

Political action & the uncivil right to resist

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‘Saints and sinners’ between conscience and the law

In June of 1968, in the wake of the assassinations of Martin Luther King Jr. and Robert Kennedy and the outbreak of mass violence in cities across the country, President Lyndon Johnson signed Executive Order #11412 establishing the National Commission on the Causes and Prevention of Violence. Chaired by Dr. Milton Eisenhower and comprised of thirteen legislators, judges, and religious and civic figures, the commission was tasked with examining “the causes and prevention of disrespect for law and order, of disrespect for public officials, and of violent disruptions of public order by individuals and groups” as well as “lawless acts of violence...including assassination, murder and assault,” in order to make policy recommendations to the administration.¹ After over a year of hearing expert testimony, commissioning reports, and compiling and analyzing relevant sociological data, the commissioners came to unanimous agreement on all areas of their report but one: the legal and moral status of civil disobedience. On this issue alone, the commission was divided in half, with a slim majority of seven on the side “of law and order” and against civil disobedience, in the words of one approving editorial.² Unable to come to an agreement, the majority drafted and released a separate statement condemning organized, mass civil disobedience as ultimately dangerous to the rule of law and the stability of democracy, while four members of the minority issued individual dissenting statements, among them the commission’s two black members, Leon Higginbotham, a District Court judge nominated by Kennedy and appointed by Johnson, and Patricia Roberts Harris, then Dean of the law school at Howard University and former US Ambassador to Luxembourg.³

¹ See M. Eisenhower et al., *To Establish Justice, To Insure Domestic Tranquility: The Final Report of the National Commission on the Causes and Prevention of Violence* (Washington, D.C.: United States Government Printing Office, 1969). The report covers an array of topics, from the role of violence in US history to robbery and rape, from civil disobedience to homicide and assassination.

² “Seven to six for law and order,” *Chicago Tribune*, 15 December 1969, p. 12.

³ Eisenhower et al., *Commission Statement on Civil Disobedience* (Washington, D.C.: United States Government Printing Office, 1969), pp. 10-18. The majority statement, issued on 8 December 1969, is an edited version of what appeared as Chapter 4 in the full report, which also includes the dissenting statements by commissioners Cooke, Harris, Hart, and Higginbotham. All further page references will be to the full report referenced in fn. 1.

According to the majority statement, no matter how worthy, just, or even necessary the goals of resisters, the demands of conscience are inadequate to justify breaking the law; citizens must continue to obey laws even when they disagree with them, unless and until such laws have been found unconstitutional. If we open the door to the claims of conscience and create a place for civil disobedience, we foster a politics of lawlessness that undermines the legal system as a whole. The slope leading from even the most principled disobedience to chaos and anarchy is, the majority argues, far too slippery: “In our democratic society, lawlessness cannot be justified on the grounds of individual belief. The spectrum of individual consciences encompasses social and political beliefs replete with discordant views. ...Is each group to be free to disregard due process and to violate laws considered objectionable? If personal or group selection of laws to be obeyed is to be the yardstick, we shall face nation-wide disobedience of many laws and thus anarchy.”⁴ In a modern, pluralist democracy in which each is entitled to her own views, values, beliefs, and vision of the good life, the claims of conscience are too sweeping, varied, and contradictory to provide guidance on when and which laws must be obeyed or disobeyed. In a particularly striking portion of the statement, the majority analogizes the law-breaking of civil rights leaders who “openly disobeyed court injunctions and urged their followers to do likewise” with the intransigence of “[s]egregationist governors” who “disobeyed court orders and proclaimed their defiance of judicial institutions.”⁵ It seems one man’s just cause is another man’s criminal lawlessness, and there is no authority that can adjudicate the dispute between their worldviews.⁶

Making legal and moral room for legitimate disobedience, in the view of the seven members of the majority, only augurs and incubates a “culture of lawlessness” in which nonviolent disobedience spills over into violence “by easy stages”⁷ – an argument that is, in fact, contradicted by the explicit findings of the full report (adopted by all commissioners), which questions the empirical linkage between

⁴ Eisenhower et al., *To Establish Justice*, pp. 89-90.

⁵ *Ibid.*, pp. 88-89. Again on p. 90, this point is reinforced: “The spectrum of individual consciences encompasses social and political beliefs replete with discordant views. If, for example, the civil libertarian in good conscience becomes a disobeyer of law, the segregationist is endowed with the same choice of conscience, or vice versa.”

⁶ The report cites the 1967 Supreme Court decision in *Walker v. City of Birmingham*, in which a 5-4 majority upheld the conviction of Martin Luther King Jr. and seven others, after they violated a local injunction which prohibited them from picketing or demonstrating in public: “...no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics or religion. ...One may sympathize with the petitioners’ impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.” Notably, it was during this jailing that King wrote “Letter from a Birmingham Jail,” which became a programmatic statement for the movement of the morality of civil disobedience to unjust laws. See Eisenhower et al., p. 90; *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

⁷ Eisenhower et al., *To Establish Justice*, p. 88.

civil disobedience and violence, and finds instead evidence to the contrary.⁸ Even so, the majority statement contends, disobedience – even when civil and nonviolent – spreads like a “cancerous growth”⁹ that erodes the very basis of the liberal democratic state. Thus, it threatens not only violence, but the degradation of the rights such forms of protest aim to secure: “Violators must ponder the fact that once they have weakened the judicial system, the very ends they sought to attain – and may have attained – cannot then be preserved. For the antagonist of the disobeyer’s attained objections most likely will proceed viciously to violate them and since judicial institutions would no longer possess essential authority and power, the ‘rights’ initially gained would be quickly lost.” The statement concludes with the words of Cardinal Cushing of the Catholic Church, to the effect that obedience to law, not defiance of it, provides the “eternal safeguard of liberty” and rights.¹⁰

The fear of widespread disorder and violence is palpable in the majority statement, and given the eruption riots and violent unrest at the time, it is perhaps understandable. However it is not the majority statement as such, but its comparison with the section of the report unanimously agreed upon by all thirteen commissioners, that provides the most interesting and telling window into the terms of the philosophical debate over legitimate resistance. In fact, aside from a more general absence of some of the more inflammatory language of the majority statement, there is very little daylight between the statement rejected by six commissioners, and the one endorsed by all. The text from the chapter on “Civil Disobedience” in the full report adds to the majority statement and four minority dissenting statements a middle section from the Task Force Report on Law and Law Enforcement, titled *Law and Order Reconsidered*, which had been compiled and presented to the commission by James Campell, Joseph Sahid, and David Stang.¹¹ This section, adopted by the minority as a more “adequate” and “accurate” discussion of “such relationship as may exist between disobedience to law and the contemporary forms of violence occurring in the United States,” was likewise approved by the majority as a supplementary statement on civil disobedience.¹² Surprisingly, it too comes to the conclusion that the “adverse effect” of civil disobedience “upon normal democratic processes is obvious” – that

⁸ Ibid., p. 100.

⁹ Ibid., p. 89.

¹⁰ Ibid., p. 91.

¹¹ See Chapter 2 (“Disobedience to Law”) in J. Campbell, J. Sahid, and D. Stang, *Law and Order Reconsidered: A Staff Report to the National Commission on the Causes and Prevention of Violence* (Washington, D.C.: United States Government Printing Office, 1969), pp. 13-23.

¹² Eisenhower et al., *To Establish Justice*, p. 87.

although “not intended to destroy” them, it “tends to plainly impair their operation,” and thus “is disastrous from the standpoint of the maintenance of a democratic society,” often leading to illiberal, inhumane, unequal, and unjust consequences.¹³ In the end, despite the sometimes painstaking gradualism implied, the commission concludes that the “remedy for the discontented...is to seek change through lawful mechanisms.”¹⁴

What, then, is the distinction between the majority statement and the one unanimously approved? The main disagreement appears to be whether civil disobedience is rightly cast as an issue of conscience or individual morality at all. Where the majority statement established a parallel between the unlawful behavior of civil rights protestors and that of white segregationists in order to demonstrate the indefensibility of civil disobedience, the language of the Task Force uses the same parallel to highlight the ridiculousness of an argument – whether for or against civil disobedience – premised on this *reductio ad absurdum*. Their reasoning is worth quoting at length:

At the level of individual morality, the problem of disobedience to law is wholly intractable. ...if we allow individual conscience to guide obedience to the law, we must take all consciences. The law cannot distinguish between saints and sinners. As Burke Marshall has said:

‘If the decision to break the law really turned on individual conscience, it is hard to see in law how Dr. King is better off than Governor Ross Barnett of Mississippi, who also believed deeply in his cause and was willing to go to jail.’

Where issues are framed in purely moral terms, they are usually incapable of resolution by substantially unanimous agreement. ...This fact is illustrated by the story of the exchange that occurred between Emerson and Thoreau, the latter of whom had in 1845 personally seceded from the United States in protest against slavery. As part of his anti-slavery campaign, Thoreau was spending a night in jail. Emerson paid him a visit, greeting him by saying, ‘What are you doing in there, Henry?’ Thoreau looked at him through the bars and replied, ‘What are you doing out there, Ralph?’¹⁵

Because the framework of individual conscience prevents us from making the distinction between King and Barnett, between civil rights leaders and segregationists, it should be held suspect; it is an unhelpful framework precisely because of the slippery slope argument offered by the majority. As a

¹³ Ibid., pp. 101-104.

¹⁴ Ibid., p. 103. The one exception, mentioned only in the majority statement, is when an individual disobeys a “legislative enactment or court decree” in order to test its constitutionality. In this case, if the individual is willing to accept punishment, the act “should be condoned.” However, this can be done effectively enough by a single individual or small group; thus “[w]hile the judicial test is in progress, all other dissenters should abide by the law involved until it is declared unconstitutional” (pp. 90-91). Mass disobedience or campaigns based on it are out of the picture.

¹⁵ Ibid., p. 99. See also B. Marshall, “The protest movement and the law,” *University of Virginia Law Review* 51 (1965), p. 800.

problem of conscience, there is no neutral judge to adjudicate between the validity of the one person's lawbreaking over another's. Instead, the Task Force Report suggests that the issues raised by civil disobedience have social and political dimensions which can give us leverage over the primary questions at stake – to wit, whether civil disobedience and forms of unlawful resistance have a legitimate role to play in the creation of a more just, more equal, and more democratic society.

The answer they all appear to reach is a tentative one in favor of what freedoms and rights the stability of gradual institutional reform can bring – limited, partial, and flawed though it may be – over swifter, riskier gains to be made extra-institutionally. Our rights are embedded, encoded, and protected in the form of law; lawfulness of any kind is a risk to those very rights. It is a conclusion with which the minority, according to the individual statements by commissioners Cooke, Harris, Hart, and Higgenbotham, are not entirely at peace.¹⁶ Nevertheless, when confronted with the inherent and seemingly unavoidable problems with framing disobedience as a matter of conscience – the individual judgments of “saints and sinners” – the uneasy consensus of the commission points to the foundations of liberal rights in the legal democratic order. As it happens, this way of framing the issue of disobedience and resistance is not peculiar to the NCCPV, nor to the historical and political moment of the late 1960s. Rather, it is a framework with deep roots in the liberal tradition of political philosophy, and in the political writings of Immanuel Kant in particular. A close examination of the terms of Kant's denial of the right of resistance – embedded within a theory of political order, legitimate authority, autonomy and law – will illuminate the degree to which contemporary practical and philosophical discourses of resistance have inherited the Kantian terms of debate, and – I contend – remain largely locked within them.¹⁷

¹⁶ Each of the four statements raises the objection that without the tactics of civil disobedience, the 1964 Civil Rights Act would never have passed. Nonetheless, despite wanting to create a legitimate home for civil disobedience within the bounds of US law, the statements are far from unequivocal on how to do so. For the most part, they are limited to expressing their dissatisfaction with the conclusion reached both by the majority and by the entire commission. See fn. 3.

¹⁷ Recently, some democratic theorists have challenged some premises of the liberal theories, and sought justifications for civil disobedience on specifically democratic grounds. While their theories improve on their liberal predecessors in a variety of ways, in others they too remain locked within the same framework. I discuss some of these theories – albeit in a cursory and unsatisfactory fashion – below. See H. Arendt, “Civil Disobedience,” in *Crises of the Republic* (New York and London: Harcourt Brace, 1972), pp. 49-102; J. Habermas, “Civil disobedience: Litmus test for the democratic constitutional state,” *Berkeley Journal of Sociology* 30 (1985): pp. 95-116; W. Smith, “Democracy, deliberation and disobedience,” *Res Publica* 10 (2004): pp. 353-377; D. Markovits, “Democratic disobedience,” *Yale Law Journal* 114 (2005): pp. 1897-1952; Smith, “Civil disobedience and the public sphere,” *The Journal of Political Philosophy* 19, no. 2 (2011): pp. 145-166.

While considerations of conscience, on the one hand, and the juridical foundations of rights, on the other, certainly have an important place in any discussion of resistance, a narrow focus on these issues occludes other perspectives which might be more fruitful in addressing the dissenting minority's concern: that there is value – political, social, and moral – in extra-institutional and extra-legal forms of action that operate to disclose the nature of forms of injustice, disrupt entrenched power imbalances and patterns of oppression, and directly transform undemocratic institutions that have proven intransigent in the face of legal and formal challenges – or seemingly immune to them. The liberal framework inherited from Kant has locked and limited discussions of disobedience into a strict framework of “fundamental rights” and legal principle which is only rarely, if ever, appropriate to its empirical referents (actually existing individuals, groups, and movements). It has tended to analyze the actions of isolated individuals as stand-ins for collective movements and diverse groups, whose tactics, strategies, and rationales are impoverished (if not distorted) by the theoretical apparatus meant to explain and justify them. It has underplayed (if not erased) the necessary role of instability, disorder, and risk in contingent forms of political action whose consequences cannot be fully pre-determined. The cause and consequence of this, I argue, is that the liberal theory of civil disobedience has rested on the tacit claim that order, stability, and peace have moral priority over social change and democratic justice – whose essential mechanisms are the claims of citizens, mobilized through a diverse set of strategies and tactics. Recovering an alternative account of this value from the perspective of political action – or the start of one – is the broader aim of this paper, and will be developed in the last section.

In the meantime, and to begin, I turn to Kant.

I. Kant: Lawful freedom and the primacy of public right

In his 1793 essay “On the common saying: This may be true in theory, but it does not apply in practice,” Kant denies, rather resolutely, the right of citizens to revolt against their government under any conditions. Sounding upon a first read uncomfortably like Hobbes, Kant asserts that political right “forbids [the people] to resist the will of the legislator by violent means. In other words, the power of the state to put the law into effect is also *irresistible*, and no rightfully established commonwealth can exist

without a force of this kind to suppress all internal resistance.”¹⁸ While the injunction against violence is unsurprising, the idea of the law as irresistible is deeply worrying. Kant’s seeming absolutism with regard to the right to resist has, in fact, proven something of a conundrum for his interpreters, many of whom write in the shadow not only of the modern totalitarian state, but also the apparent successes of civil disobedience and forms of citizen resistance in fighting gendered, racial, and colonial domination – and who, by and large, wish to create some legitimate space within which law can be *resistable*. In the words of Wolfgang Kersting, “Kant’s imagination proves to be very limited, if we measure it by our historical experience. In view of the vileness of state terrorism which our century has produced and never tires of producing, Kant’s anti-revolution and anti-resistance argument seems naïve and over-optimistic. But we cannot blame Kant for not having anticipated the political pathology of the 20th century.”¹⁹ Considerations of this sort have led many sympathetic interpreters to wedge in room for legitimate resistance between the lines of Kant’s account – whether by limiting Kant’s absolutist stance to non-republican regimes only,²⁰ by claiming that the moral duty to oneself allows passive non-cooperation with singularly unjust laws,²¹ by separating the duties of justice (which require obedience to standing law) from those of virtue (which require that we make human rights our end),²² or – in perhaps

¹⁸ I. Kant, “On the common saying: This may be true in theory, but it does not apply in practice,” in *Kant: Political Writings*, edited by H. Reiss, translated by H.B. Nisbet (Cambridge: Cambridge University Press, 1991), p. 81. Of course, Kant is not Hobbes, and we must pay careful attention to his reasons if we are to understand the strong line he takes here. Indeed, Kant responds directly in “Theory and Practice” to Hobbes’ claim that because the Sovereign has no obligations toward the people, he can do them no injustice. He begins by partially agreeing: “This proposition would be perfectly correct if injustice were taken to mean any injury which gave the injured party a *coercive right* against the one who has done him injustice,” which is a right that Kant does not believe citizens have. “But,” he adds tellingly, “in its general form, the proposition is quite terrifying.” See *ibid.*, p. 84; see also, however, Hancock’s contention that in so arguing Kant simply overlooked or misunderstood the importance of natural right in Hobbes’ theory. R. Hancock, “Kant and civil disobedience,” *Idealistic Studies*, pp. 172-173.

¹⁹ W. Kersting, “Kant’s concept of a state,” in *Kant’s Political Philosophy*, edited by H. Williams (Cardiff: University of Wales Press, 1992), p. 163; also cited in A. Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), p. 327. According to some interpreters, there is good reason to think that Nazi totalitarianism would fall under the heading of barbarism rather than despotism for Kant, and so would fail to meet the minimal standards of a “rightful condition,” thereby opening the door for resistance and even revolution. This is persuasive, but does little to address the concerns of those who wish to countenance protest, civil disobedience, and other forms of resistance under conditions of despotism, tyranny, monarchy, republic or democracy. See Ripstein, *Force and Freedom*; H.S. Reiss, “Kant and the right of rebellion,” *Journal of the History of Ideas* 17, no. 2 (1956): pp. 179-192.

²⁰ See e.g., K. Westphal, “Kant on the state, law, and obedience to authority in the alleged anti-revolutionary writings,” *Journal of Philosophical Research* 17 (1992): pp. 383-425.

²¹ See e.g., Hancock, “Kant and civil disobedience”; S. Arntzen, “Kant on duty to oneself and resistance to political authority,” *Journal of the History of Philosophy* 34, no. 3 (1996): pp. 409-424; P. Nicholson, “Kant on the duty never to resist the Sovereign,” *Ethics* 86, no. 3 (1976): pp. 214-230; W. Schwarz, “The right of resistance,” *Ethics* 74, no. 2 (1964): pp. 126-134.

²² See e.g., C. Korsgaard, “Taking the law into our own hands: Kant on the right to revolution,” in *The Constitution of Agency* (Oxford: Oxford University Press, 2008), pp. 233-262.

the most sweeping account – by arguing that Kant’s social contract is dissolved whenever even a single person’s public freedom is curtailed.²³

I will not here attempt to adjudicate between these accounts, nor do I have the space to give them all due consideration. What matters for the moment is that although Kant’s pithy comments against resistance leave some leeway for modern reinterpretations more amenable to civil disobedience and the like, the burdens of proof placed on the shoulders of such an interpreter are considerable. This in two ways, the first of which is practical: on the subject of resistance, Kant is forceful and pointed, but brief. Thus any attempt to work around the things he does explicitly say must rely heavily on what he does not say. The second reason, which will concern us more directly, is that Kant’s stance on resistance, such as it is, does not appear to be an aberration within the framework of his larger philosophical system. Though his rejection of a right to resist is not entirely unequivocal, his justifications rest on positions integral to his political and moral philosophy; his argument, uncomfortable though it may be for us, is coherent and succeeds on its own terms.

Discussions of the (non-existent) right to resist appear across Kant’s political writings and in *The Metaphysics of Morals* (1797); throughout these sources, he offers several different arguments in support of his claim that the people can have no coercive rights against the sovereign, which can be broadly construed as arguments from *rightful action* (1), *constitutional coherence* (2), and *popular sovereignty* (3), reviewed below in turn. As Arthur Ripstein has persuasively claimed, however, all of Kant’s reasons are best understood within a single framework: the grounds Kant provides for leaving a state of nature and entering into a “rightful condition,” which is “that relation of human beings among one another that contains the conditions under which alone everyone is able to *enjoy* his rights” through the medium of law coercively enforced by public authority (6:306).²⁴ It is only through the institutions of the commonwealth that individuals gain access to mechanisms for ensuring security from the violence of others and thus the realization of their rights (6:311).²⁵ The foundation of rights is therefore juridical and institutional; the guarantor of them is civil, rather than natural. Thus, though the state has a duty to bring itself ever closer to a condition of “public justice” – in which the state exists “in accordance with

²³ See e.g. Reiss, “Kant and the right of rebellion”; Hancock, “Kant and civil disobedience.”

²⁴ Kant, *The Metaphysics of Morals*, edited by M. Gregor (Cambridge: Cambridge University Press, 1996), pp. 84-85.

²⁵ *Ibid.*, p. 89.

the idea of a will giving laws for everyone” (6:306)²⁶ – there is no corresponding right of citizens to resist when the state fails to do so. Such resistance would, as Ripstein writes, “violate the postulate of public right” which provides “the precondition of any freedom under law; the state’s entitlement to rule depends only on its providing a rightful condition at all.”²⁷ Unlike in the Lockean social contract, for Kant, “a juridical condition – a condition in which human rights are upheld and enforced – can only exist in political society.”²⁸ It is within this framework that we should view Kant’s justifications.

(1) At the level of ethics, a right to resist would for Kant contradict the conditions for rightful action – universalizability, publicity, and freedom from empirical determinants – and thus could never rise to the level of a duty of reason. In terms of universalizability, Kant uses language parallel to that of the Categorical Imperative to suggest the incoherence of acting on a supposed right to resist: one could never will forceful resistance as a universal maxim for action. As he writes in “Theory and Practice,” such a maxim, “if it became general, would destroy the whole civil constitution and put an end to the only state in which men possess rights.” The moral prohibition of resistance thus cannot be bent upon our whim, “even in the direst (physical) distress”; even when faced with a tyrant – let alone an unjust law – we are duty bound not to take up arms. The prohibition against “all resistance against the supreme legislative power, all incitement of the subjects to violent expressions of discontent, all defiance which breaks out into rebellion” is not of the hypothetical sort; it is, Kant insists, “*absolute*.”²⁹ The reasons for this, as we might presume, are tied both to Kant’s views on the status of the moral law, as well as to his understanding of the necessary foundation for the exercise of our autonomy and our rights. A right to resistance would contradict the universal principle of right, according to which “Every action which by itself or by its maxim enables the freedom of each individual’s will to coexist with the freedom of everyone else in accordance with a universal law is *right*.” As we have seen, this can only exist in a juridical state, which resistance by its very nature attempts to undermine.³⁰

Similarly, a right to resist would violate the condition of publicity, and idea which Kant discusses both in “Theory and practice” as well as in his essay on “Perpetual peace” (1795). When viewed from

²⁶ Ibid., p. 85.

²⁷ Ripstein, *Force and Freedom*, p. 329. My understanding of Kant’s objections to a right to resist owes much to his book as a whole, and Chapter 11 in particular. However the discussion, categorization, and analysis of Kant’s various justifications which follows below is my own.

²⁸ Korsgaard, “Taking the law,” p. 240.

²⁹ Kant, “Theory and practice,” p. 81.

³⁰ See Reiss, introduction to *Kant: Political Writings*, pp. 22-23.

the position of attempting to found a constitution, resistance could never be made public without exposing the whole endeavor to self-contradiction: “It is easily seen that if one were to make it a condition of founding a political constitution that force might in certain eventualities be used against the head of state, the people would have to claim rightful authority over its ruler. But if this were so, the ruler would not be the head of state...The injustice of rebellion is thus apparent from the fact that if the maxim upon which it would act *were publicly acknowledged*, it would defeat its own purpose. This maxim would therefore have to be kept secret” – violating, for Kant, the prohibition against secrecy in politics.³¹ Here again, the objection is connected to Kant’s juridical understanding of rights, such that in order to have a real “right” to resist at all, it would have to be a part of the foundation of the political order itself.

Finally, any justification of resistance based on the experience of injustice within actual regimes is not to be countenanced, because the determinants of rightful action cannot depend on empirical conditions – they must be valid “not merely under certain conditions or with exceptions, but *with absolute necessity*” else they could not be “regarded as laws of the determination of the will of rational beings generally.”³² Thus even when the state has violated its duty to bring its laws into alignment with the concept of public justice, the people “can do nothing but obey.” To do otherwise would be to act with a view toward the “happiness which the subject might expect to derive from the institutions or administration of the commonwealth” rather than “the public welfare which... lies precisely in that legal constitution which guarantees everyone his freedom within the law.”³³ It is not that Kant understands injustice in trivial terms, as a matter of mere individual, subjective happiness; rather, it is that public right is the condition of possibility for any kind of justice at all. This remains true no matter how imperfectly reality aligns with reason, and apart from any experience of unjust rulers and unjust laws.

Neither is there recourse to be found by referencing the unjust or violent origins of the state. In what appears to be another Hobbesian moment, Kant suggests that if a revolution does happen to overthrow the current government, installing a new one, then we are just as duty bound to the new one as to the old: “once a revolution has succeeded and a new constitution has been established, the lack of legitimacy with which it began and has been implemented cannot release the subjects from the

³¹ Kant, “Perpetual peace: A philosophical sketch,” in *Kant: Political Writings*, p. 127; see also Kant, “Theory and practice,” p. 85.

³² Kant, *Groundwork of the Metaphysics of Morals*, translated by T.K. Abbott (New York: Prometheus Books), p. 35.

³³ Kant, “Theory and practice,” pp. 79-80.

obligation to comply with the new order of things as good citizens, and they cannot refuse honest obedience to the authority that now has the power” (6:323).³⁴ No historical regime will ever perfectly realize public justice; the shortcomings of actually existing governments, whether in their current actions or their origins, cannot justify resistance, rebellion, or revolution. As Ripstein notes, this applies equally to morally dubious origins of the distant past, because the actions of past generations cannot be used as a pretence for subverting the rightful condition of citizens now: “If the original contract is an idea of reason...there is no point in asking about when the contract was formed, any more than there would be a point in trying to ground the moral concept of a person in a series of empirical tests. An idea of reason never describes a datable historical event.”³⁵

(2) The above justifications are, of course, legal as well as moral ones, which point to a larger argument that the existence of a right to resist would, in a variety of fundamental ways, contradict the very premises the constitutional order. Once individuals have exited the state of nature and submitted their individual wills to that of “the universal legislative will,” there is no mechanism for them to stand in judgment of the constitution from outside of it: “The reason for this is that the people, under an existing civil constitution, has no longer any right to judge how the constitution should be administered. For if we suppose it does have this right to judge and that it disagrees with the judgment of the actual head of state, who is to decide who is right? Neither can act as judge of his own cause. Thus there would have to be another head above the head of state to mediate between the latter and the people, which is self-contradictory.”³⁶ This is more than the merely legalistic objection that the law cannot itself recognize a *legal* right to revolution, thereby leaving space for a moral one. As we have seen, the people’s “duty to put up with even what is held to be an unbearable abuse of supreme authority” is indeed a moral one, precisely because it is impossible for Kant to conceive of “resistance to highest legislation...as other than contrary to law, and indeed as abolishing the entire legal constitution” (6:320), thereby destroying “the only state in which men possess rights.”³⁷

(3) Finally, and relatedly, we can see that in the terms of Kant’s social contract, the general will is an institutional one which cannot exist outside of or apart from the currently existing commonwealth: Kant views existing governments as representations of the general will – even though imperfect ones.

³⁴ Kant, *Metaphysics of Morals*, p. 98.

³⁵ See Ripstein, *Force and Freedom*, pp. 334 ff.

³⁶ Kant, “Theory and practice,” p. 81.

³⁷ Kant, *Metaphysics of Morals*, pp. 96-97; “Theory and practice,” p. 81; “Perpetual peace,” p. 129.

The problem posed by resistance is thus two-fold: First, if the existing government is an expression of the general will, its decrees and laws are manifestations of the self-legislation of the people, backed by the coercive force of government. Thus, in Korsgaard's terms, "[t]o revolt, where that means to oppose the decisions of the government, is therefore to oppose the general will," which is either incoherent, or an illegitimate, unilateral dissolution of the only framework that exists for the realization of rights and the exercise of human freedom.³⁸ Second, and following directly on the heels of the last, even supposing that a resistance movement secures the endorsement of the people – even if the majority of the people, having been subject to abuse at the hands of a tyrant, are in favor of rebellion – there would be no way for us to know whether the resistance truly embodies the general will. Kant's procedural interpretation of the general will means that without a legitimate means of representing this will, we cannot know when it speaks, or lay claims to what it says. And in an already constituted regime, the representation of the legitimate will of the people is none other than the standing government. Thus, when people revolt, it is the mob, and not the people, who act.³⁹

Apart from the philosophical underpinnings of the Kantian notion of popular sovereignty, there is an empirical worry here, as well: Kant fears that a group claiming to act for the people will is not only a *de facto* mob; they will probably act like one, too. Even if a revolution is successful in putting an end to "autocratic despotism and to rapacious power-seeking oppression," Kant is wary of the kind of politics that such uprisings unleash: surely, revolutions are unlikely to lead to the kind of enlightenment and "reform in ways of thinking" that Kant wishes to see amongst the general populace. He suspects, in "What is Enlightenment?" (1784), that all that may come out of even the most successful rebellions is a replacement of new prejudices for the old, and an "[unleashing of] the great unthinking mass" – a concern made prescient by the onset of *la Terreur* in France in 1793.⁴⁰ Kant therefore advises reform, not revolution, and critique rather than rebellion – the "*freedom of the pen* is the only safeguard of the rights of the people," a freedom which, he stipulates, "must not transcend the bounds of respect and devotion towards existing constitution, which should itself create a liberal attitude of mind among the

³⁸ Korsgaard, "Taking the law," p. 250; see also Williams, *Kant's Political Philosophy*, pp. 173-178.

³⁹ See Ripstein, *Force and Freedom*, p. 336.

⁴⁰ Kant, "An answer to the question, 'What is Enlightenment?'" in *Kant: Political Writings*, p. 55.

subjects”.⁴¹ Reason and critique, not revolutionary upheaval, is the exercise of man’s freedom that enables enlightenment.

Kant’s social contract takes its lights from Rousseau, rather than Locke: in destroying the law we have ourselves willed, as a revolution would, we in some sense wage war on our own freedom – a puzzling and disastrous possibility, both politically and morally. The law is therefore inviolable, and rightful resistance always (and in all ways) a contradiction in terms. And yet, Kant is not entirely unequivocal or consistent when it comes to evaluating the revolutions of his own time – the American, and then the French. While Kant had little to say in his political writings about the revolutionaries themselves, he saw an important – indeed, a “universal” – role for the “disinterested sympathy” of the spectators, which for him was revealing of the moral character of all humanity. In a section of *The Contest of Faculties* entitled “A renewed attempt to answer the question, ‘Is the human race continually improving?’” (1798), he writes effusively about these spectators, ultimately concluding that their obvious sympathy for revolutionaries, despite the risk posed to their own lives, provides irrefutable evidence of man’s progressive and moral nature.⁴² Moreover, Kant, as a student of history and a believer in providence, created space for revolution and violent upheaval in his view of human history and the nature of progress. Elsewhere in the same essay, for example, Kant has the following to say about the gap between the ideal constitution and the lived experience of political regimes:

A civil society organized in conformity with [a commonwealth in terms of concepts of pure reason] and governed by laws of freedom is an example of representing it in the world of experience, and *it can only be achieved by a laborious process, after innumerable wars and conflicts*. But its constitution, once it has been attained as a whole, is the best qualified to keep out war, the destroyer of everything good. Thus it is our duty to enter into a constitution of this kind; and in the meantime, since it will be a considerable time before this takes place, it is the duty of monarchs to govern in a *republican* (not a democratic) manner, even although they may *rule autocratically*.⁴³

We have already seen how the duty of rulers to create a rightful, just constitution implies no corresponding right of resistance. But note here the potentially productive role that conflict and wars may play in Kant’s view of human history – at least in the long run. We are confronted with the following paradox, then: as moral subjects and citizens, we are prohibited from rebelling against our

⁴¹ Kant, “Theory and practice,” p. 85. Emphasis in original.

⁴² Kant, *The Contest of Faculties*, in *Religion and Rational Theology*, edited by P. Guyer and A. Wood, translated by M.J. Gregor and R. Anchor (Cambridge: Cambridge University Press, 1996), p. 182.

⁴³ *Ibid.*, p. 187. First emphasis mine.

governments, no matter how much they abuse us, for all the reasons we discussed above; however, should we rebel anyway, and succeed in establishing a new regime, we may in the long run (unwittingly) contribute to the progress of humankind – the realization of the regime “governed by laws of freedom” and the historical progression toward a perpetual peace. There is the belief in the triumph of reason and freedom over the long course of human history, but limited moral means for such changes to occur.

It is unclear exactly what we ought to make of all this. For though Kant perhaps ties the knot between freedom and law too tightly for our modern sensibilities (particularly when we consider conditions under autocracies and dictatorships), we cannot deny that the twentieth century has given us ample evidence in support of Kant’s worst fears: the chaos and bloodshed that often come in the wake of hopeful and inspiring resistance; the horror of a revolutionary vanguard turned powerful (and power-hungry) ruling clique; the abject denial of rights that follows the promise of a new dawn for them. What the twenty-first century has to teach us is as yet unclear, but the past decade has certainly been full enough with the blood of revolutions turned civil wars and sectarian conflicts. The lessons we might draw cannot quite shake free of this ambivalence. All that seems clear is that the individual takes an enormous moral and political risk in confronting the government: standing unmoored from moral law, the political dissident may well help inaugurate a government which better realizes and promotes the “spirit of freedom” that Kant demands from rulers – or she may be, in part, responsible for the collapse of the system, and with it, whatever rights and freedoms were available to citizens. It is an enormous and inescapable burden.

II. Resistance within the bounds of reason alone? Kant’s long shadow

Despite Kant’s enthusiasm for the French revolution and its “wishful participants,” he is insistent that even forms of resistance that fall far short of revolution are to be taken off the table, morally speaking.⁴⁴ It should strike us as surprising, then, to find deep resonances between Kant’s theory and contemporary accounts of civil disobedience and rightful resistance.⁴⁵

⁴⁴ Kant does seem to leave room for passive resistance, or a “*negative* resistance,” by which he means the ability of parliamentary members to refuse to provide the funds to enact an order from the executive. See Kant, *Metaphysics of Morals*, p. 121. See also fn. 21.

⁴⁵ Given the abiding influence of Kantian ethics on political theory, this might not actually seem that surprising. However, given Kant’s categorical denial of the right to resist, I think it should give us pause about using his framework to develop a theory of our own on this matter.

In some ways, contemporary theorists have taken a much broader view than Kant, in that resistance and even revolution against non-democratic regimes appears (at least to some) justifiable. In his 1973 *Democracy and Disobedience*, for example, Peter Singer devises three ideal-typical models of political community: a benevolent dictatorship, an autocracy based on a custom of rule seniority, and a democracy in which all decisions are taken by majority rule. Only in the latter is disobedience and resistance thought to be a real problem, as only in that case is the political decision-making procedure reasonably non-arbitrary. In democracies, Singer contends, the rules of the game – which presuppose compromise and compliance with the majority decision – create special reasons to obey, making the justification of disobedience difficult, though not impossible.⁴⁶ The question then becomes not about the right to resist per se, but about the justification for particular kinds of purposive law-breaking within democracies – thus, a question of civil disobedience. The apparent broadening of theoretical scope is only apparent; the question of resistance more broadly, outside of the context of liberal democracies and beyond a narrowly defined form of civil disobedience, ceases to be a question for most theorists at all. And while it is not unreasonable to claim that disobedience in democracies requires a special justification, this narrowing of perspective has, as I will argue below, created systematic distortions within the predominant theoretical understanding of forms of resistance, both sociologically and normatively.

In the context of the 1960s and 1970s, out of which the bulk of the literature on the subject comes, liberal philosophers attempted to construct a moral justification for civil disobedience in democracy, in response to those who – like the seven-person majority of the NCCPV – saw it as the harbinger of a “culture of lawlessness,” tied in nefarious ways to riots and urban violence. Such theorists began, with Kant, with the assumption (implicit or explicit) of a moral obligation to obey the law. The reasons for this are varied – from the expectations created by participation and the terms of “fair play” to the more republican accounts based on democratic authorship – but the presumption in favor of

⁴⁶ P. Singer, *Democracy and Disobedience* (Oxford: Oxford University Press, 1974). Singer is, of course, a utilitarian, placing him at somewhat of a remove from the rest of the liberal theorists discussed here. Nevertheless, his argument turns on something quite like the “fair play” argument of John Rawls, H.L.A. Hart, and many other liberal theorists. Singer’s argument turns on the idea of a “fair compromise,” which is similar (though not identical) to fair play: “The ground of obligation for which I am arguing is that the Dissenter, by voluntarily participating in the vote on the question of whether *The News* should be ordered, understanding that the purpose of the election is to enable the group to reach a decision on this issue, has behaved in such a way as to lead people reasonably to believe that he was accepting the democratic process as a suitable means of settling the issue” (p. 50). To his credit, however, Singer is much more sensitive to the deficiencies of actually existing democracies, namely systematic imbalances of power and inequalities of influence, such that in reality the obligation to obey is not binding on groups and individuals “with less than an equal say in decisions” (p. 134).

such an obligation is all but uniform across the literature on this topic.⁴⁷ The problem created by the civil disobedience of civil rights activists and anti-Vietnam war protestors is that political obligation is not simply dissolved by the existence of an unjust law; for Rawls as for others, the injustice of any particular law or its implementation “is not sufficient ground for not complying with it any more than the legal validity of legislation is always sufficient to require obedience to it.”⁴⁸ We are sometimes required to obey bad laws, and even unjust ones; we sometimes must simply “[suffer] the defects of one another’s sense of justice.”⁴⁹ There are, however, limits to this suffering: the philosophical problem becomes one of determining those limits – the conditions under which we may rightly be excused from our otherwise binding duty to obey.⁵⁰

If we are sometimes obligated *not* to resist a single unjust law, the same cannot be said for an entire system which has transgressed the boundaries of what is “reasonably” or “fundamentally” just. When there are embedded, pervasive institutional injustices that emanate from the “basic structure of

⁴⁷ See, e.g., J. Rawls, “Legal obligation and the duty of fair play,” in *Law and Philosophy*, edited by S. Hook (New York: New York University Press, 1964); C. Cohen, “Civil disobedience and the law,” *Rutgers Law Review* 21, no. 1 (1966): pp. 1-18; Marshall, “The protest movement and the law”; Rawls, “The justification of civil disobedience,” in *Civil Disobedience: Theory and Practice*, edited by H. Bedau (New York: Pegasus, 1969); H. Storing, “The case against civil disobedience,” in *Civil Disobedience: Theory and Practice*; H. Bedau, ed., *Civil Disobedience: Theory and Practice*; C. Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (New York: Columbia University Press, 1972); M. Cohen, “Liberalism and disobedience,” *Philosophy and Public Affairs* 1, no.3 (1972): pp. 283-314; Singer, *Democracy and Disobedience*; R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978); Dworkin, *A Matter of Principle* (London: Harvard University Press, 1985); P. Harris, *Civil Disobedience* (Lanham, MD: University Press of America, 1989). A partial exception is Michael Walzer, who argues that our duties to our more immediate communities can sometimes trump our duties to obey the state, such that we can speak of in certain cases a duty to disobey. See M. Walzer, *Obligations: Essays on Disobedience, War and Citizenship* (Cambridge, MA: Harvard University Press, 1970). For a cogent summary and critique of some of these arguments (with a view toward defending civil disobedience), see D. Lyons, “Moral judgment, historical reality, and civil disobedience,” *Philosophy and Public Affairs* 27, no. 1 (2006): pp. 31-49. Notably, however, Lyons’ argument is ultimately one that also relies in a certain way on the framework of political obligation – he simply argues that “in paradigmatic cases of civil disobedience,” (chattel slavery, British imperialism, and Jim Crow), the “moral condition for political obligation” is violated, thereby eliminating the need for a moral justification for civil disobedience (p. 32). Thus his argument cannot tell us much about civil disobedience which stands outside of these “paradigmatic” cases, the implication being that political obligation otherwise holds.

⁴⁸ Rawls, “The justification of civil disobedience,” p. 243. See also Rawls, “Legal obligation,” pp. 12-13. If this were not true, most theorists reason, we would be stuck yet again on the slippery slope, attempting to adjudicate between the consciences of saints and sinners.

⁴⁹ *Ibid.*, p. 245.

⁵⁰ The idea that there exists a particularly *moral* duty to obey the law, though once a commonplace (at least in normative political theory), has become an object of some skepticism. In particular, it seems vulnerable both as an explanatory concept and as a normative one: it neither captures how political actors confront and judge matters of legality and illegality, nor helps us distinguish between those acts that the community judges to be *mala in se*, as opposed to those which are simply *mala prohibita* (let alone the shifting and contested terrain between these categories). I cannot engage in the details of this large debate here, but suffice it to say that a moral duty to obey the law cannot be taken for granted. On this debate, see e.g. M.B.E. Smith, “Is there a prima facie obligation to obey the law?” *Yale Law Journal* 82 (1973): pp. 950-976; A. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979); K. Greenwalt, *Conflicts of Law and Morality* (New York: Oxford University Press, 1987). A helpful summary of the debate is provided in “The duty to obey the law,” in *A Companion to Philosophy of Law and Legal Theory*, edited by D. Patterson (Oxford: Blackwell Publishing, 1999): pp. 464-474.

society,” the moral duty to obey is negated; such an obligation “cannot coexist with significant, systematic injustice that is deeply entrenched.”⁵¹ Leaving aside questions of what exactly determines whether or not a system is “reasonably” or “fundamentally” just – a specification which tends to go unelaborated and under-specified, and which ought to give us pause – there is something of a puzzle created by such an account. We might rightly wonder about the democratic and liberal credentials of a system which is, at its core and in an entrenched way, *fundamentally* unjust – and to the extent that such a system is found significantly wanting on these grounds, I am not sure that there is much of a philosophical problem to be worked out, at least in the terms of democratic political obligation.⁵² Alternatively, and I think more importantly, we might question the assumption that the common conception and experience of “fundamental” injustice necessarily extends from the “basic structure of society” – and thus, if constitutional principles are in fact the exclusive target of justified protest.⁵³ And if not – if serious injustice exists and persists in the overlapping web of local, national, and global institutions and practices, and has significant political, economic, and cultural components – then the obviousness of distinguishing between justified and unjustified disobedience on the basis of its appeal to “fundamental” injustice becomes significantly muddled.

Tellingly, Rawls’ conceptualization of civil disobedience excludes claims to social and economic policies, which relate only indirectly to “fundamental equal liberties.” On Rawls’ account, only “serious infringements” of the principles of equal liberty (the more or less standard set of liberal political and civil rights) and fair equality of opportunity count as “instances of clear and substantial injustice.” He explains that this is so because, unlike infractions of equal liberty and fair equality of opportunity, claims on “economic and social institutions and policies” are too difficult to evaluate: “A choice among these *depends upon theoretical and speculative beliefs as well as upon a wealth of statistical and other information, all of this seasoned with shrewd judgment and plain hunch.* In view of the complexities of these questions, it is difficult to check the influence of self-interest and prejudice; and even if we can do this in our own case, it is another matter to convince others of our good faith. ...*The appeal to the*

⁵¹ Lyons, “Moral judgment,” pp. 36-37; Rawls, “The justification,” p. 249; Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 350-355; C. Cohen, *Civil Disobedience*, p. 6. It should be noted that Lyons’ argument differs in significant ways from the canonical liberal account that he critiques. His attention to the historical instances themselves, and to the frequent mischaracterization of liberal theory’s paradigmatic disobedients – Thoreau, Gandhi, King – are perceptive and persuasive, and broadly germane to the account offered here. But see f.n. 47.

⁵² See Lyons, “Moral judgment,” for an argument of this kind.

⁵³ More on this below.

public's conception of justice is not sufficiently clear."⁵⁴ Rawls is no doubt overly sanguine about the obviousness of distinguishing an unjust law from a just one, even when justice is so restricted to questions of "basic liberties." The question becomes altogether vexed if we grant that injustice may have other roots than in society's "basic structure."⁵⁵ This issue of clarity is crucial, however, for a Kantian account which is nervous about the precariousness of extra-institutional actions that – being extra-institutional – are unmoored from the procedural general will. The attempt to circumscribe civil disobedience in such a way as to make its claims to justice obvious and clear to all, to root them in constitutional principles which are within the purview of the general will, can thus be understood as an attempt to expunge the ambiguity and potential for arbitrariness from certain forms of collective action – to distinguish the justice of the people from the will of the mob.

These problems are multiplied by the way such theories go on to characterize permissible, rightful resistance: that form of action which is justified by and actively appeals to "a common conception of justice" held by the majority and enshrined within the constitution, and which "manifests a respect of legal procedures"⁵⁶ by directly appealing to constitutional principles.⁵⁷ Disobedience, in other words, must be "civil." While it is a notoriously disputed concept, and while there is much debate in the literature about its precise bounds, most theorists follow Hugo Bedau in understanding this to mean "disobedience which is 'passive,' 'nonviolent,' 'courteous,' 'not uncivil':"⁵⁸ it is resistance circumscribed by a prohibition against violent action and a commitment to a certain level of civility – understood in its

⁵⁴ Rawls, *A Theory of Justice*, pp. 371-373 (emphasis mine). See also Rawls, "The justification," p. 250.

⁵⁵ Brandon Terry has made a persuasive and compelling argument on this point with regard to the civil rights movement. Based on an interpretation of recent historiography of the "long civil rights movement," Terry argues that the experience of and fight against racial inequality in the US is not well-characterized by the emphasis on constitutional law, national politics, and basic liberties. When reconsidered against the backdrop of the actual institutionalization and practice of racial discrimination and segregation, the task of identifying violations of basic liberties becomes no less tendentious (with regard to the "public's conception of justice," particularly) than determining violations of economic and social justice. Moreover, Terry points out, it is arguably because the first principle does not require a redistribution of wealth that we are able to speak of any kind of consensus over the first principle at all – the Rawlsian compromise depends on leaving economic justice outside the public conception of justice. B. Terry, "Political theory and the civil rights example: Rawls and race," unpublished.

⁵⁶ Rawls, "The justification," p. 246.

⁵⁷ In addition to Rawls, see e.g. C. Cohen, "Civil disobedience and the law," pp. 1-18; C. Cohen, *Civil Disobedience*, pp. 44-46; Dworkin, *Taking Rights Seriously*, pp. 206-222; Habermas, "Civil disobedience: Litmustest," pp. 99 ff.

⁵⁸ Bedau, *Civil Disobedience: Theory and Practice*, p. 19. Interestingly, however, the idea of civil disobedience as "passive" seems to meet with more approval from liberal theorists than practitioners and their students, many of whom (following Gandhi), have been keen to highlight the very active and sometimes aggressive stance required by it. See, e.g., M.K. Gandhi, *Non-Violent Resistance* (New York: Schocken Books, 1951): pp. 3-4, 6, 15-18; K. Shridharani, *War without Violence: A study of Gandhi's method and its accomplishments* (New York: Harcourt Brace, 1939): pp. 264 ff.; R. Niebuhr, *Moral Man and Immoral Society: A Study of Ethics and Politics* (New York: Charles Scribner & Sons, 1941), pp. 245 ff.; G. Sharp, *The Politics of Nonviolent Action*, 3 vols. (Boston: Extending Horizon Books, 1973); M.L. King, *A Testament of Hope: The essential writings and speeches of Martin Luther King Jr.*, edited by J.M. Washington (San Francisco: Harper Collins, 1986), particularly the essays in Part I on nonviolence.

double-meaning as both “courteousness” and “civic-mindedness” – which expresses a willingness to act “within the limits of fidelity to the law.”⁵⁹ (Here we might linger momentarily over this opaque Rawlsian phrase to hear the echoes of Kant – his insistence that we stay within “the bounds of respect and devotion towards the existing constitution.”)

What “fidelity to the law” means in practice is not always clear, but it has come to be defined and accepted through several well-worn and paradigmatic examples: resisters must be conscientious in their violations of law; they must accept the stipulated punishment for such acts without further resistance; they must conduct themselves “civilly” toward other citizens; and they must at all times refrain from violence.⁶⁰ The claim of Rawls and others is that there is a core expressive element of these “civil” acts: they are meant to reveal the moral judgment of the resister, showing that though she resists this particular law, she means no disrespect to the constitution itself. Quite to the contrary: the act of disobedience, when it remains within these bounds, expresses a commitment to and reverence for it. The ultimate conceptual point is summarized by Carl Cohen in the following terms:

[Civil disobedience] does not seek to unseat an existing government and does not destroy the order or stability of national or community life. It is a serious matter, in being a deliberate violation of the law, but it is a shallow (although common) mistake to confuse it with revolution or to view the civil disobedient as a revolutionary.

The essential difference between the two lies in this: *the civil disobedient does, while the revolutionary does not, accept the general legitimacy of the established authorities*. While the civil disobedient may vigorously condemn some law or policy those authorities institute, and may even refuse to comply with it, *he does not by any means intend to reject the larger system of laws of which that one is a very small part*.⁶¹

In short, the civilly disobedient dispute a single law, or a small set of them; they do not question the legitimacy of the state, nor do they seek to transform it in any sweeping way. The broader governmental

⁵⁹ Rawls, “The justification,” p. 247.

⁶⁰ A noteworthy exception on this front is Michael Walzer’s essays in *Obligations*, in which he discusses some conditions under which violence (e.g. destruction of corporate property) and coercion (e.g. manipulation or other means of coercing fellow citizens) are morally acceptable. However, though his theory differs in significant ways from most theorists of civil disobedience, he too theorizes within a framework of the moral obligation to obey – even if he theorizes such an obligation differently.

⁶¹ C. Cohen, *Civil Disobedience*, pp. 44-45 (emphasis mine). A strange outcome of Cohen’s distinction between civil disobedience and revolution is that both Thoreau and Gandhi fail to pass muster as appropriately civil: “Thoreau’s act may have been a noble one, but in placing himself above the law and denying its jurisdiction over him, he became a rebel. ... Gandhi was a rebel; had tactical considerations permitted, he would surely have been permanently banished or executed” (p. 46). While Gandhi, who because of the anti-imperial nature of his protests, has raised questions for other theorists, this is particularly odd because Thoreau’s disobedience has often been critiqued from the other side—claiming, for example, that its limited, individual, and private nature render it apolitical and of little relevance to a study of civil disobedience.

apparatus remains in place and relatively stable.⁶² Even Habermas, whose account is overall broader, more flexible, and more democratic in nature, relies on similar, and by now familiar, liberal formulations of the problem and its limits: civil disobedience is thus defined by its “appeal to the legitimating foundations of our democratic constitutional order” and to “the capacity for reason and sense of justice of the majority in each particular case.”⁶³ Despite significant departures from the liberal theory – Habermas rightly positions acts of disobedience as “suspended between legitimacy and legality for good reasons”⁶⁴ – his ultimate reliance on the liberal framework renders his own account contradictory and self-defeating. While on one page Habermas appears to celebrate the ambiguity and risky nature of disobedience, which functions and succeeds precisely because it threatens a “forfeiture of [state] legitimacy,” he returns in the end to the refrain that “civil disobedience does not place the existence and fundamental significance of the constitutional order in question,” citing approvingly Rawls’ phrase about fidelity to the law. In fact, Habermas remarks, civil disobedience is reliant upon “a constitutional state that remains wholly intact” – a phrase of particularly unclear meaning when considered from the vantage point of significant structural injustice.⁶⁵

Perhaps such assurances are necessary to mollify critics who see civil disobedience as unquestionably dangerous and disruptive; they are nonetheless deeply problematic both philosophically and politically. For if political obligation is only waived under conditions of fundamental injustice, what might it mean to manifest such respect for the “general legitimacy of established authorities”? If civil disobedience is justified only when the “basic structure” of society produces systematic infringements

⁶² This is a widespread idea throughout the literature, repeated in numerous accounts, including recent ones. An article on Occupy Wall Street last year repeated the same idea: civil disobedience “[accepts] the legitimacy of political institutions, but [resists] the moral authority of resulting laws.” See B. Harcourt, “Occupy Wall Street’s political disobedience,” *The New York Times*, 13 October 2011

⁶³ Habermas, “Civil disobedience,” pp. 99.

⁶⁴ *Ibid.*, p. 112. He also allows more space for claims that deviate from the liberal model of “obvious violations” of fundamental rights in his claim that some decisions, by virtue of their irreversibility and potentially life-threatening effects, are not well-supported by the “threadbare cover of a simple parliamentary majority” (p. 109). Notably, however, he accepts Rawls’ (and others’) characterization of the civil rights movement as adequately described by the terms of the liberal theory, and appears to view his discussion as a friendly extension of it.

⁶⁵ *Ibid.*, pp. 103, 105. Habermas is not alone amongst democratic theorists who have, in the midst of critiquing the liberal account, accepted or adopted some of its more problematic features. While they rightly point to the narrowness and limited nature of the liberal theory, they tend to accept that it aptly characterizes a certain type of action (“liberal disobedience”) that occurred in a particular era of activism, in which movements “actually did assert fundamental rights against overreaching majorities,” just as the liberal account specifies that they must. The problematic liberal interpretation of disobedience, and of the civil rights movement in particular, remains untroubled and unquestioned. Moreover, while admitting a broader range of movements into the club of justifiable disobedience, these theories tend to replicate the same liberal assumptions about the ‘civility’ and non-coercive nature of civil disobedience and legitimate democratic protest – albeit from a republican or deliberative standpoint rather than a classically liberal one. See Markovits, “Democratic disobedience”; Smith, “Democracy, deliberation and disobedience”; Smith, “Civil disobedience and the public sphere.”

of rights, why should legitimate resistance be limited to making claims on some “very small part” of a larger order which is (by definition) unreasonably unjust? Should claims be limited to “basic liberties” and “constitutional principles” at all, when systematic injustices are no less likely to emanate from procedures and implementation, cultural and corporate practices, and the disparate impact of facially neutral law on marginalized populations? Is it reasonable to assume that when the meaning and interpretation of core constitutional principles have been perverted and distorted— not by a singular unjust law, but by a significantly, systematically oppressive set of institutions, not all of which are legal in nature—that a majority’s “sense of justice” will have escaped unscathed? Is it not often the case that the disobedient challenges, rather than affirms, the ‘common sense’ view of justice pervasive in society? Particularly when subjects confined to the private sphere or the market become subjects of public justice – the sexual division of labor, reproductive health, gay rights, globalization, economic and environmental justice – it is typically in challenge to, rather than affirmation of, the majority’s sense of what justice requires. Such is the shifting and contested terrain of political struggle, in which disobedience, protest, and resistance play a crucial part. The widely-shared definition of civil disobedience seems to negate its own condition of possibility.

As in Kant, liberal theorists evince a desire to recognize and affirm the outcomes of social change – and particularly, social and political progress – but little ability to understand or appreciate its mechanisms. Their theories are, I believe, driven not by the sociological model of action we might construct in close conversation with specific cases, but by a rather Kantian concern for preserving the legal order as the foundation of freedom, thereby limiting the potentially destabilizing consequences of resistance. If it is to be permissible, resistance cannot threaten to unleash the kinds of forces that Kant feared it would, nor can it threaten the duly constituted state, which provides the framework for rights, and thereby freedom. Freedom and existing law remain so deeply intertwined in these accounts as to dramatically narrow the form and scope of ‘legitimate’ resistance. Within the strictures of a theory which takes, as its starting and ending points, the stability and centrality of law, there can be but limited room for the contingency, disorder, risk, and sometimes *incivility* of groups of people engaged in the contentious business of collective political action.

The difficulties that plague the liberal theories, then, extend beyond the issue of political obligation; their chief failing has not been philosophical, but descriptive and explanatory: there is an

alarming gap between the theory and the sociological and historical realities it is meant to capture. This gap presses beyond the bounds of that necessary filter of theoretical abstraction, which (in theory!) sacrifices some fidelity to detail and individual eccentricity in the name of bringing to light essential dynamics, core principles, and general patterns. Instead, the liberal theories, often developed on the basis of a few “paradigmatic” cases – highly stylized and briefly referenced, more as cultural shorthand than an elaboration of examples – have tended to misrepresent the phenomena itself, which has had a mutually distortive effect both on the terms of our political theories as well as on the narratives through which we organize and interpret our collective histories. The selective use of history shapes the concepts and conclusions of the normative theory; the theory, in turn, lends moral weight to a caricatured and truncated history of political struggle.⁶⁶

One pervasive and clear instance of this kind of distortion is the way in which theorists of civil disobedience and social protest use individuals – often prominent, historically and culturally significant figures – as stand-ins for collective phenomena and the social groups, movements, and “movements of movements” involved in them. The appeal to figures like Socrates and Antigone as quintessential, “classical,” or exemplary models of civil disobedience is one obvious manifestation of this problem – Antigone, after all, did not stage a sit-in at Creon’s steps, nor orchestrate a public procession to bury her brother; Socrates defended his act of disobedience before the court, but cautioned Crito not to join him – but references to Thoreau, Gandhi, and King are no less problematic.⁶⁷ Oddly, since fear of “the mob” and its violence are what drives both the attack on civil disobedience and the narrowness of its defense, collectives are strikingly absent from most liberal theories. Instead, discussions of Gandhi’s actions or King’s intentions abound – as if what were at stake (historically, theoretically) in

⁶⁶ These caricatured histories are not free, either, of political uses and abuses, as the historians of the “long civil rights movement” have argued. See e.g. K. Mattson, “Civil rights made harder,” *Reviews in American History* 30, no. 4 (December 2002): pp. 663-670; R. Pride, *The Political Use of Racial Narratives: School Desegregation in Mobile, Alabama, 1954-97* (Urbana: University of Illinois Press, 2002); J.D. Hall, “The long civil rights movement and the political uses of the past,” *The Journal of American History* 91, no. 4 (March 2005): pp. 1233-1263; Terry, “Political theory and the civil rights example.”

⁶⁷ On this front the organization of some of the key edited volumes on the topic are instructive. In Bedau’s *Civil Disobedience: Theory and Practice*, Thoreau’s essay opens the work, as if to make it the center of the debate; moreover, in both Bedau’s *Civil Disobedience in Focus* as well as R.P. Wolff’s *Political Man and Social Man*, civil disobedience is framed as a debate between Thoreau and Socrates in *Crito*. Thoreau in particular provides a spectacularly poor model for understanding the collective phenomena that are the core concern of these theories. Thoreau is explicit about his individualist stance: “[t]he only obligation which I have a right to assume, is to do at any time what I think right.” His argument rests on the preservation and protection of the moral integrity of the individual, in the face of the corrupting influence of state injustice. See Thoreau, “On civil resistance,” p. 28; see also L. Gougeon, “Thoreau and reform,” in *Cambridge Companion to Henry David Thoreau*, edited by J. Myerson (Cambridge: Cambridge University Press, 1995), p. 202.

decolonization or the fight against racial injustice were the individual acts of singular men,⁶⁸ and not the organized political action of thousands, many of whom had no contact with the exemplary figures we know so well, and whose tactics, philosophies, and motivations varied considerably.⁶⁹ As Michael Walzer has written, “it is not the mere individual right to rebel, unchanged in groups large or small, that sustains the enterprise but, rather, the mutual undertakings of the participants.”⁷⁰ It is because civil disobedience, protests, boycotts, strikes, sit-ins, occupations, marches, and rallies are *collective* that they are powerful forms of political action; it is also because they are collective that they admit more contingency and risk than the claims of an individual conscience, private or otherwise. Collective action – legal forms included – is disruptive and at times disorderly. But then again, so is social change.

III. Political action & the uncivil right to resist

The emphasis on the *civility* of disobedience – its unwavering constitutional devotion and commitment to the legitimacy of the state – has served to obscure the crisis-generating function of all resistance (even the most conscientious and nonviolent forms) and thus to deny the actual dynamics of how resistance operates, and why it is effective. It insulates it from one of its defining elements, removing any semblance of *moral risk* from the perspective of participants and any *political risk* from the perspective of the system as a whole. In that way, it is also to deny the transformative potential in contentious political action: forms of oppositional collective action can and do threaten “the order and stability of national [and] community life” – *that is precisely the point*. In Gene Sharp’s estimation, “nonviolent action is a means of combat, as war. It involves the matching of forces and the waging of ‘battles,’ requires wise strategy and tactics, and demands of its ‘soldiers’ courage, discipline, and sacrifice. This view of nonviolent action as a technique of active combat is diametrically opposed to the popular assumption that, at its strongest, nonviolent action relies on rational persuasion of the

⁶⁸ Take, for example, the following statement made by Milton Konvitz: “Gandhi’s acts need to be interpreted as symbolic or vicarious acts of civil disobedience, staged by the group – for example, the untouchables – which, spiritually, he felt he represented.” See M. Konvitz, “Civil disobedience and the duty of fair play,” in *Law and Philosophy*, p. 26.

⁶⁹ Charles Payne, in his superb study of the grassroots civil rights movement in Mississippi, usefully distinguishes between “mobilization” and “organization” – the former being the “tradition best symbolized by the work of Martin Luther King,” and which relied on key charismatic public personas to mobilize “large-scale, relatively short-term public events.” Organizing, on the other hand, is what took place at the grassroots, emphasizing the “long-term development of leadership in ordinary men and women,” in order to transform individuals from passive into active democratic citizens. See C. Payne, *I’ve Got the Light of Freedom: The organizing tradition and the Mississippi freedom struggle* (Berkeley: University of California Press, 1995): pp. 3-4.

⁷⁰ Walzer, *Obligations*, p. 22.

opponent” – rather, it relies on using creative means for disturbing the balance of power, often amounting to “*nonviolent coercion*.”⁷¹

Even within the texts of key figures like Gandhi and King, it is not clear that the exhortation to “cheerfully suffer imprisonment”⁷² or to break unjust laws “*openly, lovingly*,”⁷³ plays the outsized role that normative theorists have claimed for it. Certainly, both Gandhi and King had deep commitments to nonviolent action motivated out of moral principle; often overlooked is the fact that nonviolent means and acceptance of punishment also met particular pragmatic and strategic needs: violence was immoral, but violence against a stronger enemy was also foolhardy and fatalistic; willingness to suffer punishment might perform a moral function, but it also put the various coercive mechanisms of an unjust system into sharp relief, playing on the consciences of other citizens, the media, and political figures.⁷⁴ King’s “Letter from a Birmingham Jail” is a case in point: King certainly makes reference to respect for the law, but he also frames the problem of civil disobedience in the following way: “Nonviolent direct action seeks to *create such a crisis and establish such creative tension* that a community that has constantly refused to negotiate is *forced* to confront the issue. It seeks so to *dramatize* the issue that it can no longer be ignored. ...So the purpose of the direct action is *to create a situation so crisis-packed* that it will inevitably open the door to negotiation.”⁷⁵ The language is unmistakably the language of crisis, destabilization, and even coercion (though nonviolent). It is also a performative language which addresses not just the moral bounds of action, but its function: to “dramatize” the ongoing oppression faced by the Black population, and to “force” a confrontation with systematic injustice. On both counts, it evinces an understanding of resistance that goes unaddressed in most theories of civil disobedience.

⁷¹ Sharp, *Politics of Nonviolent Action*, pp. 67-69.

⁷² Gandhi, *Nonviolent Resistance*, p. 4.

⁷³ King, “Letter from a Birmingham Jail,” in *Civil Disobedience: Theory and Practice*, p. 78.

⁷⁴ Consider the following passage from King’s book *Where Do We Go From Here?:* “One of the main questions that the Negro must confront in his pursuit of freedom is that of effectiveness. What is the most effective way to achieve the desired goal? If a method is not effective, no matter how much steam it releases, it is an expression of weakness, not strength. Now the plain, inexorable fact is that any attempt of the American Negro to overthrow his oppressor with violence will not work. We do not need President Johnson to tell us this by reminding Negro rioters that they are outnumbered ten to one. The courageous efforts of our own insurrectionist brothers, such as Denmark Vesey and Nat Turner, should be eternal reminders to us that violent rebellion is doomed from the start. ...This is no time for romantic illusions and empty philosophical debates about freedom. This is a time for action. What we need is a strategy for change, a tactical program that will bring the Negro into the mainstream of American life as quickly as possible. So far, this has only been offered by the nonviolent movement. Without recognizing this we will end up with solutions that don’t solve, answers that don’t answer and explanations that don’t explain.” See King, *Where Do We Go From Here: Chaos or Community?*, in *Testament of Hope*, pp. 590-592. See also Lyons, “Moral judgment,” pp. 39 ff.

⁷⁵ King, “Letter from a Birmingham Jail,” p. 75 (emphasis mine).

In reading the “Letter,” it becomes difficult to separate the unjust law from the greater system which issues it. King discusses not just the single unjust law imposed on a minority, and not just the just law unjustly enforced, but also the case of an entire system of law and order without any foundation in justice.⁷⁶ Nor is this theme an isolated figure in one of King’s many writings; it pervades them. Far from separating single laws from a more fundamental legitimacy, King insists, in “A Testament of Hope,” that “justice for black people cannot be achieved without radical changes in the structure of society. The comfortable, the entrenched, the privileged cannot continue to tremble at the prospect of change in the status quo.” He continues, more forcefully still: “the black revolution is much more than a struggle for the rights of Negroes. It is forcing America to face *all its interrelated flaws – racism, poverty, militarism, and materialism*. It is exposing evils that are rooted deeply in the whole structure of our society. It reveals systemic rather than superficial flaws and suggests *that radical reconstruction of society itself is the real issue to be faced.*”⁷⁷ These statements do not leave the overall legitimacy of the state unquestioned. They insist that America’s problems extend beyond a system of “de jure” racism, limited to the South; and they recognize – in King’s words – not just “the tools of persuasion” but “the tools of coercion” as necessary to “break the backbone” of power.⁷⁸

Fiery language aside, King is not talking about recourse to violence. But he *is* making far more expansive claims about the state’s legitimacy – and what needs to be done in order for justice to be served, the kind of tactics we need to employ – than we would be led to believe by most theories of civil disobedience. In other writings, he explicitly links the fight for civil rights with the “madness in Vietnam” and the plight of labor, giving a sweeping sense of a fundamentally problematic system operating at multiple interrelated levels, not a matter of an isolated set of laws.⁷⁹ The “backbone,” he says, of American power must be broken. It seems, as Hannah Arendt observed, a distinction between the revolutionary and the civilly disobedient premised on an acceptance of the “frame of established authority” is not plausible.⁸⁰ Nor is it plausible that King experienced his decision to organize protests

⁷⁶ Ibid., p. 79.

⁷⁷ King, “A testament of hope,” in *Testament of Hope*, pp. 314-315 (emphasis mine).

⁷⁸ King, “MIA mass meeting at Holt Street Baptist Church,” accessed 12 February 2012 at http://www.stanford.edu/group/King/papers/vol3/551205.004-MIA_Mass_Meeting_at_Holt_Street_Baptist_Church.htm; see also King, “The drum major instinct,” in *Testament of Hope*, p. 265.

⁷⁹ See e.g. King, “If the Negro wins, labor wins,” in *A Testament of Hope*, pp. 201-207; “A time to break the silence,” in *ibid.*, pp. 231-244; *The Trumpet of Conscience*, in *ibid.*, pp. 634-656; “A testament of hope,” in *ibid.*, 313-330; “Showdown for nonviolence,” in *ibid.*, pp. 64-74; “Remaining awake through a great revolution,” in *ibid.*, pp. 268-278; *Stride toward Freedom*, in *ibid.*, pp. 417-490; and *Where Do We Go From Here*, in *ibid.*, pp. 555-633 just to name a few.

⁸⁰ Arendt, “Civil disobedience,” p. 77, citing C. Cohen, “Civil disobedience and the law,” p. 3.

and break certain laws as a moral dilemma, between upholding his obligation to obey and fighting the good fight.⁸¹ Such distinctions do not capture the historical reality of even paradigmatic cases of civil disobedience, and thus fail to isolate the element of civil disobedience that renders it morally and politically legitimate. Viewed from the perspective of the analysis offered here, in fact, civil disobedience appears altogether less civil.

All of this leaves entirely aside the claim that theories of civil disobedience too quickly eliminate the potential for other forms of legitimate resistance. However, if such theories cannot do justice to King's claims – King, who occupies so central a location in the conceptualization of the moral parameters of civil disobedience – then perhaps we ought to view them with no small amount of skepticism. It may be the case that this framework is not quite commensurable with the task of discussing resistance as something which *acts* in the world, and resisters as those actors who can destabilize an unjust and undemocratic system enough to change it.

If disobedience cannot be defended on the basis of its tameness, its restrained avoidance of crisis, its *civility*, then where does that leave us? Certainly, I am not in a position to offer a new normative theory that defends civil disobedience as a moral right or duty; nor can I provide a better way to prove that disobedience is actually a form of obedient reverence for law. If what I have said thus far is at all persuasive, then it would seem that this sort of venture will inevitably be frustrated by the very nature of the thing. Kant's denial of a right to resist operates, in part, on the premise that one cannot construct a general theory for something which – like resistance or disobedience to law – is in principle not generalizable. Kant, I think, is right about this; disobedience remains suspended (as Habermas says) between legitimacy and legality. Ironically, this is a truth more readily recognized by critics of civil disobedience than its defenders. And so it is that Joseph Raz, in an argument for why there can be no right to civil disobedience (as such) in liberal states, says the following: "civil disobedience is an exceptional political action. ...It is not necessarily, as is sometimes said, justified only as an action of last resort. In support of a just cause it may be less harmful than certain kinds of lawful action (e.g. a national strike, or a long strike in a key industry or service). It may be wrong not to resort to civil disobedience and to turn to such lawful action first, or give up any action in support of a just cause. The claim that civil disobedience is justified only when all else has failed or is certain to fail, like the claims

⁸¹ This point is made well and convincingly by David Lyons. See Lyons, Lyons, "Moral judgment," pp. 42-46.

that it should be open and non-violent, etc., reflects a failure to conceive of its true nature. It is an attempt to routinize it and make it a regular form of political action to which all have a right.”⁸² While Raz’s comments fit within the framework of a larger theory of the nature of authority, rights, and duties with which I am presently not concerned, there is a basic methodological point to be made: perhaps we would do better, in trying to recount and defend the value of oppositional political action like civil disobedience, with a different approach, one rooted in trying first and foremost to understand how it works and what it does.

Emphasizing the explanatory, descriptive, and phenomenological over the normative, such an approach may first remind us that civil disobedience is above all else a *tactic*, used in consort with numerous other forms of social protest – many of which, like the strike, boycott, or occupation, are just as disruptive, despite being (putatively) legal.⁸³ From this perspective, which questions the distinction between “legal” and “illegal” protest, between “civil” and “coercive” means, and between “principled” and “strategic” action, civil disobedience may prove less interesting for its illegality – the feature that holds the most interest for liberal theorists and lawyers – than for the necessary role it plays in democratization and social change. A phenomenological engagement with the strategies and tactics of collective, democratic dissent, would require much more space than I have here – not to mention a much deeper engagement with the historiography and sociology of social protest and “repertoires” of resistance, which spans across large and diverse literatures. Below I provide only a brief sketch, one that I hope is suggestive. By revisiting a well-known, “classical” example of civil disobedience – the 1960 Nashville lunch counter sit-ins – I discuss three critical functions of the sit-ins necessary to the process of democratic change: that of *disclosing* the nature of forms of oppression; that of *disrupting* entrenched power imbalances and destabilizing status quo understandings of justice; and directly *transforming* undemocratic institutions through a politics of enactment.

Nashville, Tennessee, 1960.

In some ways Nashville seemed an unlikely location for a popular campaign against segregation: by the late 1950s, it had an integrated police force, a host of interracial organizations, black members of the

⁸² J. Raz, *The Authority of Law* (Oxford: The Clarendon Press, 1979): p. 275.

⁸³ Moments of heightened protest also teach us that the lines between legal and illegal are shifting, and sometimes subject to the arbitrary redefinition of local law enforcement – it is not uncommon for protestors to be arrested not for breaking any particular law, but for a more generalized “threat to public safety.”

city council, four prominent black colleges, and a city bus system that had been desegregated without violence. Moreover, unlike in other cities, there was no law mandating segregated lunch counters – the practice was upheld only by local convention. But a series of bombings in 1957 in protest of school desegregation brought that idea into question, and pointed to the many arenas of public life in which segregation remained the intransigent norm.⁸⁴

In 1958, the Nashville Christian Leadership Council, a branch of the larger Southern Christian Leadership Council, began holding workshops on nonviolent direct action, organized and led by James Lawson, a student of Gandhian nonviolence and a member of the Fellowship of Recognition (FOR). It was at these workshops that the plan to desegregate Nashville's lunch counters began to take shape. After giving several of the local store owners the chance to voluntarily integrate – offers that were rejected out of hand – the organization staged two test sit-ins in November of 1959, and continued to lay plans for a larger campaign. But it was the eruption of the Greensboro sit-ins that propelled the movement into action. Thus on 6 February, 1960, the Nashville sit-ins were launched. Week after week, hundreds of activists sat at lunch counters across the city, asking to be served. They were given strict instructions not to retaliate if harassed or beaten; they had received special training in the workshops on how to withstand attack. For a time the police refrained from action, but by the end of the month, they announced that “the grace period was over.” After allowing the protestors to be beaten by some white civilians with “rocks, fists, and lighted cigarettes,” the police arrested seventy-five of the sit-in protestors. None of their white attackers faced charges or arrest.⁸⁵

After the imprisonment of dozens of protestors, the organization reached a compromise with Nashville mayor Ben West, who agreed to desegregate some (but not all) of the city's lunch counters. The protestors responded with a renewed wave of sit-ins and an economic boycott of the downtown shopping area. The boycott was incredibly effective, but it was a contingent event – the 19 April bombing of the house of Z. Alexander Looby, the lawyer who had represented the Nashville sit-in protestors in court – that brought the situation to a head. After 4,000 people marched in protest to the court, the students directly confronted the mayor, and essentially cornered him into recommending the desegregation of lunch counters. According to Ernest Limbo's recounting of the confrontation,

⁸⁴ E. Limbo, “James Lawson: The Nashville civil rights movement,” in *The Human Tradition in the Civil Rights Movement*, edited by S. Glisson (Lanham, MD: Rowman & Littlefield, 2006), pp. 159 ff.

⁸⁵ Ibid. See also, F.O. Sargent, *The Civil Rights Revolution: Events and leaders, 1955-1968* (Jefferson, NC: MacFarland, 2004), pp. 41-43.

Diane Nash [one of the key student organizers]...suddenly saw the mayor in a different light. He was no longer the powerful, white politician she feared; he as a mayor with limited powers being pressed by many factions. Remembering Lawson's teachings in the workshops...she asked the mayor if he personally believed that segregation was wrong and if he would use his prestige as a mayor to end segregation. West did. "I appeal to all citizens to end discrimination, to have no bias, no hatred,' he said." Nash continued, "'Then, Mayor, do you recommend that the lunch counters be desegregated?" "Yes,'" he found himself saying.⁸⁶

Finally, three weeks after the bombing and three months after the start of the sit-in campaign, lunch counters began to serve black patrons.

Disclosure. It has become a commonplace to note the "dramaturgical" element of the key events of the civil rights movement as we have come to know it – the reliance on a kind of "choreography" and "staging" of public protest, paired with an effective use of the media, to dramatize the confrontation between black Americans and the injustices and indignities of segregation.⁸⁷ But by "disclosure," I mean to capture more than the dramatics of public protest. Rather, I want to point to the way that these particular public acts, because of their dramaturgical nature, are able to disclose something vital about the structure of power, and in so doing disrupt "a rigid culture with a strict code of interaction and conventions"⁸⁸ – in this case, one defined by segregation, inequality, and endemic racial domination, as well as by the denial of their fundamentally corrosive effects on democratic life. Here the reference to "world disclosure" of a Heideggerian sort is only a loose one. Forms of political action do, in some sense, operate as 'alethic' truth-disclosure – in that they reveal something that already *is* as it is, in an objective sense – but I mean it in a much more practical, and much more materialist, way. My claim is that the staging of particular forms of protest is sometimes able to show us the way that forms of power and domination operate and are reproduced; and in so doing, allow us to glimpse new possibilities for overturning them.

Clearly, what the "dramaturgical" analysis of the civil rights movement shows is how these "staged" events demonstrated, for national and local audiences alike, the injustice, inequality, and

⁸⁶ Limbo, "James Lawson," p. 176; quotations from Nash and West from D. Halberstam, *The Children* (New York: Ballantine, 1998), p. 234.

⁸⁷ See e.g., E. Groffman, *The Presentation of Self in Everyday Life* (Garden City, NJ: Doubleday Anchor, 1959); R. Benford and S. Hunt, "Dramaturgy and social movements: The social construction and communication of power," *Sociological Inquiry* 62, no. 1 (1992): pp. 36-55; D. McAdam, "The framing function of movement tactics: Strategic dramaturgy in the American civil rights movement," in *Comparative Perspectives on Social Movements: Political opportunities, mobilizing structures, and cultural framings*, edited by D. McAdam, J. McCarthy, and M. Zald (Cambridge: Cambridge University Press, 1996), pp. 338-355; S.L. Foster, "Choreographies of protest," *Theatre Journal* 55, no. 3 (2003): pp. 395-412; R. Kowal, "Staging the Greensboro sit-ins," *The Drama Review* 48, no. 4 (2004): pp. 135-154.

⁸⁸ J. Bohman, "World disclosure and radical criticism," *Thesis Eleven* 37 (1994): p. 88-89.

disrespect embedded in the experience of segregation – as well-dressed, well-mannered, and persistently nonviolent Black college students were harassed, beaten, provoked, insulted, and finally arrested by the dozens.⁸⁹ But the sit-ins, if we look closely, reveal much more than this. The dynamics of the interaction – the “choreography” of protest – disclose something fundamental about the actual workings of racial domination in America, and the network of practices and institutions that held (and continue to hold) it in place. In the midst of the Jim Crow south, racial domination was not then, and certainly is not now, a matter of segregation laws which needed to be proven unconstitutional. Rather, African Americans confronted a myriad of overlapping, interrelated cultural and political norms – some enshrined in laws and policies, others practiced on the basis of custom and everyday convention; some backed by the coercive power of the state, others enforced by the coercive power of white civilians. In Nashville, the students protested businesses which were willing to see their money, but not their persons, as equals; they confronted a local economy that denied them access to spaces not on the basis of standing law or even city policy, but the collective force of decisions taken by individual businesses and business owners. They were taunted, insulted, and beaten; cigarettes were put out on their backs. Local police stood by while a growing crowd of agitated whites attacked the students, then arrested dozens of the nonviolent protestors – but none of the attackers – and charged them with disturbing the peace.⁹⁰ And when the local black community managed to raise \$45,000 in three days to cover the bonds of every individual arrested, or when a crowd of 2,000 supporters gathered outside the courthouse on the day of the students’ trial, this too disclosed something vital: far from the agitations of a few upstarts from outside the community, the sit-ins were representative of a larger group – a “wholly dissatisfied black community” in Nashville, who were actively challenging the city’s self-understanding as a peaceful, relatively tolerant and progressive, segregated city.⁹¹

Seventy-five of the protestors were arrested at the sit-ins at the end of February; they were convicted of disorderly conduct and ordered to pay a fine of fifty dollars per person. The students refused to pay the fine, choosing a 30-day jail sentence instead. Diane Nash, then a student at Fisk University and the spokeswoman for the students, explained the decision this way: “We feel that if we

⁸⁹ The dramaturgical analysis also, of course, demonstrates the degree to which such dramatizations required intense organization, discipline, planning, and strategy.

⁹⁰ Sargent, *Civil Rights Revolution*, pp. 41-43; “The Nashville sit-ins,” *The Tennessee Tribune* (February 18, 2010): pp. 5A-6A.

⁹¹ Limbo, “James Lawson,” p. 174.

pay these fines we would be contributing to and supporting the injustice and immoral practices that have been performed in the arrest and conviction of the defendants.”⁹² Far from expressing a respect for the law or its legitimacy, the students’ choice to accept the harsher of the two punishments extended the performance of their protest from the site of one injustice – the segregated lunch counter – to another related one – the mockery of legal justice that imposed racial domination through a coded language of public safety and law and order. In the image of racism and segregation that is disclosed, it becomes difficult to make the case for a South defined only by *de jure* racism and a civil rights movement defined only by constitutional appeals aimed at the basic structure of society.⁹³ Disclosure is necessary precisely because the complex workings of injustice and domination are not obvious or transparent to everyone; injustice does not always announce itself in the form of direct and clear violations of constitutional essentials that can be remedied by changing the law. Disclosure is necessary precisely because these protests are the subject of a changing and contested sense of justice, not the direct appeal to a fixed and settled notion.

Disruption. The idea that protest is disruptive is likewise not new; sociologists have long argued that the ability of social movements to act as effective agents for social change depends upon tactics that disrupt public order.⁹⁴ Here, I want to draw out two linked processes of disruption employed in the sit-ins: the disruption of daily life and everyday practices of segregation and racial discrimination; and the resulting disruption of institutional inertia, which heightens the cost of maintaining the status quo.

In some ways, the model of the lunch counter sit-in might seem like an odd candidate for disruptive behavior: compared to demonstrations which purposely block traffic or entrances, fully occupy public spaces, or otherwise attempt to bring business as usual to a complete halt, the lunch

⁹² M. Harris, "75 Students Back in Jail," *The Tennessean* (March 2, 1960); see also Sargent, *Civil Rights Revolution*, p. 42.

⁹³ Nor is a bright line between the political and the economic possible. As Jeanne Theoharis has argued, "[t]he fight for desegregated public facilities... was always a fight for resources because segregation itself was a tool of economic control and resource distribution. Segregation meant that blacks subsidized finer schools and regular sanitation, accessible city government, better public transportation, and a wide array of public services for whites. It was taxation without representation, and thus the lunch counter and the bus and the schoolroom were never just about a seat but always about gaining full citizenship and economic equity. ... At the grassroots, economics were not divorceable from civil rights... even if historians and politicians in recent decades have begun to split them." J. Theoharis, "Introduction," *Freedom North: Black freedom struggles outside the South, 1940-1980*, edited by J. Theoharis and K. Woodard (New York: Palgrave MacMillan, 2003): p. 7.

⁹⁴ See e.g., M. Lipsky, *Protest in City Politics* (Chicago: Rand McNally, 1970); F.F. Piven and R.A. Cloward, *Poor People's Movements* (New York: Vintage, 1979); S. Tarrow, *Power in Movement: Social movements and contentious politics* (Cambridge: Cambridge University Press, 1998); McAdam, "The framing function."

counter sit-in seems out of place. The Nashville protestors did not picket the entrance to department stores or attempt to prevent people from entering or sitting down at the counter; in fact, as Nash specified in interviews with the press, they specifically avoided taking all the seats at the lunch counter so as not to “take over.”⁹⁵ And yet the sit-ins were disruptive, and intentionally so. They disrupted not only daily routine, but the shared expectations and everyday experience of unquestioned segregated space. Susan Leigh Foster, in her interpretation of the Greensboro sit-ins, explains it this way: “The students’ bodies were not out of place, but rather, the wrong color. Unlike a general sit-in, used to block access or to insistently remind those in power of the protestors’ demands, the lunch counter sit-ins performed the function of the very action they were protesting. ...Not only did their sitting convey a double significance, as quotidian event and as protest, but it reverberated with the tension created among all the bodies who, in contrast, circulated through the space. Shoppers, clerks, waitresses, dishwashers, managers, police, those in support and those who were outraged by the students’ actions – all maneuvered around the static, tensile postures of the protestors.”⁹⁶ By resolutely inserting themselves into segregated areas, by refusing to leave, they disrupted those spaces, making black bodies present in spaces defined by their absence. They performed the goal they sought to achieve – access to public spaces on equal terms – and so disrupted the orderly patterns of everyday life and upset the dictates of gradual top-down reform.

Such disruptions play a necessary role in counteracting and bringing into question institutional inertia, through which established customs, procedures, policies, and practices come to appear unquestionable or unchangeable. What had seemed a settled, ordinary part of daily life becomes crisis-ridden, contentious, and often violent. Indeed, the disruption of the sit-in, like other non-violent methods, appears to be designed to provoke a violent confrontation that brings the status quo into sharp relief, and ultimately into question.⁹⁷ The sit-ins effectively “broadened the circle of conflict” to

⁹⁵ “100 arrested in Southern racial rows: Violence erupts after incidents at 5 stores in Nashville,” *The Baltimore Sun* (February 28, 1960): p. 3. Many lunch counters did shut down temporarily as a result of the sit-ins – an expected turn of events for the protestors, who knew that such shut-downs would cost the department stores significant revenue and thus contribute to a crisis in need of resolution. My point is simply that such closures were not the result of tactics which sought the monopolization of space in the way that an occupation does.

⁹⁶ Foster, “Choreography of protest,” p. 399. See also Tarrow, *Power in Movement*, pp. 96-98.

⁹⁷ As Gene Sharp writes, “Nonviolent action is designed to operate against opponents who are able and willing to use violent sanctions. There is no assumption in this technique that such opponents will, when faced with nonviolent action, suddenly renounce their violence, or even that they will consistently restrict their use of violent repression.” Sharp speculates, but does not investigate further, that nonviolent resistance depends for its effectiveness on violent repression, and might not be successful otherwise. This opens the question of a deeper entanglement between nonviolence and violence than lives in our popular imagination. See Sharp, *Politics of Nonviolent Action*, p. 109.

include local business owners, other lunch counter diners and department store shoppers, local police and judges, and other civic figures – like the trustees of Vanderbilt University who expelled James Lawson after the sit-ins, and were subsequently forced to reinstate him by the hundreds of faculty who resigned in protest.⁹⁸ The sit-ins, and the economic boycott that followed, thus effectively raised the cost of upholding segregation in public places for the entire community: as Limbo notes, “merchants had long argued that if they opened their lunch counters to blacks, they would lose a significant percentage of their white customers... Increasingly merchants had to measure a known economic loss as a result of the sit-ins and boycott against an unknown and indefinable loss if they accepted integration. The known loss soon became more significant than any potential loss.”⁹⁹ In this way, disruption erodes the sense of certainty usually enjoyed by the status quo – of the costs and benefits of particular choices; of the expectations of how others will behave and the consequences that will result – and so opens up the potential for the previously unimaginable. Paired with the disclosive functions of the sit-ins, this suggests the way in which the protestors did not simply appeal to an existing sense of justice held in common and shared with the majority: through disruptive political action, they were actively engaged in challenging it and reshaping it.

Transformation and enactment. There is an obvious sense in which the Nashville sit-ins transformed an unjust institution: to the extent the coordinated, creative actions of the protestors were responsible for the eventual integration of the lunch counters, they were responsible for the transformation of segregated spaces into desegregated ones. Without denying the force of agency that made such changes possible, I want to emphasize here a slightly different process of transformation, one that depended upon what I will call the “politics of enactment.” Picking up on the mode of disruption discussed above – the symbolic and forced insertion of black bodies into spaces reserved for whites – in a very direct way, the sit-ins staged a demonstration not just against segregation, but of integration. The protestors *enacted* equality even while being denied service and equal treatment. They *enacted* political power – in a coordinated display of numbers, solidarity, discipline, organization, and tenacity – even while being beaten, harassed, and jailed. They *enacted* authorship of community policy and convention over which they had a right – but limited historical ability – to determine, on equal terms with the rest of the city.

⁹⁸ Sargent, *Civil Rights Revolution*, p. 43.

⁹⁹ Limbo, “James Lawson,” p. 175.

There is also the less plainly visible, but no less important, dynamic of “organization,” in Charles Payne’s sense.¹⁰⁰ The orchestration of the sit-ins relied, as we know well, on the work of local leaders and grassroots organizations – on the training, strategizing, and leadership of civil rights organizers. This, too, is a politics of enactment in which not just end goals, but the process of leadership development and the realization of agency, are at stake. Without the transformation of passive individuals into active citizens, the confrontation with systematic power inequalities and entrenched domination that we rightly celebrate in the Nashville sit-ins might never occur. “This is not just empowerment, as the concept is used in pop psychology,” Linda Gordon suggests in her review of Payne’s book. “It is intellectual and political because it requires understanding one’s place in the social world and being able to evaluate realistically how to exert influence.” It is in this way that, through organizing, “personal transformation [becomes] a part of political empowerment.”¹⁰¹ We celebrate the Nashville sit-ins, along with those in other cities, for their successes in forcing the transformation of concrete policies and laws; but I would like to suggest that we should equally understand them from the perspective of the kind of politics they enacted in pursuit of such goals. Strategy, tactics, and organization, in this way, are simultaneously instrumental means for achieving certain ends, as well as the radical enactment of the ends themselves. Put differently, means are never mere means, nor are they purely instrumental.¹⁰² The sit-ins, and the organizational forms that gave rise to them, were not just a protest against something, but the practice of a new politics – an enactment of engaged democratic citizenship and a realization of individual and collective agency.

Conclusion

The concepts and frames we have inherited from a Kantian-inflected liberal theory are somehow incommensurate with the phenomena at hand: protest, collective dissent, and disobedience, being extra-institutional and sometimes extra-legal, simply do not have a convincing place within a normative theory that ties all human freedom to legitimate law, and thus to constitutional (and constituted) order. Its terms cannot do justice to the disorder, risk, and contingency that are fundamental to the process of

¹⁰⁰ See f.n. 69 above.

¹⁰¹ L. Gordon, “Charles Payne, *I’ve Got the Light of Freedom* (1995), in *A Companion to Post-1945 America*, edited by J. Agnew and R. Rosenzweig (Oxford: Blackwell Publishing, 2002), p. 527.

¹⁰² See, e.g., K. Mantena, “Another realism: The politics of Gandhian nonviolence,” *American Political Science Review* 106, no. 2 (2012): pp. 455-470.

social change. Liberal theorists have struggled to come to terms with the uncertainty and instability of a given act of resistance while making room for the movements and figures they rightly want to celebrate as the agents of democratization and social justice. But in the end the serious moral question, it seems to me, is left hanging in an ambivalent space— as for Kant, in the gap between the actually existing regime (with all its faults) and the troubled road that we may have to travel toward the realization of our freedom. There is, thus, an uncomfortable consequentialism – an ex post facto judgment – that seems to be required in order to disentangle the relationship between resistance and the rights and freedoms that live within the law. It is a difficult and risky thing to take the law into our own hands, both morally and politically—the potential disconnect between ideas, ideals, and best laid plans, on the one hand, and the political outcomes, on the other. Resistance is costly, and not only for those directly involved. It purposely and purposefully creates disorder and crisis; it disrupts daily practice, institutional order, and the prevailing sense of justice; it threatens what Reinhold Niebuhr has called the “moral conceit” of the status quo and challenges the idea that peace always trumps equality, justice, or democracy.¹⁰³ And it does so for reasons that are as much bound up with tactics and strategy as they are with morality, reason, or conscience. Confronting these ideas—contingency and crisis, and the intertwining of principled action with strategic thinking—will require stepping out from Kant’s shadow, and considering the matter from a different perspective.

At present, this paper can be nothing more than a promissory note. But I hope it is a suggestive and provocative one which can contribute in a small way to the ongoing conversation about how to understand and theorize the disruptive, uncertain, and at times uncivil, route that we must take toward democratic justice.

¹⁰³ Niebuhr, *Moral Man and Immoral Society*, p. 250.