cases where these reasons apply, for her action to be considered justified, those reasons must be defeated by weightier moral reasons in support of her disobedient action.

Now, to begin, it should first of all be made clear that moral reasons to obey the law, since they derive from different sources and vary according to the particular circumstances of any given case, will in each case be more or less weighty. Our moral reason to adhere to a regulation that restricts being in a public park after dusk will (in most cases) not be as weighty as our moral reason to abide by a law that restricts blocking a busy roadway. What this means is that the reasons that support acting disobediently in the former case will similarly have to be less weighty than the reasons that support acting disobediently in the latter case. Of course, it is a notoriously difficult task to offer any generally applicable advice on how such weighting should be done; but there are at least a few theoretical considerations we can mention that can assist the agent in avoiding some of the more typical errors that can occur when engaging this kind of practical reasoning.

One such error is that we are oftentimes too quick to act on what we only *believe* are the relevant moral facts pertaining to any particular case. Situations in which one must weigh competing moral reasons for and against obedience can be thought to include (at least) the following four variables: a.) the relevant moral facts in favor of obeying; b.) moral beliefs that favor obeying; c.) the relevant moral facts in favor of disobeying; and, d.) moral beliefs that favor disobeying. When practical moral reasoning is done well, we hope that categories (a) and (b) and/or categories (c) and (d) fall into perfect alignment. In other words, we hope that the

relevant moral facts that favor the agent's choice to either obey or disobey link up with his moral beliefs about what he should do. But things seldom work out like this. Our beliefs about how much weight a particular reason should carry in our moral deliberations oftentimes diverges quite radically from the relevant moral facts. It is therefore essential that one take care when assessing his reasons for disobeying against the backdrop of some existing reason to obey that he not put too much emphasis on what he only *believes* to be the case. To my mind, although there will always be certain natural limits to the agent's epistemic access to the relevant moral facts, there are at least a range of these facts that will, more often than not, be available for consideration. Consider, for example, the decision facing an agent (we'll call her Sam) of whether or not to block a busy roadway in protest of some governmental policy. If Sam's reason for blocking the roadway is due only to the fact that she believes her doing so will lead to the government revoking the policy, but even a superficial glance through the history of actions similar to her own would suggest that she is mistaken in this belief, Sam can rightfully be criticized for not considering the fuller scope of the relevant moral facts that pertain to her initiative. Furthermore, since in this case Sam can plausibly be assumed to have a duty to obey the law on the basis of fairness (she will have benefitted, in numerous ways, from others submitting to the rule not to block busy roadways), a decision to disobey based only on the erroneous facts she has offered would be unjustifiable. This is so because, as in all cases where one attributes justification to an act, her reasons for disobeying would have to be weighty enough to defeat her reasons to obey. But the reasons she has offered do not in this particular case link up with the relevant moral facts.

Of course, Sam could always give another kind of reason to support her decision to disobey--one that draws on a different source than the improved state of affairs she believes her act will bring about. For instance, Sam could argue that she is right to disobey in virtue of the fact that *the law she is protesting against is wrong*. This is a common argument in support of political disobedience, and is one therefore that demands some further attention. There is a well-known distinction made in the literature between direct and indirect disobedience.[188] One engages in an act of direct disobedience when she disobeys the very law she considers to be unjustifiable; on the other hand, when an agent, in order to draw attention to a law she finds unjustifiable, disobeys some *other* law, she thereby engages in an act of indirect disobedience. To my mind, and with respect to the issue we are currently examining, there is a prima facie--though by no means conclusive--argument in support of acts of direct disobedience over those of indirect disobedience. Here is why. When one disobeys the very law they are protesting, their action expresses a positive belief that the law should not be obeyed at all, regardless of whether or not they are mistaken in their belief. In other words, their action signifies that they consider the moral reasons in favor of obeying that law to either be very weak, or absent altogether.[189] A famous example of this kind of direct disobedience is Rosa Parks' decision in 1955 to sit in the 'whites-only' section of a Montgomery public bus. Parks certainly had prudential reasons to obey the law in that case (e.g., to avoid punishment), but her decision to directly disobey signified her

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[188] C.f., Brownlee, 2012. *Conscience and Conviction: The Case for Civil Disobedience*. Oxford: Oxford University Press, p.19.

[189] I take it this is what Ronald Dworkin meant to suggest when he wrote, "...it is silly to speak of a duty to obey the law as such" in times when an agent is confronted with an unjustifiable law. (Dworkin, 1977. *Taking Rights Seriously*. London: Gerald Duckworth & Co. Ltd., p.192).

belief that she had absolutely no moral reason to do so. In cases of indirect disobedience, the same conclusion does not follow. When one disobeys a law with the intent to protest against some other law, it is very possible--and maybe even likely--that she will be faced with a decision of whether the moral reasons she has to disobey that law outweigh the moral reasons she has to obey it. This is so because here, unlike in cases of direct disobedience, the agent may believe the law she disobeys to in fact be legitimate. It is therefore in cases of indirect disobedience where a balancing between competing moral reasons for and against disobeying the law becomes especially salient.

The example offered above where Sam chooses to block a busy roadway to protest against an iniquitous law or policy is one of indirect disobedience. In the first description of the case, the reason Sam chose to pursue that action was that she (erroneously) believed her disobedient act would result in the government correcting the law or policy she considered to be morally suspect. In our reformulated description, the ground of her reasons for engaging in the act are no longer (exclusively) based on a belief that the act will lead to a remedying of that law or policy, but also draw some support from the wrongness of the law or policy itself. In other words, she will cite the wrongness of the particular law or policy, and the fact that it is right to fight against such wrongness, as a moral reason that supports her acting in a disobedient manner. What are we to make of this kind of argument in favor of disobedience? In his article 'Limits to the Moral Claim in Civil Disobedience', Harry Prosch constructs a good argument for why relying too heavily on the moral rectitude of one's position can be dangerous. For Prosch, instances of political disobedience are defined by a conflict regarding the moral quality of the law. At one end of the spectrum, this conflict will be between all citizens and the law; much more paradigmatically however, it will be between a set of citizens who consider some law to be morally justified, and others who do not. Prosch asks how we are to reach a common ground on these disagreements. His reply is that, in a relatively well-functioning democratic society, normal political processes are in place that allow us to reach such common ground. But concerning acts of disobedience, these normal political processes are by definition circumvented. For this reason, Prosch argues, it would be incredibly difficult, if not impossible, for the agent to appropriate a coherent moral principle that would allow him to ground the justification of disobedient action on the basis of a deeply held moral conviction alone. Here is why. For x to be recognized as a valid moral principle, it is generally agreed that it must at the very least be universally applicable.[190] In other words, x would have to be applicable to all cases that fall under some type. But the moral principle 'it is justifiable to fight for what is right' would, on that basis, be self-defeating. For Sam to claim that it is justifiable for all to fight for what is right is for her to claim that it is justifiable for others to fight against her for what they think is right. But the very basis of Sam's principle is that she is, in the first place, fighting for what is right. And part of this fight entails that she oppose her opponent's position with respect to what they think is right. The crux of the matter of course is that, when it comes to substantive moral issues, it is seldom the case that any of us can be certain who is, and who is not, right. As Prosch explains:

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[190] Even John Mackie's 'moral error theory' (based as it is on anti-realist assumptions) takes universalizability to be necessary to the establishment of a moral principle. C.f., chapter 4 of Mackie, 1977. *Ethics: Inventing Right and Wrong*. Harmondsworth: Penguin Books Ltd.

> It might seem that if there are some causes which are really right as causes, then to fail to fight for them must really be wrong. But the difficulty is that, even if we are sure that we have our fingers on the really right ones, our opponents are also sure they have their fingers on the really right ones, too; and, as long as we have been unable to agree with each other upon which ends or causes are the truly right ones, the principle that we ought all to fight for the right ones would be far from providing us with a common principle to live by. It could only be said to be common to us in an abstract sense. Since we would be putting different concrete fillings in it (battling for different causes), it could only lead us in practice to tear each other apart in thoroughly unprincipled ways.[191]

Understood on this basis, for Sam to extend the argument that her act of disobedience is justified on the basis of the 'wrongness' of the law or policy she protests against would be for her to overlook both: a.) the theoretical consistency of her claim; and, b.) the epistemic limitations she faces with respect to moral truths. She may feel very strongly that she is right to disobey--that by doing so she is addressing an issue that needs morally to be addressed--but it is presumptuous of her to act on this personal conviction without any other reason supporting it. Indeed, what our conclusion at the end of the last chapter should have taught us is that there is always a competing moral reason (one of 'self-restraint') in favor of obedience whenever a law has been decided by way of a democratic procedure. This then is enough to establish that Sam would be unjustified were she to act in a politically disobedient manner exclusively on the basis of some moral conviction she holds.

Now, generally speaking, what the foregoing has alluded to is the familiar claim that there are no clear or sharp lines that can inform the agent when certain moral reasons she has in favor of disobeying the law can be said to outweigh the moral reasons she has to obey; there is, in other words, no 'one size fits all' formula she can apply. Joel Feinberg puts the point succinctly when he writes, "no *general* advice from a moral philosopher is possible except to weigh sensitively the two conflicting [reasons] and act in accordance with the one that seems weightier in the present circumstances."[192] This advice may come across as trite, but it contains about as much useful content as we can hope to extract from the topic. In particular, Feinberg gives us two 'rules of thumb', both of which are important to keep in mind when engaging our faculty of practical reasoning. First, one must be *sensitive* when weighing competing reasons for and against disobeying. In many cases, what may at first appear to be no conflict at all could turn out to be a very delicate one. In these situations, one has a moral responsibility to make an assessment of the relevant moral facts surrounding one's practical decision to disobey (e.g., how the act might effect others; the likelihood of the act achieving its intended result; etc.) and to include those facts in one's ultimate decision. As we've noted, the efficiency of our moral reasoning will most often face inherent limitations, and many relevant facts will escape our notice. But we should take care, especially in situations where there are competing reasons in

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[191] Prosch, 1965. 'Limits to the Moral Claim in Civil Disobedience' in *Ethics*, vol.75, p.109.

[192] Feinberg, 1979. 'Civil Disobedience in the Modern World' in *Humanities in Society*, vol.2, p.131.

support of contrary actions, to do our best to get to the morally preferable answer. Second, Feinberg is apt to remind us that the way one has come to make a decision in the past, though not totally unimportant with respect to one's current decision, should be treated with only a degree of deference. In other words, one should take care to evaluate the demands of the present circumstances and decide on that basis which moral reason is weightier.[193] I think Carl Wellman puts the point well when he states, "one does not judge the morality of an action by subsuming it under principles, but by weighing the facts of the particular case."[194] This is not to say that the agent's past decisions, and the practical knowledge gleaned from those decisions, should play absolutely no role in allowing her to come to a better moral decision on some current quandary. The point here is simply that she should be weary of putting too much emphasis when making that current decision on the way she has reasoned in the past. Indeed, the present circumstances, being always new and different, should play just as large a role in that decision.

4.1.2: Justifying Conditions for Political Disobedience

In chapter 1 (1.4) we introduced a rough outline of the various forms political disobedience could take. We divided these forms into four different categories of action, all of which were classified by the particular characteristics belonging to each act, and/or the motivation of the agent for performing the act. We explained that an act of conscientious refusal is when an agent refuses to comply with a state prescribed mandate (e.g., to pay his taxes) on the basis of some set of moral reasons. Civil disobedience, on the other hand, was described as an illegal act undertaken by an agent who intends through that act to effect change to an existing law or policy. Militant action (or radical protest) is much like civil disobedience, but is distinguished on the basis that: a.) it is a more intense form of action; b.) its aim is to effect change on a wider range of state policies; and/or, c.) it may be violent. Finally, revolutionary activity is a form of disobedience undertaken by agents whose aim it is to upset either the entire constitutional form of government, or the regime that is currently in power. Now, the fact that our investigation is limited to the role our right to dissent plays within the context of a liberal democracy, certain forms of political disobedience may *ab initio* be left out of that investigation. It is, for instance, not important for us to evaluate the justifiability conditions which support revolutionary activity. Since the aim of revolutionary activity, if it is to be justified at all, is to bring a political regime closer into line with certain values promoted by liberal democratic states, it is not a form of political disobedience that can be justified in existing liberal democratic states (unless, of course, the existing liberal democratic state is one in name only). This then leaves us with three forms of political disobedience to examine: conscientious refusal, civil disobedience, and militant action. I will consider each in turn.

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[193] This is an indirect critique of the idea that casuistry (i.e., a type of moral reasoning used to resolve conflicts by extracting principles from prior cases and applying them to present cases) can be a universally applicable method for moral reasoning. On this score, c.f., Kagan, 1988. 'The Additive Fallacy' in *Ethics*, vol.90; and, Beauchamp, 1979. 'A Reply to Rachels on Active and Passive Euthanasia' in *Medical Responsibility* (Robison and Prichard, eds.). Clifton: Humana Press. For more on the general idea of casuistry, c.f., Jonsen and Toulmin, 1988. *The Abuse of Casuistry: A History of Moral Reasoning*. Berkeley: University of California Press.

[194] Wellman, 1970. 'Reasons for Breaking the Law' in *Journal of Value Inquiry*, vol.4, p.265.

A. Conscientious Refusal

In what is perhaps the standard account of the justifiability conditions in support of certain forms of political disobedience within a liberal democracy, John Rawls in *A Theory of Justice* narrows his investigation to conscientious refusal and civil disobedience alone. His reason for doing so seems to be the following. Rawls' understanding of militant action is that it be distinguished on the basis of the breadth of state policies those who partake in such an action aim to address (i.e., classification (b) above). As Rawls argues, the militant believes the basic structure of his political society, "to be so unjust or else to depart so widely from its own professed ideals that one must try to prepare the way for radical and even revolutionary change."[195] On this basis then, and just as we saw above concerning revolutionary activity, Rawls takes it that such actions cannot be justified in a reasonably just society. Now, as I argued in the section which first introduced the idea of militant action, my hesitation with defining it in the way Rawls does is that understanding it on this basis fails to delineate a clear space between acts of civil disobedience and revolutionary activity. This is expressed most evidently by the vagueness surrounding Rawls' notion that militant action may be understood as a 'clearing the way for revolutionary activity'. It was for this reason that I opted instead to (primarily) define militant action more precisely by the presence of *violence*. By doing so, a clear space may be drawn between acts of civil disobedience and revolutionary actions such that, if an act is undertaken, not with the aim of fundamentally changing a constitutional situation or existing regime, but rather of changing only one or a few existing practices, but is of pressing enough weight to the actor that it justifies for him acting violently, then that act may be called 'militant'. Understood in this way, it is my claim that we may more clearly evaluate whether acting militantly in a particular situation is justifiable, even within a liberal democracy. But more on that later. Let us first of all briefly examine Rawls' justification for both acts of conscientious refusal and acts of civil disobedience.

For Rawls, political acts of conscientious refusal are justified for either of two reasons: a.) if the aim of the state-issued mandate is morally corrupt; or, b.) if the actions the mandate requires the agent to perform are likely to be defeated by significantly weighty moral reasons. Rawls uses the example of conscription to make his point salient. If the reason a state decides to go to war is to gain some kind of economic advantage, or to secure increased national power, then the aim of the war may be considered suspect, and the agent has justifiable reason to refuse to comply with the mandate requiring conscription. Similarly, if the agent determines with relative certainty that the acts she will be required to perform while participating in the war effort are in violation of more pressing moral requirements, it will be justifiable for her to conscientiously refuse to participate. Two points should be noted about Rawls' account of the justifiability of acts of conscientious refusal. First, it is by no means suggested by Rawls that refusing to comply with a state-issued mandate is justifiable on the basis of the agent's *belief* that the aim of the state-issued mandate is morally corrupt, or that it will likely lead her to perform actions she has weightier moral reason not to perform.[196] Instead, in a number of cases, it would be unjustifiable for the agent to engage in an act of conscientious refusal *even if she felt very*

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[195] Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press, p.323.

[196] For Rawls, the moral requirement to which the act mandated by the state must be in violation is termed 'a natural duty', giving the impression that the requirement is not specific to a person's own moral code (c.f., *ibid*, p.334).

strongly that she was right to do so. Consider, for example, a staunch libertarian who refuses to pay her taxes. In this case, it could well be that the agent authentically believes that, by forcing her to pay taxes, the state is acting beyond its powers, and that to comply with the state-issued mandate regarding taxation would therefore be a violation of a personally held moral conviction. But according to Rawls' analysis, the agent may still be said to be unjustified in conscientiously refusing in this case. She would if: a.) the aim of taxation is in fact not morally corrupt; and, b.) her compliance on the matter does not defeat any other natural moral duties she may have. Quite beside the point is whether she is morally convinced that taxation is tantamount to state-sanctioned theft. If the state-issued requirement does not in fact contradict any standing moral requirements of greater weight, then the agent cannot be said to be justified in her action.

Chaim Gans offers an analysis of the justification of acts of political disobedience that helps to flesh out the force of Rawls' argument here. In *Philosophical Anarchism and Political Disobedience* Gans takes a decidedly neutral stance on the moral quality of the law. For Gans, a society's political morality will depend, at least in part, on the values that society has come to adopt, all of which will of course be subject to the same kinds of stipulations that underlie all forms of sound moral reasoning.[197] His wider argument is that if one of the goals of a society's political morality is outright contravened by a law of that society, one can be said to be justified in disobeying that law.[198] Understood on the basis of this broader account then, it becomes clear that, for Rawls' conditions of justification to hold, it is not the case that one must adopt some strong objectivist conception of morality. All one must accept is that there are some objective moral standards (perhaps ones that attach only to the methods for moral reasoning) that make a particular reason for refusing to abide by a state-issued directive either morally acceptable, or morally suspect. In other words, Rawls' conditions for the justification of acts of conscientious refusal are perfectly compatible with positions of moral pluralism.[199]

Having said all of this, it of course remains true that, on both justificatory conditions outlined by Rawls, there remains a great deal of interpretive liberty left to the agent who chooses to engage in an act of conscientious refusal. One may legitimately ask: how certain must the agent be either of the intentions of her state, or that the acts she will be asked to perform will violate other free-standing moral requirements, to justify her engaging in an act of conscientious refusal? Here, and for the same kinds of reasons we explored in the section prior to this (4.1.1), we encounter a question that resists any kind of generalizable response. The only advice we may offer the agent in advance of her decision is to outline, as Rawls has done, the kinds of reasons

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[197] Ronald Dworkin gives a good account of these kinds of requirements in chapter 10 ('Liberty and Moralism') of Dworkin, 1977. *Taking Rights Seriously*. London: Gerald Duckworth & Co. Ltd. His argument is that for a moral position to be counted as genuine, it must satisfy the basic ground rules of moral reasoning. These include: a.) that the position be based on reasons; b.) that the reasons advanced are not based on prejudice, characteristics an individual cannot help having, or an emotional reaction; c.) that the position not rely on facts that do not meet the minimal standards of evidence and argument; d.) that the position not appeal to the fallacy of *argumentum ad populum*; and, e.) that the reasons advanced be grounded in some moral principle or theory.

[198] C.f., Gans, 1992. *Philosophical Anarchism and Political Disobedience*. Cambridge: Cambridge University Press, pp.138-146.

[199] Moral pluralism holds that different sets of individuals may justifiably come to different conclusions on the how moral values should be weighted. For more on moral pluralism, c.f., Kekes, 1993. *The Morality of Pluralism*. Princeton: Princeton University Press; Stocker, 1990. *Plural and Conflicting Values*. Oxford: Clarendon Press; and, Williams, 1985. *Ethics and the Limits of Philosophy*. Cambridge, MA: Harvard University Press.

that will justify acts of conscientious refusal, rather than pinpointing exact cases in which those reasons will hold. In fact, the point may be put more strongly than this. If we take seriously Chaim Gans' suggestion that particular societies may be governed by different principles of political morality--even societies of the same type (e.g., liberal democracies)--then it is *in theory* impossible to nail down concrete cases in which particular acts of conscientious refusal will be justified. These evaluations will become a matter of the agent demonstrating a nuanced and sensitive awareness of her responsibilities as a moral reasoner before the act is undertaken, as well as a reflective and conscientious appreciation of the consequences of her act after it has been committed. These are quite simply the limitations that accompany any difficult moral decision. It is therefore also what we should expect from them.

B. *Civil Disobedience*

Turning now to civil disobedience, we get a much more refined list of justificatory conditions than what was offered for acts of conscientious refusal. Already in his definition of civil disobedience, we get a sense of the kinds of conditions Rawls will propose. Recall that for Rawls, civil disobedience is, "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[200] Right off the bat, we can assume that, if an act of civil disobedience is to be justified, it must at the very least fit this definition. In other words, the act must be: a.) public; b.) non-violent; c.) conscientious; and, d.) politically motivated. However, these descriptive conditions for civil disobedience cannot themselves be interpreted as justifying conditions since, even if every one of them were present, some act of civil disobedience might still go unjustified. On no condition is this divide so apparent as it is with 'conscientiousness'. That an act is done conscientiously does not mean that the act is done justifiably. Indeed, as the example of the libertarian above should have made clear, that one conscientiously comes to some decision does not then mean that, on that basis alone, it is a morally justifiable decision. It is possible, and maybe even typical, that some of what we believe to be our most conscientious decisions are the result of biased, and therefore unreliable, moral reasoning. With this in mind, Rawls mentions four[201] explicit conditions that must be present for an act of civil disobedience to be considered justifiable. The act must: a.) be limited to instances of substantial and clear injustice; b.) be used only as a last resort; c.) not cross a certain threshold that will upset the efficacy of the just constitution; and, d.) be rationally framed to advance one's aims.

Now, before we examine each of the justificatory conditions Rawls proposes in more detail, it would do us well to outline what Rawls takes the general objective of acts of civil disobedience to be. That objective is essentially this: engaging in an act of civil disobedience is a way to communicate a message that, for all the white noise and moving images typical of modern liberal democratic states, might otherwise get lost. Even near perfect states cannot predict or account for all the ground-level issues that might arise for particular factions of society. Moreover, the nearer to perfect a state becomes, it stands to reason that it will, by nature, aim to maintain the status quo. Engaging in an act of civil disobedience is a way the normal

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[200] Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press, p.320.

[201] In fact, Rawls only explicitly lists three, but his analysis confirms presence of a fourth (c.f., *ibid*, pp.331-335).

citizen can communicate a message to her compatriots concerning some injustice that has simply gone unnoticed by the wider public, or unremedied by officials of the state.[202] This is what Rawls primarily understands the purpose of civil disobedience to be. It is not to be understood as something society must tolerate (e.g., on the basis of its commitment to individual autonomy), but instead as a device that can be used to improve society. In Rawls' own language then, "[civil disobedience] serves to inhibit departures from justice and to correct them when they occur."[203] In this way, Rawls gives us a fundamentally instrumentalist account of the justification of acts of civil disobedience. And yet, it would be incorrect to read it exhaustively in this way. Here is why. In chapter 9 of *Conflicts of Law and Morality*, Kent Greenawalt suggests a distinction be drawn between what he calls 'positive deontological duties' and 'negative deontological duties'.[204] The former are duties done with respect to the promotion of a future state of moral value (e.g., justice) while the latter are duties to act on the basis of the moral value itself. Now, although it may not be said that Rawls promotes a negative deontological argument for how acts of civil disobedience are justified, he does appear to allow space for positive deontological considerations. For Rawls, acts of civil disobedience are justified on the basis that their aim is to bring about a more just state of affairs than what exists at present. Nothing in Rawls' treatment however suggests that such acts are justified *only if* they bring about this improved state of affairs. Instead, an argument can be made that the instrumentalist character of the Rawlsian paradigm functions merely as a backdrop that can help the agent to better understand the kinds of reasons or motivations that will serve to justify his act of civil disobedience. In other words, for Rawls, it isn't the actual consequences that justify some act of civil disobedience, but *an awareness by the agent of those consequences*. To interpret Rawls in this way is to recognize that both agent-relative and agent-neutral considerations play a role in a justificatory analysis of acts of political disobedience. And, and as I have been arguing throughout the chapter, it would appear that this position is defensible. Here is why. Concerning the issue of justification, a distinction can be drawn between: a.) whether some act is justified; and, b.) whether the agent is justified in performing some act. This is so because, as it is presumably the case that agents can never become fully aware of all the pertinent moral facts regarding a particular action, there must surely be some threshold whereby an agent can be said to be justified in performing some act without the act itself being justifiable. Indeed, if an agent did everything in his power to come to the right decision, but failed in execution, there is a good argument to say that the agent would still be justified in acting as he did. Conversely, and perhaps more paradigmatically, just because an agent happens to get to the right moral outcome does not mean that he was justified in acting as he did. To wit, he would be unjustified if that moral outcome came about merely by chance. Such arguments seem to push back against the suggestion I have been advancing that acts of disobedience cannot be justified on the basis of the moral attitude of the agent alone. If it is the case that the justifiability of acts should be differently assessed than the justifiability of the agent's performing those acts, then it seems to follow that an agent may be justified in

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[202] This is also the tack taken on civil disobedience by Daniel Markovits in Markovits, 2005. 'Democratic Disobedience' in *Yale Law Journal*, vol.114.

[203] Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press, p.336.

[204] C.f., chapter 9 of Greenawalt, 1987. *Conflicts of Law and Morality*. Oxford: Oxford University Press.

performing some act regardless of whether or not the act itself was justified. And this would imply further that the agent's attitude *is* the relevant moral consideration when assessing whether he was justified in performing some action. Of course, I resist this line of thinking. As it strikes me, the salient distinction in question when discussing the justifiability of an agent performing some act is not one between: a.) the act; and, b.) the agent performing the act; but rather, is one between: a.) the act; and, b.) the *motivation* of the agent *for* performing the act. This is a crucial difference. Assessing the justifiability of the agent's performing the act implicates the act itself in a way that assessing the justifiability of the agent's motivation for performing the act does not. In the former case, what we are interested in is whether or not the agent was justified in undertaking some act; in the latter case, our interest is merely to discover whether or not the agent was justified in having the motivations he had that led him to perform some act. This means that assessments of the latter kind may be undertaken proscriptively, and thus outside the context of the act actually taking place. Assessments of the former kind do not enjoy this same distance.

Now, for some authors, one of the upshots of this distinction is that it becomes possible to account for the justifiability of the agent's decision to disobey purely on the basis of his moral attitude. In particular, this becomes possible when the object of one's assessment narrows exclusively on the agent's *motivations* for acting in some disobedient way.[205] Here, we can judge whether those motivations were justifiable or not without even considering the act. But as I have been arguing, whether the agent had the right motivations for performing some act is not indicative of whether or not he was justified in *performing* the act. This wider justificatory analysis must include an assessment of the act itself. Of course, it should go without saying that since it will always be an agent who performs some act of disobedience, his motivations for performing the act will also be a relevant feature of any justificatory analysis. But this only confirms that such analyses should include *both* an assessment of the reasons the agent took himself to have for performing the act (viz., his motivations) as well as the moral reasons that support his performing the act (viz., the moral facts that pertain to the case). It is for this reason that Rawls counts the conscientiousness of the agent as a *necessary* condition pertaining to the justifiability of his decision to disobey--and on this score, I am in full agreement with him. But I have also cautioned against placing too much emphasis on this one aspect alone. Although any justificatory analysis of acts of political disobedience must take account of the agent's motivations for performing those acts, this will not itself be *sufficient* to justify the act. In

[205] A number of authors have taken this approach to justification. For example, c.f., Thoreau, who writes, "the only obligation which [a person has]...is to do at any time what [they] think is right" (Thoreau, 1849. *Resistance to Civil Government*. Prescott, Az: Warfield Press, p.19). Also, c.f., part I of Wolff, 1970. *In Defense of Anarchism*. Berkeley: University of California Press; and, Godwin, 1976. *Enquiry Concerning Political Justice* (Kramnick, ed.). Harmondsworth: Penguin Press. Even Michael Walzer, in a roundabout way, seems to accept this approach. He writes, "[i]f disobedience depended upon a conscience really private, it might always be justified..." (Walzer, 1970. *Obligations: Essays on Disobedience, War, and Citizenship*. Cambridge, MA: Harvard University Press, p.22).

addition to this, reasons that exist independently of those the agent takes himself to have should also play a role.[206]

Let us now return to Rawls' conditions for the justification of acts of civil disobedience to see if we can't make some headway on the matter. Although there is good reason to accept Rawls' conditions at some level, it would be rash to take them on board without first explaining how they must be qualified. The Rawlsian approach to political acts of disobedience is quite flat. In particular, Rawls does a poor job accounting for the varying weights that may be attached to specific duties to obey. He does not, for example, discuss the fact that one's moral duty to pay his taxes will be different in weight than his moral duty to avoid jaywalking, and therefore seems to gloss over the fact that the justification for each act will also be different in weight. Due either to Rawls' personal take on political obligation,[207] or simply because he was only interested in offering a very general account of the justifying conditions for acts of civil disobedience, it is possible to read Rawls as putting forward a 'one size fits all' account of those justifying conditions--something that is clearly at odds with the weighted approach I have been arguing for. But as suggested above, this is not the way I interpret Rawls. Rather than reading Rawls' list of conditions as those sufficient to justify some act of disobedience, it is my proposal that we instead read them as heuristic reminders an agent may use to ensure he comes to a better moral decision in any particular case of disobedience. Applying this alternative reading is not only germane to the way I have been arguing we should approach the issue of justification generally, but carries the benefit of allowing us to side-step much of the criticism that is typically directed at Rawls' 'overly narrow' justificatory analysis.[208]

Recall that Rawls' first condition states that acts of civil disobedience should be limited to instances of clear and substantial injustice. In particular, what Rawls proposes is that acts of civil disobedience be restricted to, "serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity."[209] Notice a symmetry here between the reasons Rawls offers for why citizens have a duty to obey the law and the instances in which they are justified in disobeying. To wit, they may disobey precisely when the law does not uphold for them the reasons they would have to obey (i.e., the just institution does not extend to them, and/or they are not being treated fairly under the current structure of the state). Of note is that this mirrors the

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[206] Note that this analysis is in line with the plausible intuition that although an agent's motivations for engaging in some act should certainly be counted as a *mitigating* consideration for how she should punitively be treated by others, it is seldom enough to disqualify any punitive treatment whatsoever of a wrongful act. For more on the issue of punishing acts of political disobedience, c.f., chapter 8 of Brownlee, 2012. *Conscience and Conviction: The Case for Civil Disobedience*. Oxford: Oxford University Press; chapter 4 of Cohen, 1971. *Civil Disobedience: Conscience, Tactics, and the Law*. New York: Columbia University Press; 1985, Buttle. 'Civil Disobedience and Punishment' in *Political Studies*, vol.33; and, Woozley, 1976. 'Civil Disobedience and Punishment' in *Ethics*, vol.86.

[207] Rawls contends that citizens have a *general* duty to obey the law on the basis of their natural duty to support just institutions (as well as in some cases their obligation of fair play). C.f., paragraphs 51 and 52 of Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press.

[208] Kimberley Brownlee notes that, "[a] general challenge to Rawls' conception of civil disobedience is that it is overly narrow, and as such it predetermines the conclusion that most acts of civil disobedience are morally justifiable." (Brownlee, 2013. 'Civil Disobedience' in *The Stanford Encyclopedia of Philosophy* (Zalta, ed.), <http://plato.stanford.edu/archives/win2013/entries/civil-disobedience/>.

[209] Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press, p.326.

approach other thinkers have used to justify acts of civil disobedience.[210] Concerning the wider theme of our own analysis however, what this condition helps to ensure is that, in times when there is a particularly weighty reason in support of obedience (e.g., when the agent's act will almost certainly threaten the integrity of an existing justice-promoting institution) the agent be restricted in too quickly acting on what he only believes to be the justificatory reasons that favor his choice to disobey without first attempting to assess the relevant facts that pertain to the case. Limiting the justifiability of acts of civil disobedience to clear and substantial cases of injustice would seem to entail that the moral facts that support one's disobedient action are, at least to a degree, likewise clear and substantial. Of course, with respect to some relatively light duties to obey, this condition need not apply. However, in cases where the stakes are relatively high, Rawls' first condition goes a long way toward ensuring that the process of practical moral reasoning undertaken by the agent is reliable.

The second condition Rawls proposes is that one engage in acts of civil disobedience only as a last resort. Again, this seems to be an excessive condition if its aim is to apply to all acts of civil disobedience. For instance, smoking a marijuana cigarette on Parliament Hill in protest of marijuana legislation need not be a 'last resort' consideration by the Canadian citizen engaging in the act. This is due, of course, to the relatively weak moral duty one has to obey any legislation that restricts the smoking of marijuana.[211] However, and for reasons comparable to the first condition, when the agent has a relatively strong duty to obey the law, acting disobediently only as a last resort will help to ensure one is justified in doing so. Kimberley Brownlee takes a similar line to the one I am arguing here when she writes that, "a commonsense notion of [last resort] is appropriate to set the bar for dialogic effort very high in cases where persons are tempted to resort to radical means of communication."[212] Now importantly, last resort does not mean that all legal avenues for remedying some injustice have been exhausted. As Rawls is keen to note, "further normal appeals can be repeated; free speech is always possible."[213] However, what last resort does indicate is that the agent has made a sincere attempt to have the injustice addressed through the legal mechanisms available. Of course, this kind of argument relies on the very same reasoning we introduced when discussing the democratic principle in both chapters 2 (2.3.3) and 3 (3.2.4), and is therefore on the basis of our own analysis, sound.

Third, Rawls argues that acts of civil disobedience must not cross a certain threshold that will upset the efficacy of the just constitution. The threshold Rawls refers to here is the same one discussed nearing the end of chapter 3 when we suggested that a duty to obey the law could be established on the basis of a natural duty each of us has to support just institutions. There, we already put forward that, under normal conditions, justice-promoting institutions could put up with quite a bit of disobedience before their integrity could reasonably be thought to be

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[210] C.f., e.g., chapter 8 of Dworkin, 1977. *Taking Rights Seriously*. London: Gerald Duckworth & Co. Ltd.

[211] I am not even sure there is a duty to obey such legislation. An argument could be made that a particularly weak duty develops on the basis of considerations of fairness with respect to the adverse effects smoking a marijuana cigarette in public will have on others (e.g., they do not enjoy the smell), but more likely this situation is more in line with merely having a moral reason to abide by a piece of legislation that was decided democratically.

[212] Brownlee, 2012. *Conscience and Conviction: The Case for Civil Disobedience*. Oxford: Oxford University Press, p.45.

[213] Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press, pp.327-328.

threatened. And here, Rawls is essentially referring to the same thing. But whereas our analysis in chapter 3 was for the most part vertical (the relation discussed in that chapter was between the act and the institution), Rawls' argument here is horizontal. What this condition helps to remind the agent is that his act of disobedience does not happen in a vacuum. It is not as if the only thing the agent must consider when assessing whether his act will cause undue harm to an existing justice-promoting institution is the effect the act *in isolation* will have on the institution. Rather, his act must be assessed in the broader field of the actions of all members of society. In this way, it could very well be possible that an act that would, if undertaken singly, have absolutely no adverse effect on some justice-promoting institution would, if taken in the context of all other societal action at the time, have some adverse effect. As Rawls reminds us, "[i]t is conceivable...that there should be many groups with an equally sound case for being civilly disobedient; but that, if they were all to act in this way, serious disorder would follow which might well undermine the efficacy of the just constitution."[214] Rawls' third condition highlights for the agent the need to evaluate his decision to disobey in the context of its overall, rather than its discrete, effect.

Finally, a condition that Rawls does not explicitly demarcate, but that can be gleaned from his account, is that for an act of civil disobedience to be justifiable, it must be rationally framed to achieve one's ends. This of course entails that the act has these ends, and that the agent can articulate (at least to some extent) what they are, but also that the means he sets out to achieve them are rational. In many ways, this final condition is a summary of all the other three, as well as inclusive of the descriptive conditions Rawls proposes for civil disobedience. Here, we see Rawls lean heavily on forward-looking considerations in favor of justifying disobedience. To wit, if one's act is perfectly legitimate from a deontological perspective, but has very little chance at succeeding with respect to the instrumental ends he has articulated (either because the ends themselves are unrealistic, or because the means proposed to achieve those ends are irrational), that act may be, at least in some respect, unjustified. This argument highlights the fact that justification need not be applied in a universal manner to acts. For example, not only is it possible, but I suspect quite common, for an act of disobedience to be justified from the perspective of some deontological value, but not from the perspective of some instrumental consideration (and vice versa).[215] There is, of course, no specific way to determine which consideration should be privileged in any given instance--this will all depend on what moral theory one accepts. However, what this final condition will remind the agent is that justifiability in one aspect of some decision does not indicate full justifiability, and that therefore she must

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[214] *Ibid*, p.328.

[215] This tension can clearly be seen in the case of the 1981 'Maze Hunger Strikes' where a number of Irish prisoners, initially in protest of the British governments decision to withdraw Special Category Status for convicted paramilitary prisoners, but increasingly as an act of dissent against British treatment of Irish war criminals, decided to wage a hunger strike. Although then Prime Minister, Margaret Thatcher, made it very clear that the protest would not lead to any of the instrumental objectives the prisoners had set out (e.g., she stated, "[w]e are not prepared to consider special category status for certain groups of people serving sentences for crime. Crime is crime is crime, it is not political"), there are some who convincingly argue that the protest was justifiable on the basis that it affirmed the basic human worth of the prisoners. For more on the event, c.f., Beresford, 1987. *Ten Men Dead: The Story of the 1981 Irish Hunger Strike*. New York: Atlantic Monthly Press.

take care to understand as many elements and implications of her act as possible before engaging in the difficult process of weighing her moral reasons for and against disobeying.

C. Militant Activity

The foregoing analysis of the justification of both acts of conscientious refusal and acts of civil disobedience allow me to explain why I do not take militant activities, generally speaking, to be justified in a liberal democracy. In chapter 1 (1.4.2) I put forward three different ways we could distinguish between acts of civil disobedience and stronger forms of protest (such as militant activity), which would increasingly allow for a more focused analysis. These were: a.) general intensity; b.) intensity-in-relation-to-scope; and, c.) violence. I opted to use violence as the defining characteristic between these two kinds of disobedient acts, as this would allow for the clearest analysis of each. The implication was that if violence could sometimes be shown to be justifiable, the next move shouldn't then be to try to fit it into the definition of civil disobedience, but rather would merely show that, under certain conditions, militant action could be justified. I stand by this conclusion. I think it is fair to say that, unless one subscribes to a strong pacifist position, there are certain situations that would justify the use of violence. The clearest example is self-defense; but it is certainly not the only one.[216] Be that as it may, since what we are interested in here are not the various situations in which militant activity would be justified, but a general assessment of the justifiability of this particular type of politically disobedient action within the context of a liberal democracy, we cannot simply impute the fact that some situations call for justified violence to mean that militant action is then generally justified in this particular context. In fact, my argument will deny this.

We must first of all get clear on what I mean by 'violence'. I take violence to be the physical force used by an individual with the intention to hurt, damage, or kill someone or something. This points to what Hannah Arendt called, 'the instrumental character' of violence. What she meant by this is that violence, especially in the modern world, will be characterized by the use of implements--implements which, "are designed and used for the purpose of multiplying natural strength until, at the last stage of their development, they can substitute for it."[217] Violence is therefore by its very nature coercive; it relies on the corruptive quality of both our bodies and our property to influence those to whom violence is being done to some course of action. For this reason, Arendt claims that violence and power are polar opposites. Indeed, "where the one rules absolutely, the other is absent."[218] Since power for Arendt signals the quality of a group acting in concert, violence is used precisely when this quality is diminished. In other words, it is used when solitary individuals cannot organically bring others into line with their intended aim, and thus must turn to artificial implements to coercively force those others to do so. In the context of a liberal democracy, and based on the reasoning offered to this point, I take the use of violence, and hence a resort to militant action, to be, as a general matter,

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[216] Howard Zinn gives a good argument for when violence can be said to be justified in Zinn, 1968. *Disobedience and Democracy: Nice Fallacies on Law and Order*. New York: Vintage Books. C.f., also, Morreall, 1976. 'The Justifiability of Violent Civil Disobedience' in *Canadian Journal of Philosophy*, vol.6; and, Gert, 1969. 'Justifying Violence' in *The Journal of Philosophy*, vol.66.

[217] Arendt, 1970. *On Violence*. New York: Harcourt, Inc., p.46.

[218] *Ibid*, p.56.

unjustifiable. I do because the values that are promoted by a liberal democracy allow agents means other than violence to convince their compatriots of the worth of some idea. These means include of course the normal political processes indicative of a democratic form of governance, but also the ability to participate in ways that, as was clearly outlined in chapter 2, are covered by the citizen's right to dissent. In essence, the only argument that the militant actor has left to justify her violent action is to claim that society is ignoring her to such an extent, and that the cause for which she is fighting is of such dire importance, that it necessitates violently coercive measures. But we have already come across the notorious problem that surrounds this kind of reasoning, both in this section and the last: to wit, it is both unclear how certain she can ever be in the 'rightness' of her cause, and whether less radical forms of protest--even of the illegal type--will have no practical effect. Now, to be sure, there may turn out to be instances in a liberal democracy in which the use of violence can be said to have been justified *ex post* (e.g., some of the property destruction that occurred in the Women's Suffragette Movement in the early 20th century); but this will almost always be contingent on a number of details obtaining--details that no one could have predicted in advance, and that therefore could have been otherwise. Thus, militancy is not the kind of action that allows for *prospective* justification (which, I take it, is what any philosophical analysis of the justifying conditions for some activity is about). For these reasons then, I do not take militant activity to be, generally-speaking, justifiable in the context of a liberal democracy.[219]

This marks the end of our analysis of the justification of various forms of political disobedience. The general lesson to be taken away from our analysis is that there is no proscriptive measure available that will allow us to determine when particular acts of political disobedience will be justified and when they will not be. Justification is a matter of practical moral reasoning; and because it is, it stands to reason that the better one exercises her faculty of practical reasoning, the better her chances will be that her acts are justifiable. In particular, the justification of political disobedience is a matter of determining when the moral reasons that favor disobeying some state-issued directive outweigh the moral reasons that favor obedience. Such a determination therefore depends in large part on a correct assessment of the strength of our duties to obey. Chapter 3 laid out in rough detail the general sources of these duties, but failed to give specific guidance on the strength of the duties in any particular case. As Joel Feinberg tells us, perhaps such specific instructions are beyond what we can expect from the moral philosopher.[220] But even the rough guidelines outlined above help us to get clearer on the kinds of considerations that must be taken into account when engaging in moral reasoning. At the very least, the analysis I have offered has hopefully made clear how important it is for the agent to exercise her moral reasoning in the first place, and to recognize the epistemic limitations that go along with that moral reasoning and the full panoply of considerations that should be brought to bear in determining how best the agent should act when faced with what she believes to be an

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[219] I say 'generally-speaking' since not all liberal democracies live up to their professed name. As a general rule then, the closer a society comes to embodying the values typical of a liberal democracy, the less justifiable will be the use of violence in opposing some state-held position. This is not to say that it is always--or even 'ever'--justifiable for citizens to use violence in non-liberal democratic regimes; only that it will not be unjustifiable for the same kinds of reasons expressed here.

[220] Feinberg, 1979. 'Civil Disobedience in the Modern World' in *Humanities in Society*, vol.2, p.131.

unjust law. In the next section, we turn our attention to the justification of acts of legal dissent. Ostensibly, this seems like a strange undertaking, since we have already in chapter 2 given a normative appraisal of what ought to constitute the citizen's legal right to dissent in the context of a liberal democracy. However, as our analysis in that chapter was limited to a general examination of the kinds of activities making up that right, we have not yet had an opportunity to address when those activities, despite being protected by a legal right, may go unjustified. This is what I propose to tackle in the next section. In particular, the question I will address is this: under what conditions can the citizen be said to be unjustified in acting on her legal right to dissent?

4.2: The Justifiability of Acting on the Right to Political Dissent

Let us quickly recall what we argued the citizen's right to dissent ought to include in the context of a liberal democracy. That right should include: a.) a *negative claim* over others not to interfere with: i.) the agent's choice of expression; ii.) her choice of association or assembly; iii.) her choice to vote and/or run for elected office; and, iv.) her choice to engage in the various due process protections that may be performed by the right-holder herself; b.) a *positive claim* over the state that: i.) certain spaces be designated as 'public'; ii.) provisions be offered such that elections be held at regular and timely intervals; iii.) voting be made relatively accessible to the right-holder; and, iv.) the mechanisms of due process (e.g., the court system) run continuously and efficiently; c.) a *liberty* enjoyed by the right-holder to perform all those activities on which she also enjoys a negative claim of non-interference; d.) a *power* to modify the relation to both her expression and association rights; and, e.) an *immunity* on all rights constitutive of her right to dissent. Taken together, this offers a sufficient accounting of what the citizen of a liberal democracy ought legally to be entitled to claim as her right of dissent. Of course, as was explained in a few different places in chapter 2, the objective of my analysis there was to examine the citizen's right to dissent in only an abstract and general way--I did not profess to engage the question of when the citizen was morally justified in acting on that legal right. This is the question I will address in the final section of the dissertation.

The section will unfold in the following manner. I will first lay the groundwork (in 4.2.1) for the issue of the justifiability of acts of legal dissent by demonstrating why it is an issue at all. It is my suspicion that some are unreflectively of the belief that having a right to engage in some activity is synonymous with being justified in engaging in that activity. As I will argue, to hold such a belief would be incorrect. In the first part of the section, I will explain the importance of keeping the question of rights and justifiability separate, which will allow me to further articulate why engaging in an act that ought to be protected by the agent's right to dissent may also be an act that is unjustifiable. Having established this much, I will then explain (in 4.2.2) that the framework for the justification of acts of legal dissent is precisely equivalent to the one we employed when discussing acts of political disobedience. Specifically, when the moral reasons in favor of the agent not acting on his legal right to dissent outweigh his moral reasons for engaging in the act, his decision to dissent may be said to be unjustified. Furthermore, because the justificatory framework is the same with respect to both kinds of dissenting acts, the very same considerations we discussed that can assist the agent in coming to more felicitous moral decisions in cases of political disobedience will be equally helpful in cases of legal dissent (this is the subject of 4.2.3). More strongly, I will argue (in 4.2.4) that the same considerations that are

relevant to whether the agent's act of political disobedience is justified will be equally applicable to an evaluation of whether or not the agent is justified in acting on his legal right dissent.

4.2.1: Rights, Justification, and Toleration

Having a right to ϕ does not equate to being morally justified in ϕ-ing. This is the case even when what is at issue is the moral right to ϕ. Authors have typically explained the idea of moral rights on the basis of the agent's 'right to do wrong', by which they mean to suggest that, "one needs no right to be entitled to do the right thing. That it is right gives one all the title one needs. But one needs a right to be entitled to do that which one should not."[221] As Joseph Raz explains in this passage, the idea of a moral right only makes sense if we think of it as a protection on the agent's performing morally wrong acts. In other words, the whole notion of a moral right assumes that, considered from the perspective of the act, the agent is *unjustified* in engaging in those acts that ought to be protected by her moral right. But this does not imply that assigning such rights is either unimportant or morally problematic. As we have seen, a crucial aim of assigning rights to individuals is to protect their autonomy,[222] which means that rights serve a valuable moral purpose even if they allow the agent to act in a morally unjustifiable manner. Now, although I am not altogether convinced that the idea of a 'right to do wrong' is the correct way to understand moral rights,[223] the idea nevertheless serves to show why, when turning to the notion of a legal right, there isn't even a prima facie argument to be made that one is morally justified when performing an act that is protected by her right to perform it.

In chapter 2 we explained that the function of a right to dissent was two-fold: first, the right aims to protect the right-holder's capacity to make autonomous choices (i.e., by giving the agent a discretionary choice in matters of dissent); second, it helps to protect the right-holder's interest in participating in decisions that may come to affect her. To satisfy these two functions, it is unimportant from the perspective of the right whether the actions that are to be protected are morally justified or not. Indeed, as Raz's notion of a 'right to do wrong' teaches us, the function of protecting the autonomy of the right-holder is satisfied not only despite, but in some senses because, the action of the right-holder is unjustified. Think, for example, of the constitutive element of the right to dissent that protects the agent in freely expressing herself. Clearly the right will protect the agent in expressing morally acceptable, and even morally benign, ideas. More importantly however, this right will also protect the agent (at least to an extent) in expressing any morally objectionable ideas she may have. Calling someone a derogatory name, or claiming that some heinous historical event was a fabrication, are surely morally unjustifiable acts *qua acts*, but they do not then imply that one should not have the right to express them. As

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[221] Raz, 2009. *The Authority of Law* (2nd edition). Oxford: Oxford University Press, p.266.

[222] Raz writes: "...the purpose and justification of rights of action...is to develop and protect the autonomy of the agent." (*Ibid*).

[223] Whereas for Raz, moral rights "entitle [the agent] to choose for himself rightly or wrongly. But [it] cannot do that unless [it] allows him to choose wrongly" (Raz, 2009. *The Authority of Law* (2nd edition). Oxford: Oxford University Press, pp.266-267), as I understand moral rights, it is not that they allow the agent to 'choose wrongly' per se, but rather to be protected in a choice that may be morally disagreeable to others. This is an important distinction, and one that is grossly underdeveloped in the literature. For more on the idea of 'the right to do wrong', c.f., Waldron, 1981. 'A Right to Do Wrong' in *Ethics*, vol.92.

Evelyn Beatrice Hall famously attributed to Voltaire in her biography of the French thinker: "I [may] disapprove of what you say, but I will defend to the death your right to say it."[224]

The issue we are alluding to here is that of toleration. More directly, we are alluding to an argument in support of society being tolerant of the objectionable behavior of individuals in order to promote other important values.[225] Such an argument is common among political philosophers--especially those writing within the liberal tradition[226]--as it gets right to the heart of how a society should address the empirical fact that different members of society come to different moral conclusions on matters. Of course, in relation to the citizen's right to dissent, the argument seems to be especially apt. Since dissent is, by definition, an act that challenges a position that is at least partially accepted by the members of a group to which one belongs, it begs the question of how far the group should tolerate such antagonistic behavior. In this particular context then, the question of toleration seems to be one of *limits*. In other words, it appears to ask: when is society justified in limiting the citizen's right to dissent? Now, although on the surface this question appears to be precisely the one we should be addressing, it turns out that our question is something else entirely. Here is why. As I have described the right to dissent, it is best understood as a cluster of other rights, all of which have certain elemental features that help to bring about the function of the overarching right. This means that each of the constituent rights of the cluster 'the right to dissent' are overdeterminate of the particular role they play in that cluster. To put it another way: each constituent right has functions that extend beyond the role they play for the citizen's right to dissent. This is clearly evidenced by acknowledging how important it is for the agent to express himself, or to associate with persons of his choosing, beyond the particular manifestation these acts have as dissent (e.g., artistic or creative expression). What all of this implies then is that, since we have argued that a right to dissent *just is* the various rights constitutive of it, to draw a limit on that right would be to argue for limits on each of the constituent rights that make it up. But since the functions played by these various rights extend beyond the particular role they play within the right to dissent, to do so would likely lead us into territory well beyond our explicit interest. Suppose, for instance, we were to propose an argument in favor of limiting the agent's right to free expression on the basis of Mill's 'Harm Principle' (viz., "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"[227]). To be sure, such a limit may well touch on the agent's dissenting expression (e.g., if the harmful expression happens to be dissenting in nature), but nothing insists that it must. In fact, the point may be put even more strongly than this: limiting the agent's free expression should never be a matter of the *intent* of the expression, but rather should in all cases be a matter of its *practical effects*. This means that it would be completely unjustified for society to ever place a limit on

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[224] C.f., the chapter on 'Helvetius' in Tallentyre, 1906. *The Friends of Voltaire*. London: Smith Elder and Co.

[225] Whether these values are consequentialist in nature (e.g., society will fare better if it is tolerant) or deontological (e.g., autonomy considerations demands that society be tolerant) need not detain us.

[226] C.f., chapter 4 of Rawls, 1971. *A Theory of Justice*. Oxford: Oxford University Press; Newey, 1999. *Virtue, Reason and Toleration: The Place of Toleration in Ethical and Political Philosophy*. Edinburgh: Edinburgh University Press; Walzer, 1997. *On Toleration*. New Haven: Yale University Press; and, Heyd (ed.), 1996. *Toleration: An Elusive Virtue*. Princeton: Princeton University Press.

[227] Mill, 2002. *On Liberty*. Mineola: Dover Publications, Inc., p.8.

dissenting activities *qua their dissenting character*. There are of course good reasons to place substantive limits on each of the activities that are generally to be protected under the citizen's right to dissent (i.e., on her expression, association and assembly, and political participation),[228] but these limits will not derive from the intent of the agent who engages in such activities, but rather from the effects those activities will have in any given case. With this in mind, framing the conditions under which society can be said to be justified in limiting any of the rights constitutive of the citizen's right to dissent only tangentially touches on the issue of the justifiability of dissenting actions. It is for this reason that the central question of our investigation in this final section will not be 'when is society justified in limiting the citizen's right to dissent?' but rather 'when is the citizen unjustified in acting on her legal right to dissent?'. By narrowing our lens on this latter question, we will be able to much more directly defend our claim that, regardless of the reasons society has for protecting the agent in her dissenting actions, she has an equally pressing moral responsibility to reflect upon her decision to engage in such activity as she does when choosing, for political reasons, to disobey the laws of her society.

4.2.2: The Justificaory Framework for Acts of Legal Dissent

Recall from section 4.1 the approach that was taken to determine when an act of political disobedience was justified: politically disobedient acts are justified when the moral reasons that favor the agent engaging in the act outweigh the moral reasons that oppose it. It is my argument now that, to determine whether some act of legal dissent is justified, we must engage in the very same exercise of moral weighting. But what kinds of moral reasons can be said to weigh against the agent acting on her legal right to dissent? Well, we've already established that having a right to ϕ does not imply that one is justified in ϕ-ing--so we can be sure that such reasons exist in theory. The problem however is this: typically agents fail to acknowledge that they have any reason whatsoever not to engage in an act that is protected by their legal right to dissent; at the very least, they fail to acknowledge the extent to which these reasons apply. Indeed, it seems to be a widely accepted belief that the reasons that oppose acting on one's legal right to dissent are by nature far less ponderous than those that oppose acting in a politically disobedient manner. But as should by now be obvious, I resist this view, and attribute it to at least two common mistakes in judgment. The first is this: as there are certainly far more, and far weightier, prudential reasons that oppose acting disobediently than there are that oppose acting on one's legal right to dissent, it is only natural that the agent will more egregiously confuse these weights in the former case than she will in the latter.[229] This will of course result in the agent unjustifiably attributing greater weight to the moral reasons that exist against acting disobediently than to those that oppose acting on her legal right to dissent. Second, and more importantly, there is

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[228] For more on this topic, c.f., Miller, 2008. 'Justification and Rights Limitations' in *Expounding the Constitution: Essays in Constitutional Theory* (Huscroft, ed.). Cambridge: Cambridge University Press; Gardbaum, 2007. 'Limiting Constitutional Rights' in *UCLA Law Review*, vol.54; Hiebert, 1996. *Limiting Rights: The Dilemma of Judicial Review.* Montreal: McGill-Queens University Press.

[229] This is due, roughly speaking, to a phenomenon akin to what psychologists call 'confirmation bias'. For more on this phenomenon, c.f., parts 2, 3, and 4 of Kahneman, 2011.*Thinking, Fast and Slow*. Toronto: Doubleday Canada; and, Nickerson, 1998. 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' in *Review of General Psychology*, vol.2.

again a likelihood that the agent will simply mistake what it means to disobey at all when assessing her reasons for engaging in each act. Recall from chapter 3 (3.2) Hart's argument regarding 'the minimum content of the natural law'. As Hart explains, in virtue of certain physiological and psychological facts about human beings, it is only natural that the law and morality will aim to address similar kinds of action. For example, there will typically be both legal and moral codes against physically harming others (due to the vulnerable physiology of humans) as well as legal and moral codes against theft and dishonesty (due to the natural infirmity of our wills). That this is so suggests that activities done in contravention of the law will have a far greater natural propensity to being 'morally suspect' than activities that are not. But as has extensively been argued, acting in *contravention* of the law does not equate to *disobeying* the law. To disobey, the agent must fail to comply with the law on the basis of a content-independent reason. To suggest then that the agent has a moral reason to obey the law on the basis that the law directs her to the same activity that is covered by some independent moral standard is to misunderstand the nature of obedience. In such a case, one does not have moral reason to *obey* the law, but merely an added moral reason to *conform her action to what the law requires*. As it strikes me, this is a common mistake made by those who attribute greater natural weight to the reasons that oppose an agent acting in a politically disobedient manner to those that oppose an agent acting on her legal right to dissent. The wider argument I will present in this section will systematically push back against this mistake in reasoning. My claim will be that in both the case of one's dissenting action being legally protected by a right to perform the activity, as well as in the case in which it is not, the moral reasons for engaging in the act will in all important respects be identical.

My claim is less controversial than it may at first appear. Recall from our analysis in chapter 1 that dissent and disobedience share many common features. For instance, both are antagonistic responses that have intentional, normative characters. But they are distinctive insofar as: a.) disobedience is always a response to something required of the agent, while dissent need not be; and, b.) dissent is always directed at a position held by a group to which one belongs, whereas disobedience need not be. When applying our analysis to the political arena specifically, we saw that distinctive quality (b) is removed: whenever one disobeys politically, it is a position of the state she disobeys. Therefore, with respect to the political arena, the only difference between legal dissent and political disobedience is whether or not the act in question is in contravention of a state-issued directive. Furthermore, that this is the sole distinction between each kind of act implies that one would have to articulate a morally relevant feature pertaining to state-issued directives to further explain why the weight of reasons that oppose acts of political disobedience are *categorically* stronger than those that oppose acts that ought to be protected by the citizen's legal right to dissent. But as our chapter 3 analysis has shown, no such morally relevant feature pertains. To be sure, there are moral obligations that are generated from certain legal directives issued by the state, but their application depends on both the relation between the agent to whom the directive is issued and the directive-issuing source, as well as to the particular directive in question. In other words, it has nowhere been argued that the citizen has a moral duty to obey the law *strictly on the basis that it is the law*. What all of this means then is that the very same kinds of considerations that were disclosed in chapter 3 for when an agent can be said to

have reason to obey the law may theoretically be applied as reasons that oppose the agent acting on her legal right to dissent.

4.2.3: Theories of Obligation Applied to Acts of Legal Dissent

In chapter 3 we assessed a number of candidate theories, three of which were said to be able to generate a moral obligation in the agent to obey the law. The first theory we examined was one based on Raz's argument for practical authority. There, it was explained that the agent could be said to have a moral obligation to obey the law if by following the law's directives she would better conform with moral reasons that apply to her independently of that directive. Many regulatory matters would fall under this category of obligation (e.g., a regulation on how to dispose of dangerous substances), as well as some straightforward coordination activities (e.g., driving on the right side of the road as a way of discharging the independent moral duty of not putting others in harm). Of course, it is certainly the case that the law is the most salient form of authority to meet the criteria outlined by Raz's service conception; but importantly, it is not the only one. As Stephen Perry writes in his article 'Two Problems of Political Authority':

> Suppose that no governmental agency exists to regulate the transportation of dangerous substances, but that I have a friend who has exactly the same level of expertise that we have been attributing to the agency. My friend gives me advice about how to transport the substance that is identical in content to the directives or recommendations that we were supposing would have been issued by the governmental agency. So long as I have reason to know that I will do better in conforming with the background categorical reasons that apply to me by following my friend's advice than if I were to try to follow my own judgment, it is once again difficult to avoid the conclusion that the justificatory argument establishes that I have a moral obligation to follow my friend's advice.[230]

What Perry's story suggests is that, in the same way an agent may have a moral obligation to obey the law in cases when the law directs him to an activity he has independent moral reason to perform anyway, the agent may similarly acquire a moral obligation to obey the advice of a friend who directs him to the same result. In other words, nothing is special about the law in this respect save for the fact that: a.) it tends to claim authority, whereas friends generally do not; and, b.) by virtue of the position it occupies in relation to a mass of individuals, it tends to issue far more directives that cover a far wider basis than any other single directive-issuing source. Considered in the abstract, these differences may be meaningful; but concretely, they suggest that an obligation acquired through the law and one acquired through some other medium can in the important respects be the same. With respect to the agent's decision to engage in an act that is covered by his right to dissent then, it may turn out that a piece of advice is offered, or even some directive issued, that he has moral reason to obey for the simple fact that by doing so, he will better conform with

[230] Perry, 2007. 'Two Problems of Political Authority' in the *APA Newsletter on Philosophy and Law* (Scalet, ed.), vol.6, no.2, p.33.

independent moral reasons that apply to him anyway. This is especially clear in cases when an agent chooses to act on his right to assemble in public places. Consider, for example, the advice sometimes given to protestors to avoid crowded areas on the basis that it could result in unintended harm to people (e.g., through trampling); or, more pointedly, the directives issued by legal authorities for protesters to disperse when their manifestation has become unwieldy. In both of these cases, though the act of assembling in a public place ought to be protected under the agent's right to dissent, the agent may have a moral obligation to obey the directives not to engage in that act on the basis that certain directives issued will help him to better conform with reasons that apply to him anyway.

The other two theories examined make the case even more succinctly. According to the argument from fairness, one has an obligation to obey some rule whenever it can be said that she has benefitted from others submitting to that rule. As we argued in the section that introduced the idea however (3.2.3), nothing in the logic of the argument suggests that the rule in question must be a *legal* rule. Indeed, it is perhaps even more typical for an obligation based on fairness to develop from conventional, rather than institutional, rules. An example to this effect was introduced earlier. If a conventional rule exists for a neighborhood that all are to be quiet after 11 p.m., and John has benefitted from that rule, he owes a duty to all others to similarly submit to the rule. In other words, John has a moral reason to avoid making excess noise after 11 p.m. In a similar way, there will be many conventional rules followed by a community that, although not enforced by law, are still binding on the agent (e.g., the practice of queuing). This then means that it is theoretically possible for the agent to have moral reason to avoid engaging in acts that are legally protected by her right to dissent based on considerations of fairness. Once again, a salient example here is the agent's right to assembly. If Andrea has benefitted from the free use of park space in the past, but decides to join a protest movement whose plan is to 'occupy' park spaces in the hope of drawing public attention to some issue, it can be said that she has a moral reason not to do so on the basis of considerations of fairness. Or take an agent's right to freely express himself. If Sean has benefitted from being left alone when he has no desire to be engaged, he thereby acquires a moral obligation (of at least some weight), based on the argument from fairness, to avoid expressing his own dissenting opinions to those who quite clearly are not interested in hearing them. In either of these cases, it is of course true that the moral reasons that oppose engaging in the dissenting action could swiftly be defeated by reasons that favor the decision. But it is important to note that considerations of fairness may very well be relevant even in times when one's act is legally protected, and that it is therefore incumbent upon the agent that she include these considerations when deliberating on whether or not to engage in the act in the first place.

The final argument we looked at was one based on considerations of justice. The argument from justice claims that the agent incurs a moral obligation to obey the law whenever it is the case that her disobedient action could reasonably be thought to cause harm to some justice-promoting institution. As was expressed, there are few times this obligation would hold, as most justice-promoting institutions are so firmly established in liberal democracies that discrete disobedient actions could scarcely be thought to cause them harm. Be that as it may, there is still a thin obligation that is established on the basis

of this argument; but it is one that is in no way exclusive to acts of political disobedience. Consider, for instance, the charismatic anarchist who, through his expression, rallies others to join in some cause that could well threaten the integrity of some justice-promoting institution; or again, the agent who entertains the possibility of joining a political association that is known to have radical aspirations.[231] Here, by acting within their legal right to dissent, such agents could potentially cause more harm to existing justice-promoting institutions than they would if they were to outright disobey the law. In both of these cases then, considerations of justice could be said to generate moral reasons for the agent not to engage in acts that are protected under her legal right to dissent.

What the foregoing ought to have demonstrated is that the moral obligations the agent has to obey the law can also apply to matters on which the law is silent. This then means that the agent may acquire an obligation to resist acting on her legal right to dissent that has the very same basis as the obligation she has to obey the law. In both cases, it is possible for her to acquire a moral obligation to comply with whatever practice a group has come to accept (either legally or conventionally), and to consider that obligation when weighing her reasons for and against dissenting. Most importantly for our purposes, what this means is that, in light of these reasons being identical in kind, the considerations that apply to the moral reasoning of each type of dissenting action should likewise be identical. In other words, the same kinds of considerations we examined as relevant to the agent successfully reasoning through a moral controversy with respect to engaging in acts of political disobedience should be equally applicable to situations where the agent must decide whether or not to act on her legal right to dissent. It is this claim I will examine in the final section of the chapter.

4.2.4: Moral Considerations for Acting on a Legal Right to Dissent

One set of criteria we introduced that could assist the agent in more felicitously exercising her practical reasoning was Rawls' four conditions for justified civil disobedience. Recall those four conditions. According to Rawls, for an act of civil disobedience to be justified, the act must: a.) be limited to instances of clear and substantial injustice; b.) be used as a last resort; c.) not cross a certain threshold that will upset the efficacy of the just constitution; and, d.) be rationally framed to advance one's aims. Now, at first glance, it would appear that few (if any) of these conditions can be said to assist the agent in reasoning her way to a more felicitous moral decision with respect to acting on her legal right to dissent. For one thing, the conditions seem far too onerous to apply to the these types of acts; furthermore, at least one condition (viz., condition b) seems to be prima facie inapplicable, as it explicitly employs the notion of legality. But if the conclusion drawn in section 4.2.3 is sound, then Rawls' justifying conditions for acts of civil disobedience should have at least a degree of applicability to cases of legal dissent.

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[231] Although this kind of action is in most jurisdictions criminalized under sedition laws, and thus would not technically be included within the citizen's right to dissent, there is enough leniency surrounding this kind of activity in the context of modern liberal democracies that it is possible for an agent to do significant damage to some justice-promoting institution before she would be charged under a sedition provision. For more on the relation between dissent and sedition, c.f., Franks (ed.), 1989. *Dissent and the State*. Oxford: Oxford University Press.

To begin, it is important to remember that my interpretation of Rawls' list of justificatory conditions, even in the context they were originally proposed, is not to interpret them as hard and fast rules for justification, but rather as heuristic reminders the agent may use to come to better moral decisions in any particular case of disobedience. When read in this way, Rawls' conditions of justification do not seem as ill-placed in the context of the agent's decision to act on her legal right to dissent as may at first appear to be the case.

Both conditions (a) and (b) were heavily qualified in the context of disobedience. In section 4.1.3, I argued that only when the strength of moral reasons in favor of obeying the law were substantial were these conditions of any assistance to the agent; times when the duty to obey was relatively weak, these conditions played no real part. Condition (a) (i.e., that the act be limited to instances of clear and substantial injustice) most certainly shares this same qualification when related to acts of legal dissent. When there is a strong moral reason for the agent not to act on his legal right to dissent (e.g., joining an organization that has an especially dubious record of behavior), he should do so only when the issue prompting him to dissent is a clear and substantial case of injustice (e.g., the advocacy of that organization addresses a blatant case of injustice).

Condition (b) (i.e., that the act be used as a last resort), although having the appearance of being prima facie inapplicable to cases of legal dissent, if understood the right way, may apply as well. Acts of legal dissent, as I have been presenting them, are not all on par morally. That this is so is a consequence of the argument made above (4.2.1) to the effect that a separation exists between the kind of actions that ought to be protected by the agent's right to dissent and the kind of actions that are morally justifiable. In essence, some acts of legal dissent will be more justifiable than others, and some will be less. What condition (b) might insist the agent consider then is that, when there exists a choice between more or less benign acts of dissent to accomplish some goal, the agent choose the more benign act first (i.e., the act that is, on the balance of reasons, morally preferable). This may be a convoluted understanding of the 'last resort' condition, but it is in line with the one I have offered in the context of political disobedience as well.

Condition (c) (i.e., that the act not cross a certain threshold that will upset the efficacy of the just constitution) is simply a repetition of the argument from justice, and thus has already been argued to be applicable to acts of legal dissent in the previous section. However, just as we saw when discussing this condition in the context of civil disobedience, it serves to remind the agent that the effect his act of dissent will have on justice-promoting institutions as a discrete action is a different matter to the effect it will have when it is considered as one action among several. This horizontal perspective must be kept in mind when the agent is making a decision on whether or not some act of legal dissent is morally justified.

Finally, condition (d) (i.e., that the act be rationally framed to advance one's aims) shows that an assessment of some act of legal dissent must be placed within the context of the ends it hopes to achieve. What this condition ensures is that the agent be aware of the different moral elements that may be relevant to his moral decision to dissent (e.g., both

deontological and instrumental elements) and that he sincerely attempt to take notice of as wide a range of them as possible when assessing the justifiability of his action.

In fact, this final condition points to perhaps the most important consideration for the agent who is planning to engage in some legal act of dissent. In some sense, what it suggests is that, just as one of the necessary conditions for an act of political disobedience to be considered justifiable is that it be based on an attitude of moral conviction by the agent, so too is such an attitude necessary for an act of legal dissent to be justifiable. By demanding that the agent rationally frame her action to advance the ends she desires to attain is to ensure that she is both conscientious of the reasons she has for engaging in the act, and has determined the justifiability of that engagement on the basis of those reasons. The significance of this point with respect to actions that ought to be protected by a citizen's legal right to dissent cannot be overstated. As has been mentioned a few different times now, it is natural for a citizen to confuse legality for moral justifiability--to believe that if her action is legally permissible, then it is morally justifiable as well. But as we've seen, to hold this belief would be a mistake. Engaging in an act of dissent, whether it be a legal or illegal act, is by nature antagonistic to some position held by a group. In the political context, that group is the state; and in the context of a liberal democratic state, we may assume that these positions are, in one way or another, accepted by a fair portion of the group. This means that acts of political dissent are by nature *moral acts* (i.e., acts that necessarily involve other people) and that therefore making a decision to engage in them is a *moral decision*. In other words, no act of political dissent, whether it is legally protected through the citizen's right to engage in it, or unprotected as an act of political disobedience, is morally neutral. Every act of political dissent will necessitate a commitment to moral reasoning. From this it follows that the very same conditions that are required of the agent to ensure his motivations for acting in a politically disobedient manner are authentic will apply as well to his motivations for acting on his legal right to dissent.

In *Conscience and Conviction: The Case for Civil Disobedience* Kimberley Brownlee proposes a list of conditions intended to address this very issue. According to Brownlee, ensuring the agent's motivations for acting in a politically disobedient manner are authentic is a matter of the agent satisfying four criteria, including: a.) that the agent is *consistent* in her judgments, motivations, and conduct; b.) that a *universality* holds between the judgments the agent makes of herself and those she makes of others; c.) that the agent does *not evade* responsibility for her action; and, d.) that the agent engages others in a *dialogue* with respect to the merits of her position.[232] Since it is my claim that acts of legal dissent, just like acts of political disobedience, are necessarily moral acts, it follows that these four criteria will apply *equally to both*. Consider, for instance, an agent's decision to join a protest movement against her government's decision to freeze wages for a particular sector of public workers. As this is undoubtedly an act of dissent, it is my claim that it too must be considered a moral act; one, moreover, that demands that the

[232] C.f., Brownlee, 2012. *Conscience and Conviction: The Case for Civil Disobedience*. Oxford: Oxford University Press, pp.29-30.

agent's motivations for engaging in the act be authentic. In other words, it is not enough that the agent join the protest movement simply because it is in her prudential best interest that the government not freeze those wages. In addition to this, the agent must demonstrate that: a.) her judgment on the matter is consistent with prior judgments she has made (e.g., that in different cases bearing the same set of considerations, she has, or would have, come to the same conclusions); b.) her judgement is universalizable (e.g., she would similarly dissent from the government's decision to freeze the wages of any other public sector worker under similar conditions); c.) she not evade the responsibility of her actions, whatever they may be (e.g., she understands that she is accountable for, and is willing to own up to, any consequences that result from her actions); and, d.) she engage others in authentic dialogue about her decision (e.g., that she genuinely listens and attempts to understand the reasons offered by the government, and perhaps others, for the government freeze, and considers them when deliberating whether or not to engage in her act of dissent). Suggesting the agent satisfy all four criteria Brownlee lists as a way to ensure the authenticity of her motivations may appear to be overly excessive when applied to acts of legal dissent. But if the argument I have proposed in this section is sound, such criteria should apply *just as much* to these kinds of acts as they do to acts of political disobedience.

What is more, such criteria ought to apply to *all* the constituent rights that make up the citizen's right to dissent. Consider in this regard the citizen's right to political participation. As I have explained it, part of the citizen's right to dissent in a liberal democracy is captured by her right to participate in political decisions that may come to affect her (either through voting, or by running for elected office). In the latter case, I think it is relatively obvious that the agent's motivations for engaging such a position will have an influence over the moral justifiability of the action. For instance, if an agent seeks political office for no other reason than to increase her standing in society, or to push an agenda that is beneficial only to certain personal interests she may have, she would rightfully be said to be unjustified in seeking that position. But in the case of voting, it seems almost distinctive of the act that one is to engage in it on the basis of prudential reasons alone (e.g., to endorse candidates or mandates that will satisfy one's own self-interests). For the same reasons outlined above, I resist this interpretation. Just as we saw with the public sector worker who protests against her government's decision to freeze wages, for the agent who votes in dissent of a particular government mandate to truly be considered morally justified, she must have reasons that extend beyond her personal preferability of the mandate issued. In other words, she must meet Brownlee's four criteria, the most important of which being that she actually engages her reasons for voting one way rather than another in the first place (criterion d). Such a description of voting is far more in line with a deliberative model of democracy than it is with an aggregative model,[233] and touches on some of the current problems that have been discussed in relation to voting procedures (such as the claim that with the advent of increased media dissemination, results of elections are more often based on fear-mongering than they are on

[233] C.f., footnote 126 in chapter 2.

positive policy initiatives).[234] It is therefore a description that is far less dubious than what may at first appear to be the case. Perhaps even more importantly, it is also one that is perfectly consistent with the wider argument I have submitted in this final chapter.

4.3: Conclusion

This brings the analysis of the justificatory conditions for both acts of political disobedience and acts that ought to be legally protected by the citizen's right to dissent to a close. It also brings us to the end of our analysis of political dissent in general. Although it may appear that what the final section of this chapter has presented is a very strong argument against the agent engaging in acts of legal dissent, nothing could be further from the truth. What our analysis has shown is nothing more than that an equivalence exists between the conditions of justifiability for acts of political disobedience and those that apply to acts that ought to be protected by the citizen's legal right to dissent. In this regard, and with respect to any general position on the justifiability of acts of dissent, our analysis has been decidedly neutral. Once again, on the question of justification, our response has been consistent: both acts of political disobedience, as well as acts that ought to be protected by the citizen's right to dissent, are justified if the moral reasons that exist in favor of performing the act outweigh the moral reasons that oppose its performance. And as we saw, the kind of moral reasons that are relevant to the agent's decision are in each case the same. It is most likely the case that, as a matter of fact, the weight of reasons that oppose engaging in some act of disobedience will often be stronger than those that oppose acts of legal dissent. But this is only because: a.) one of the central roles played by the law is to coordinate the behavior of a number of different individuals, and thus is in many respects set up to give those individuals moral reasons to abide by its rules; and, b.) the range of rules that the law imposes will be far vaster, and reach far more individuals, than any other single directive-issuing source in society. Be that as it may, there is nothing about the law that will establish for the citizen some kind of *general* obligation to abide by its rules. Indeed, one will oftentimes have either a very thin moral reason, or no moral reason at all, to do as the law directs. On the other hand, one will often have quite weighty moral reasons to abstain from acting on his legal right to dissent. The only general conclusion that can therefore be drawn from the account I have offered is the following: however high one wishes to set the bar for when an act of political disobedience can be said to be justified, one must be equally prepared to impose that same bar on the justifiability conditions for acts that ought to be protected by one's legal right to dissent. On the other hand, if one wishes to set the bar especially low for when actions covered by the citizen's legal right to dissent are justified, one must be prepared to equally apply that same bar to actions of political disobedience. In the end, what has been established is merely that the framework of justifiability, at least from a theoretical standpoint, is equivalent. At the very least then, regardless of whether the dissenting action the agent

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[234] C.f., DellaVigna and Kaplan, 2007. 'The Fox News Effect: Media Bias and Voting' in *Quarterly Journal of Economics*, vol.122; and, Gerber, et al, 2009. 'Does the Media Matter? A Field Experiment Measuring the Effect of Newspapers on Voting Behavior and Political Opinion' in *American Economic Journal: Applied Economics*, vol.1, no.2.

proposes to engage in is legally permissible, or is instead in contravention of a legal rule, the agent has a moral responsibility to employ his faculty of practical moral reasoning to do the best he can to decide whether the reasons that favor his performing the dissenting action outweigh the reasons that oppose his performing it.

Conclusion

To bring the argument submitted throughout the dissertation to a close, let me return to the anecdote with which it began. Recall the details of that anecdote. A group affiliated with an especially intolerant political party (let's call them 'Vlaams Blok') were given permission by the relevant authorities to march through the small University town of Leuven, Belgium. Upon learning of this march, several students decided to counter the group's initiative by blockading its intended route (we'll call this group 'the students'). For a period of time, a wall of riot police is all that separated the two antagonistic groups. Eventually however, a decision was made (again, by the relevant authorities) to forcibly remove the unsanctioned group (the students) through the use of water-canons, thus ending what was until then a stand-off between the two rival factions. What can we say about this particular case that will help to draw out in a more practical way some of the details expressed by our examination of dissent? Well, to begin, it should be evident that both groups, according to our definition of dissent, did in fact engage in acts of dissent. As we have described it, dissent is: a normative expression of disapproval that is undertaken by a member of a group, and is directed at a (settled and/or practically effective) position held by that group, which (typically) aims to effect influence over some future state of affairs of the group. Concerning Vlaams Blok (the group that was originally given permission to march through Leuven), the catalyst for their demonstration was presumably to express some sort of disapproval with (a range of) policies held by the government in power at the time. The group of students who staged a counter-demonstration, on the other hand, were clearly expressing both a disapproval of the platform held by Vlaams Blok, and of the official decision by the relevant authorities to allow such a group to march. In this way, both groups satisfied the criteria necessary to label their acts 'dissenting acts'.

Of course, this in no way implies that each group's act of dissent was the same type of act. The dissenting action undertaken by Vlaams Blok was one that was protected by each of its members' legal right to dissent, and was therefore an act of legal political dissent. Conversely, the act undertaken by the students was in contravention of a state-issued directive (against blocking roadways), and thus, was one we have called 'political disobedience'. Furthermore, considering the analysis we have offered, the categorical distinction elucidated by this case seems to be justifiable. Although the views of Vlaams Blok may have been morally questionable, this does not in itself signify that they should not have been given a protected means to express them. As was argued in chapter 2, part of the citizen's right to dissent includes a protection on her choices of expression, association and assembly. Each of these protections implies that it was justifiable for the authorities to secure to Vlaams Blok permission to stage their demonstration. But what of the students who engaged in the counter-demonstration against Vlaams Blok? Did not the constituent elements of their right to dissent also protect them from being forcibly removed from the area? In some senses, yes: the students who opposed Vlaams Blok had just as much of a protected right to express their opinion, to associate with persons of their choosing, and to assemble in a public space as did Vlaams Blok itself. But in a more important sense, no: the 'public space' in question was a roadway; and thus, their 'choice of area' to congregate was one that was justifiably regulated by the state. Due to this, although the students ought to have been protected in expressing their opinion, as well as in their choice to do so as a group, they did

not have a claim to being protected in their decision to congregate on a roadway. For this reason then, it is right to characterize the act undertaken by Vlaams Blok as one of legal dissent, and equally right to characterize the act undertaken by the students as one of political disobedience.

Of course, as we have just seen, this conclusion is mute with respect to the justifiability of each group's act of dissent. As the principal thesis of the dissertation was that legal acts of dissent are subject to an identical justificatory analysis as are acts of political disobedience, the issue of justification in this case is still very much up in the air. What then can we say about the justifiability of each group's act? To answer this question, we should first of all reiterate two crucial aspects of our approach to justification. First, since our approach relies on balancing the reasons for and against engaging in some act of dissent, it is one that resists any sort of general or abstract response. Indeed, it is not as if there exists some finite list of conditions that, if satisfied, confirm the justifiability of some act of dissent. Second, our approach to justification recognizes that both agent-relative and agent-neutral considerations should play a role in justificaory analyses. When assessing whether the agent was justified in performing some act of dissent, both the reasons she takes herself to have for performing the act (her motivations) as well as reasons that exist independent of her acknowledgment (the moral facts that pertain to the case) are relevant. With these two aspects of our approach to justification in mind, we may now conclude that the issue of justification, with respect to acts of dissent, is both: a.) person-specific; and, b.) context-sensitive. We may not, therefore, discuss whether the entire group 'Vlaams Blok' or the entire group 'the studnets' were justified in their respective acts of dissent. Ours must be a much more nuanced analysis than this.

Let's begin with 'Vlaams Blok'. If, as a group, Vlaams Blok could legitimately be said to promote policies that would unfairly exploit a particular group of persons (e.g., anti-immigration legislation aimed at a particular race or religion), then the moral facts pertaining to the case would suggest that even the most sincere and convicted of its members would be unjustified in engaging in that dissenting act. If, however, the truth of this claim could be challenged, and certain group members who were sufficiently attuned to the moral facts of the case could genuinely declare that the actual cause of their protest was morally defensible, the same conclusion might not follow. Of course, even in this latter case, the members would still have to consider other reasons that oppose their choice to act on their right to dissent; considerations such as: a.) that the march was sure to incite an antagonistic response from the student population; which would, b.) increase the likelihood of someone being harmed; and, c.) perhaps unfairly draw on public resources (e.g., increased police presence); etc. Considering these additional facts then, although not completely unimaginable, it is highly unlikely that, in this case, any member of Vlaams Blok was justified in his choice to dissent.

Concerning now the students, we see a reversal in the kind of evaluation that was offered with respect to Vlaams Blok. Because in this case the moral facts seem naturally to favor the students' cause, the issue of justification with respect to this group is far more about the motivations of the individuals who engaged in the act than it is about the moral facts that pertain to the case. As I have argued, the moral attitude of the agent, though by no means sufficient to justify an act of dissent, must certainly be counted as a necessary element for justification. It follows that those students who joined the counter-demonstration purely on the basis of the thrill they would receive from being part of the experience (as memory serves, there were many such

individuals who fit this description) or from some other illegitimate motive, could not be considered justified in engaging in that act. *This is so even if all the moral facts pertaining to the case weighed in favor of the students*. Furthermore, even for the students who did act on the basis of a sincere motivation, if they were only obscurely aware of the details of the case (e.g., if their information on the opprobrious nature of Vlaams Blok was acquired flippantly), then they could not on that basis be said to be justified in engaging in their act of dissent. This is so for the very same reasons expressed above (consider in this regard the list offered by Kimberley Brownlee to ensure the agent's motivations for engaging in some act are authentic). Indeed, there are a number of relevant moral facts that pertain to cases such as this one that have *nothing to do with the causes of each of the groups in question*. Such facts often weigh against an agent's decision to engage in a dissenting act--whether it be one that ought to be protected by the agent's right to dissent (as in the case of Vlaams Blok) or one that goes unprotected (as in the case of the students).

Now, having said all of this, if certain members of the student group could legitimately have been said to have both: a.) a reasoned awareness of the facts pertaining to the case; and, b.) acted from sincere motivations, then it would seem very possible that, with respect to these particular individuals, their decision to engage in that act was justifiable. This instills a certain confidence in the conclusion that was reached at the end of chapter 4. That the act of dissent undertaken by the students was legitimately one of political disobedience, and the one undertaken by Vlaams Blok had a legitimate claim on being protected through its members' right to dissent, had only a superficial effect on the justifiability of each action. Although it could be argued that the students acquired a political obligation (based on fairness) to allow a group that had obtained the proper legal permission to go ahead with their protest, and a moral reason to allow a decision that had resulted from a democratic process to stand, both of these reasons could swiftly have been defeated by a number of other considerations that pertained to the case. Moreover, that Vlaams Blok had obtained permission from the relevant authorities did not have an especially weighty bearing--if any bearing at all--on the justifiability of their protest. What all of this means is that there is no prima facie argument that favors one type of dissenting action over the other--both, at least theoretically speaking, are on par.

For some, this final insight might sound dangerous--indeed, it is possible that some may interpret it as an incitement to anarchy. But to my mind, much the opposite is the truth. What my conclusion suggests is not that we, both as a society, and as individuals within society, relax our moral commitments to the law, but rather that we strengthen our moral commitments to each other. This final claim holds regardless of whether those moral commitments happen within the law, or outside of it.

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