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THE MYTH OF CIVIL DISOBEDIENCE[1]

Wibren Van der Burg

1. Introduction

In the nineteen sixties and the early seventies the subject of civil disobedience was intensely discussed by philosophers and other scholars. This academic discussion was a response to recent social developments: illegal political actions had become a relatively common aspect of public life and received much public attention. The main targets of action of the disobedient citizens in the United States were civil rights and the Vietnam-war. Now, in the eighties, in some countries in Western Europe we can see a renewed academic and practical discussion, originating mainly from the protests against the American cruise missiles, and in the United States itself the peace movement is active once more. Other well-known instances of civil disobedience at present are those against South-African apartheid and the Sanctuary Movement (a group that illegally helps and hides Latin-American refugees).

It is remarkable that recent academic discussion differs only in minor ways from that of the earlier period. Apart from the simple law-and-order-position, rejecting civil disobedience, we can crudely distinguish two others. Firstly, a contractarian approach, which leaves more room for civil disobedience than the simple law-and-order-view, although, that room is very confined, with regard to both means and ends. The main representative of this theory is John Rawls.[2] The majority of the authors in the Anglo-American world, as well as in the Netherlands and in the Federal Republic of Germany belong to this tradition.[3] We will therefore call it the 'ruling' theory.

Secondly, there is a group of more radical, non-contractarian authors, who are more difficult to bring under a common denominator. They have only in common a more critical attitude toward the state's claims to obedience and a more positive attitude toward disobedience to the law.[4,5]

The central thesis of this article is that the ruling theory must be rejected, because it is based on a theory of social contract which is either irrelevant or unsound. Therefore, we need a fresh start in order to develop a different approach to civil disobedience, taking the individual citizen as its starting-point. This is an approach that belongs to the second tradition.

The design of this article is as follows. First the characteristics of the ruling theory are discussed (§2). Then the main thesis will be presented and defended, which is, that the ruling theory is based on the (irrelevant or unsound) assumption of a social contract and therefore must be rejected (§3). Following that, the foundations will be laid for a new, more modest, ethical theory of civil disobedience (§§4, 5, 7 and 8). In §6 we will return to the social contract, using the model

of Joseph Raz, to make clear why precisely, it is unsuccessful as a basis for a general theory of civil disobedience. In §9 a normative theory for government reaction, based on liberal-democratic principles, will be sketched. Disobedience of government officials and politicians poses special problems, which can be illuminating for the general theory of civil disobedience (§10). The closing section offers some final conclusions.

2. The ruling theory

The ruling theory is relatively new, though it has some older origins, notably to be found in the works of John Locke. It developed in response to the Civil Rights Movement in the late fifties and the sixties, and was reinforced by the anti-Vietnam movement. Out of that discussion a great number of publications in the American and British academic literature issued. The theory of John Rawls can be seen as a kind of summary of the central part of the debate, and it is mainly in the form of his theory that the results were introduced outside the English-speaking world, for instance in the Netherlands and the Federal Republic of Germany. But whereas in the Netherlands the discussion had already been introduced in 1972 in the dissertation of C. J. M. Schuyt[6], in the Federal Republic of Germany it took until about 1983 for the concept of civil disobedience to enter public discussion.[7]

We can sum up the ruling theory in six points. This list of characteristics must be seen as 'idealtypisch' in the Weberian sense; within this approach not all six elements can be found in every author. In the theory of Rawls, however, all these characteristics can be seen in a pure and consistent form. Therefore, and because of the influence of Rawls' theory, we will in this article, focus on his treatment of the subject.

1. The definition of civil disobedience is very narrow. Far-reaching normative elements (like nonviolence and publicity) are included in the definition, thus smuggling into the concept a specific moral theory. As a result, many actions fall outside the scope of it, because they don't satisfy the moral requirements included in the definition. It is thus already by definition, that the question of moral and political justification is partly answered. That some action can be characterized as civil disobedience, makes it more likely that it is morally justified.

A good example is the authoritative definition of Rawls: civil disobedience is "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[8]

The implications of this definition reach further than one would, at first sight, think. According to Rawls, the definition implies, for instance, that the disobedient citizen is willing to accept the legal consequences of the act and that he or she appeals only to the sense of justice of the majority of the community. Thus it is clear that important moral premises are implied in the definition.

Rawls, though, admits that this definition is much narrower than the traditional one, which included almost every breach of law on grounds of conscience.[9,10]

2. The moral justification of civil disobedience, according to the ruling theory, must be based on common values: a common sense of justice (Rawls) or the principles of a democratic society. Thus, moral principles that are not generally

accepted in our democratic society, for instance the notion that animals are valuable in themselves, can not be a justification for civil disobedience, even when these principles are, according to the actor, totally sound.[11]

3. The central moral question is not: whether, and when, do we have a moral *duty* of civil disobedience, but: whether, and when, there is a moral *right* to civil disobedience. The question whether it is wise, or prudent, or morally obligatory, to use this right, is usually passed over in silence, or is mentioned only by the way.[12]

4. The attitude of the government towards the disobedient citizen should be relatively benevolent and responsive. Civil disobedience, narrowly defined as in the Rawlsian way, is seen as a more or less normal part of a democracy. Consequently, police reaction should be avoided when possible. Furthermore, it should seriously be considered whether it is possible to refrain from criminal prosecution altogether, and when, nevertheless, prosecution follows, only light penalties should be demanded and imposed.

5. The conflict between government and citizen is to be kept very restricted, as an implication of points 1, 2, and 4 taken together. For the justification and guidance of their conduct, government and citizen both appeal to the same common principles; the conflict only relates to the interpretation of these common values. Fundamental differences of opinion about those values themselves are not at stake.

The conflict is also restricted by the means government and citizen use. The citizen's action is nonviolent, public, and the citizen is willing to accept the legal consequences, etc. He or she is very loyal to the government. Conversely, the government should be loyal as well, and therefore should not react too repressively.

It should be noted that it is mainly the citizen, and not the government, who is responsible for the limitation of the conflict. He or she appeals only to values the government and the majority of the community share, and not to personal moral convictions, that may be much more important for the citizen. The citizen also shows self-restraint (by definition) in the means used. The relatively benevolent and conciliatory attitude, that the government must take according to this theory, only results in a comparatively small limitation of the conflict. Moreover, a prudent government could also adopt this liberal attitude on other grounds. Consequently, insofar as the conflict is confined, it is usually due to the citizen; insofar as the conflict is not, it is usually first and foremost due to the government. Whosoever compares the hitherto moderately harmonious situation on civil disobedience in the Netherlands with the highly polarized situation in the Federal Republic of Germany, finds here the reaction of the government one of the most important causes.

6. The last and most fundamental characteristic is that some form of a social contract is assumed. The foundation of the organisation of society and thereby of government and law, is a social contract. Consequently, the duty of obedience to the law (usually called political obligation), is based on the social contract. This contract takes different forms. On the one hand, hypothetical forms (like those of Rawls), on the other, forms that more or less approximate a factual consent (e.g. the quasi-consent of Peter Singer).

3. The social contract

The list of six characteristics just mentioned, shows a clear interconnectedness which is not haphazard. The first five hang together closely, but moreover are all based on the sixth characteristic: the social contract, which doesn't mean that no other basis is possible for some of the elements mentioned. The liberal attitude of the government can be justified independently of the social contract, on the basis of the ideal of democracy. However, especially the characteristics one, two, and three find their principle justification in the social contract, and stand or fall by the soundness of it. To demonstrate this, we will now run over all five elements.

1. Rawls justifies the narrow definition explicitly with a reference to the social contract. Apart from civil disobedience Rawls distinguishes 'conscientious objection':

> "noncomplice with a more or less direct legal injunction or administrative order."[13]

He acknowledges that the traditional concept of civil disobedience, current since Thoreau, includes conscientious objection. He justifies the essential distinction between both, by pointing out that in conscientious objection no appeal is made to the common principles of justice laid down in the contract, whereas in civil disobedience it is.[14] If the contract happens to be an unsound or irrelevant fiction, then this would dispose of the ground for the distinction, and we might better return to the traditional broader concept of civil disobedience.

2. The limited moral justification is, in Rawls' theory, closely connected with the social contract. For, in his view, citizens can justify their illegal actions only with an appeal to the values laid down in that contract. Only when they can do so, may the duty of obedience that originates from the same contract, lapse. This reference to the social contract can be found in the writings of many others, for instance by Helmut Simon.[15]

3. The focus on rights is rather typical of contractarian theories (though there are, of course, noncontractarian rights-theories as well). It makes sense, indeed, to talk of legal rights in a legal theory. But talk about moral rights against the state or against one's fellow-citizens, must assume that idea of a general relation between citizen and state. The social contract forms the basis of this relationship.

A contract yields both rights and duties for the parties to the contract. If one wants to show that the general duty of obedience doesn't apply to the case at hand, the most obvious possibility is that the contract itself gives certain rights of disobedience. Therefore it is particularly in a contractarian theory quite natural to try and justify civil disobedience as a right, for instance as a form of speech, or as an extension of the freedom of association.

The other possibility a contract theory gives to justify disobedience is much more problematic: that is, by showing that one acts in accordance with one of the obligations of the contract and that this obligation outweighs that of obedience to the law. In most cases of civil disobedience this proof is extremely difficult to give, which is exactly why one is dependent on the idea of a right to civil disobedience, and why the idea of a conflict of duties or obligations (very common in modern ethics), falls into the background.

4. The moderate reaction of the government is closely bound up with the social contract. The disobedient citizen, by definition, only appeals to the same values as those that ought to determine the actions of the government. The means of action too show that the citizen adopts a loyal attitude. In view of this fundamental loyalty, it is only rational for the government to treat the disobedient citizen less severely than the criminally disobedient citizen. Moreover it is only prudent for a government to avoid alienating such loyal citizens by repressive reaction which is not strictly necessary.

5. The limitation of the conflict finds, as argued above, its origin in the narrow definition of civil disobedience, the limited moral justification and the liberal reaction of the government. As these three are all dependent on the social contract, so then is the fifth characteristic.

It appears that the ruling theory is strongly determined by its contractarian basis. If this basis were to fall away, then the foundation of the whole theory would be gone. We therefore need to investigate whether the social contract is a foundation strong enough to bear this edifice.

The problem, however, is that there are many different forms of contract theories.[16] We therefore need to go over the most important alternative readings.

i. The social contract is a purely fictitious contract. The best-known representative of this strain of thought being, of course, John Rawls.[17] But such a purely fictitious contract has been sharply criticized by Ronald Dworkin. Dworkin contends that a fictitious promise is not a special type of promise; it is no promise at all. Likewise, a fictitious contract is not a special form of contract; it is no contract at all.[18] A hypothetical contract, therefore, can never be a direct foundation of the state or of a political obligation. It only has heuristic value.

From Dworkin's critical analysis it follows that the 'original position' constructed by Rawls might have a function as a kind of ideal observer position.[19] But as far as civil disobedience is concerned, it is exactly this kind of ideal observer position that is the least adequate. For, from the point of view of the citizen, civil disobedience finds its basis in the fact that real society is not ideal. To jump over from an ideal society to a non-ideal one, causes serious distortions, the more serious because civil disobedience in most cases, especially in actions with political goals, aims at the non-ideal aspects of actual society.

Thus, a purely hypothetical contract can possibly be useful and sound as a point of view from which we can deduce and criticize general moral principles, but for the real, concrete problem of civil disobedience, it is irrelevant.

ii. In addition to the purely hypothetical contract Rawls offers a second construction for political obligation, based on the principle of fairness. This principle holds:

> "that a person is under an obligation to do his part as specified by the rules of an institution whenever he has voluntarily accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests, provided that this institution is just or fair, that is, satisfies the two principles of justice."[20]

This principle is one of those accepted in the original position, and it must be granted that it is a sound principle. But it is much more limited than Rawls bids us believe, especially when we try to apply it to real society.

In Rawls' opinion, it is a condition for the soundness of the fair play argument, that the institution is *just*. But the actual law, and the actual state are certainly not just, even less so when we consider them in their worldwide context. Even to speak of an almost-just institution goes too far. This means that the fair play argument cannot be the foundation of a general duty of obedience, or of a general social contract.

The only thing the principle might be relevant for, is an individual law. For, in respect of some laws, it can be shown indeed that they are good, that the person in question has voluntarily accepted the benefits, and that this is a good reason for obedience to these laws, and perhaps for other closely related ones too.[21] But even then, the foundation is pure self-interest, and therefore the argument can't reach further than self-interest. As a prima facie reason the fair play argument only has force to put aside reasons of self-interest, but it is not strong enough to overrule reasons for disobedience based on moral ideals. (The exact implications of this point will become clear in section 5.) This means that the principle of fairness is usually a barrier to tax-dodging based on egoistic motives, but not to public tax-refusal based on idealistic motives (granting that the citizen does not belong to the worst-off in society, and, as in most cases will be true in western societies, that he or she has had a certain profit from goods that have been financed by taxes).

So the fair play principle is sound, but with only limited relevance for the problem of civil disobedience.

iii. Then there are theories based on factual consent with a social contract. One of them is a theory based on real consent: according to D. D. Raphael the foundation of the United States of America can be seen as the making of such a social contract.[22] But even putting aside the question whether this thesis were true for the majority of the inhabitants of the state at that time, for their descendants and later immigrants, it certainly doesn't hold.[23] We can therefore disregard this reading of the contract as at complete variance with the facts; for a duty or obligation of obedience in a modern society it provides no good foundations.

iv. A better-known reading of a factual social contract is based on a tacit, implicit consent, the idea of John Locke. By living in a certain country, and by using certain facilities that the state offers its citizens, one is presumed to consent tacitly to the social contract. But for consent to have real moral implications, it must be a free choice. Such free choice doesn't exist nowadays (if it ever did); emigration is not a solution any longer for someone who doesn't accept a certain regime in his or her own country, but who equally doesn't like the governments in other countries. Quite apart from emigration failing to be a solution, some of the most important actual problems that give rise to civil disobedience – the risk of a nuclear war and pollution – threaten every country on this earth.

We are sometimes told that participation in free elections does imply consent. But as much value as we may attach to these elections, we can't see them as a really free consent with the state and the parliamentary system. For, the choice is not between being governed according to the parliamentary system or being governed according to one's own ideas; one only has those options that are offered within the parliamentary system. So there is no question of a free choice that can be the basis for a commitment to the state.

v. An intermediate form of consent is the construction developed by Peter Singer: quasi-consent. In his book *Democracy and Disobedience* he first attacks the preceding argument: in his opinion someone who participates in elections, indeed doesn't thereby consent. Nevertheless he or she incurs a duty of obedience, because other participants may expect that voting implies consent.[24] However, because the incorrectness of the preceding argument can be clear to anyone, it is irrational for the other participants to expect that voting imples consent, because they can surely know that for the anti-democrat, voting will sometimes be the most rational choice. And the irrational expectation of others is no good reason for obedience.

Our conclusion can therefore be that the construction of a social contract is either irrelevant – in the cases of a fictitious contract, or unsound – in the cases of factual consent. It can at best serve as a heuristic device, whereby the 'original position' functions as a kind of ideal observer position from which point to test our moral intuitions and develop and criticize general moral principles. But this is totally inadequate as a foundation for the far-reaching claims the ruling theory makes. In section 7, we will analyse in a more elaborate way why this is inadequate, but before we can complete our criticism of the ruling theory, we must first return to the general question of the moral evaluation of civil disobedience.

4. A first sketch for a new approach of civil disobedience

If social contract theories cannot be the basis for a theory of civil disobedience, how then can we develop such a theory of civil disobedience? The answer is to straightforwardly acknowledge that there is no general 'unified theory'. There are, of course, general considerations about the subject, but nothing to substantiate calling it a ''unified theory''. Civil disobedience is usually the expression of a conflict between government and citizen, both apparently having different opinions on the same subject. We should not theorize that conflict away, but consider it as a fact. Only if we start from there, would it be possible to come to a reduction, and perhaps even a solution of the conflict.

But what then is the basis of the state, the legitimation of government authority? Perhaps we'd better forget that question. It is as insoluble and as fruitless as the question of the theodicee. Because the state is a product of human beings, a full legitimation of state authority is impossible. What is possible, is a limited and conditional legitimacy of state authority, and therefore concomitantly, a limited and conditional duty of obedience, or duties of obedience, as circumstances may require. As long as the state is a human affair, there are going to be conflicts between citizen and government. These should not be covert on a theoretical level, but should be overt on the concrete level. A theory of civil disobedience is only then successful, if it creates the opportunity for open discussion, and abstains from parti pris.

The following points of view at least are important: the moral point of view of the individual citizen, the political point of view of the government, and the legal point of view of the judge who must sometimes decide the conflict between government and citizen. (This enumeration is not exhaustive, for instance, it is possible to develop a theory from the point of view of companies and other

organisations on a meso-level.) Properly speaking, this means that we should construe *several* theories of civil disobedience, according to the various points of view from which we can look at actions of civil disobedience. Only when we have dealt with the normative questions within each of these points of view separately, would it be possible to investigate whether a synthesis is possible on a theoretical level.

From the moral point of view it would seem natural to take up the broad question: when is a breach of the law morally right? From the point of view of the government and that of the judge, the central question is: how should the government or judge react when a citizen breaches the law, claiming that his or her action is morally justified?

What does this mean for the definition of civil disobedience? From all points of view a neutral definition is preferable, because we thereby avoid a prior imposition of a certain normative theory, and a favouring of one of the parties. Possibly this theory at the end will prove to be right, but this must not be decided in advance on the basis of the definition.

In Rawls' definition, once the basis of the social contract has fallen to pieces, the difference between civil disobedience and conscientious objection collapses. The common elements that remain are illegality[25] and conscientiousness, the second element to be interpreted as the action being, in the opinion of the actor, morally justified. It is no accident, that these two elements are widely considered to be minimal elements of a definition of civil disobedience.

However, besides these elements, we need a third one, to be seen as an interpretation of the notion 'civil': the citizen sees his or her position as that of a citizen who does not completely deny the legitimacy of the state. This addition is necessary, because otherwise the question of the moral justification of disobedience does not even arise; for when the legitimacy is not acknowledged, the existence of a law is only a tactical consideration, and not a direct moral one. From the political and legal points of view too, this addition is essential: government and judge are accepted as such, and are not seen in terms of sheer force. However this acceptance of legitimacy need not be total; in fact total acceptance of the legal order is as absurd as complete rejection. Obviously one can have fundamental points of criticism of the existing legal order, without completely rejecting it.

As a definition we can now propose:

> Civil disobedience is conscious non-compliance with legal obligations, which, in the opinion of the actor, is morally justified, even though he or she does not completely reject the legitimacy of the legal order.

This definition is congruent with many other proposals for a broader definition.[26]

5. Moral reasons for obedience

The central question of the moral theory for individual action is: when is civil disobedience morally right? The general political obligation of the ruling theory, with certain exceptions (rights), which was based on the social contract, has fallen away. Therefore we'll have to put the question the other way round. Not the question of the justification of *disobedience* is central, but the one of the justification of

obedience. What moral reasons do we have for obedience to the law? In concrete cases these can be many, but the most important ones are the following:

1. Promise. Someone swears allegiance to the laws or to the constitution of the country. A condition of the moral relevance of such a promise is that it be freely made. When, for instance, every military conscript is obliged to swear allegiance, there is neither real freedom nor free consent. Such a promise then has almost no moral force at all. A comparable situation occurs when for some occupations one is dependent on the state (teaching) and when such a promise is a condition of the job. Once again, free choice is utterly limited and hence the moral force of the promise is limited too. On the other hand with many political offices the voluntariness is high, and so, consequently is the moral force of the promise. This is one of the reasons why the disobedience of politicians and officials is much more difficult to justify than that of ordinary citizens.

2. Fair play. This argument has been dealt with above. It does indeed yield a reason for obedience, although it has most relevance as far as self-interest is concerned. Nevertheless some reasons of self-interest can be put aside by it. But when no-one is harmed by a breach of law, the fair play principle does not apply. Consequently, the importance of the fair play principle is limited.

3. Democratic procedure. When a truly democratic procedure has led to the law in question, that in itself is an important reason for obedience to that law. But then there has to be a real democracy, implying more than a decision made in accordance with the formal rules of a democratic procedure. There must have been a real willingness on the part of the majority to discuss the subject with minorities, etc. Moreover there should be no permanent minorities. In the case of nuclear energy and missiles in some western European countries such a permanent minority does exist: over and again it is the same minority that objects to certain essential political majority decisions. In such a case the democratic legitimation is weakened for those decisions in respect of this minority.[27]

4a. The good law. This is the most obvious argument for obedience to the law. One has a duty to support a good institution; when, in the case of a good law, that law can be supported by obeying it, this is an important reason for obedience. The central question in real life is, of course: when must a law be considered as good? Because this is one of the central controversies of political ethics, and cannot be discussed in a few words, we do not intend to go into the exact criteria here. In most cases, however, it will nevertheless be possible to reach a workable consensus on the evaluation of concrete laws despite different theoretical premises.

4b. The good legal order. The legal order as a whole is good, and therefore the individual law must be obeyed. This argument can be found with many authors. But it is not a sound argument. Of course the legal order has some value, but it is not indivisible. Some laws within that legal order have much value, whereas others have only small value or even none at all. Only if the legal order itself were to have extra value, that would be damaged by non-compliance to bad laws, would this argument hold.

But this must be seriously doubted. Perhaps the opposite is the case: the value of the legal order might become greater if citizens only selectively obey laws. For though the order might be diminished, it would be more just then. Moreover

it is not clear, what exactly the damage to the legal order as a whole would be, if certain bad laws were disobeyed.

The legal order as a whole, therefore, cannot yield an extra argument for obedience.

5. Legitimate expectations. When others trust with good reason my compliance, then I may not betray their confidence if they have acted on the basis of this trust, as a result of which action they will suffer a loss because of my noncompliance. But this is only true, if their trust is justified (hence not for the white South-African who wants to see only white customers in a restaurant), and when they do suffer losses. The argument is relevant. Usually, however, it is possible to prevent it from becoming valid, by giving prior publicity to the action, or by compensating victims as much as possible.

6. Respect for the law. A personal attitude of respect for the law can be a reason for obedience. This has been brought to the fore by Joseph Raz: it is an actor-directed reason.[28]

Most people in western society do have such a personal attitude of obedience, due either to a personal habit of obedience, or to certain feelings of loyalty to the law. This can indeed be a good prima facie reason for obedience to the law, and may also explain why so many people have found it difficult to proceed to civil disobedience, despite the fact that after long and ample deliberation they have concluded that this would be morally obligatory. They have not reckoned with the force of this reason, or thought of it as important, but not conclusive; consequently it gives them a sense of unease.

6. Prima facie and exclusive reasons

So much for some of the possible reasons for obedience to the law. These are prima facie reasons, which, when present in the case at hand, can be overruled by other more weighty reasons, for instance by the moral duty to help the destitute, or by the duty to try to change an unjust government's policy.

But beside prima facie reasons there are other types too. Joseph Raz has named them 'exclusionary reasons'.[29] An exclusionary reason is a second order reason. It cannot simply be balanced against other reasons, but excludes some others from the balance altogether. For instance an order is not only an important prima facie reason for acting in accordance with that order, but is an exclusionary reason with regard to certain other reasons, e.g. the reason that I think that my superior is wrong. The point of an order is exactly that I *have* to obey, regardless of my own views on the issue.

Equally, a promise is an exclusionary reason. If I promised to be present at ten, I may not arrive late, merely because I preferred an expansive and extended reading of the morning paper. But I may arrive late, if the reason is that I had to help a victim of a traffic accident on the way to my appointment. Thus it is clear that the scope of exclusion is very important. With an order the scope of exclusion will be rather large, but varies according to context. With a promise the scope may also vary. When we have arranged to drink coffee at ten, then the scope is smaller than it would be if I were bringing my friend to the airport.

Raz calls a fact that is both a prima facie and an exclusionary reason, a 'protected

reason'.[30] A promise, for instance, is both a prima facie reason to act in accordance with the promise and an exclusionary reason not to act according to a number of other reasons.

The question now is whether some of the above-mentioned reasons for obedience are protected reasons. And, indeed, some of them are. The idea of an exclusionary reason was illustrated above by the example of a promise. So a promise or an oath of allegiance is an exclusionary reason, and as it is a prima facie reason for obedience as well, it is a protected reason. Consequently, for those who have sworn allegiance, civil disobedience is much more difficult to justify. The exact implications for the disobedience of officials and politicians will be elaborated in section 10. The fair play principle also results in a protected reason. The scope, however, is confined to conflicts with self-interest. The fair play principle can only exclude from the balance those reasons for disobedience, that are reasons of self-interest. For the foundation of the fair play argument is that others may enjoy the same sort of profits I have had before. The point is a fair distribution of profits, a distribution implying that everyone in the long run gets a fair share. The moral force is based on, and therefore confined to, the advantages I have had. Consequently, this principle can never exclude competing moral reasons, but only the non-moral reason that I would myself benefit by this illegal act. This type of egoistic reason is indeed excluded. The implication is that tax-dodging usually cannot be morally justified, when the main justificatory reason would be personal profit, but that open tax-refusal may well be justifiable, if it is aimed at the public good.

The most important exclusionary reason, however, is the democratic procedure. It is of the essence of a democratic procedure that the minority bears the loss, when after open and fair discussion a decision has been reached on the basis of good arguments. Had I participated in that procedure, or could I have participated had I wanted to, then I am not as free in my actions as I was before. It is no longer right for me to act on those reasons that have been brought forward in the discussion, but have been weighed and found wanting by the majority.

A condition, of course, is that it really was a democratic procedure. Clearly the central question is: when is a procedure really democratic? To enter this discussion here would lead us too far away, but we can bring out some aspects. Firstly: a democratic procedure by itself, in the end cannot legitimize essential, irreversible decisions. One of the reasons why a democratic procedure is acceptable for the minority, is the possibility of that minority becoming a majority and then reversing the decision, or receiving compensation in other points. But with essential, irreversible decisions neither of these alternatives is available.[31]

Further conditions for a democratic procedure are that no permanent minorities exist, that the majority tries to take full account of the minority, and that, when necessary and possible, it tries to meet the minority by making concessions. Moreover, the discussion should be really open, fair, and not dominated by personal interests and power.

In view of all those demands, it will be clear that such a really democratic procedure is as distant from reality as the famous 'herrschaftsfreie Diskurs' of Habermas. But of course this doesn't mean the ideal is without significance. For we have to evaluate how far reality does meet the ideal. If it does to a reasonable

degree, then the democratic procedure can exclude the concurring prima facie reasons if not completely, at least partially. The consequences for civil disobedience are twofold. For direct civil disobedience they are quite simple: the legal rule that is broken is the very rule in dispute. Thus, when the procedure for making and in older cases, maintaining the law, was a really democratic one, civil disobedience could not be right, if the only justification were that the citizen opposes the law. The democratic procedure then acts both as a prima facie reason for obedience and as an exclusionary reason in regard of those reasons for disobedience that are based on substantial criticisms of the law, but were already considered in the procedure that led to it. Hence the democratic procedure is a protected reason.

The case of indirect civil disobedience is somewhat more complicated. Indirect civil disobedience means that some undisputed rule is broken, in order to protect against some other law or policy. In such a case two democratic procedures are relevant. First the democratic procedure in framing the specific law that is disobeyed, which procedure forms a prima facie reason for obedience to that law. But quite apart from that, the democratic procedure in making a controversial law or policy plays a role. This second procedure might form an exclusionary reason in regard of those prima facie reasons for disobedience to the broken law, that are based on objections to the controversial law or policy. For instance, one cannot justify a road-blockade with reasons that have been weighed and found wanting in the democratic procedure. Consequently, in this case, there is not *one* protected reason, but there are separate, prima facie and exclusionary reasons.

The rather obvious conclusion is that, the more democratic the policy, the stronger the reasons for obedience to the law are, and the less civil disobedience is justifiable. That this conclusion, which is also intuitively acceptable, directly follows from the model, can be seen as an indication of the usefulness of such a model.

7. The social contract as a protected reason

We can now complete the analysis of the social contract. Above it proved impossible to base the social contract on factual consent. On the other hand a hypothetical social contract proved to be sound, but was rejected as irrelevant. Using the concept of a protected reason, we can now explain why we rejected it.

The concept of protected reason can be applied to the social contract. A contract is a combination of promises by both parties. This means that a contract, just like a promise, is a protected reason. A social contract is a very fundamental contract, that controls almost all the social activities of the parties to that contract. For the contract regulates the entire ordering of society. Thus the scope of the protected reason is very large, if not all-embracing (this depends on the exact contents of the contract, especially on whether unalienable rights are acknowledged). With this it gets clear how the morality of citizenship functions as a '*role morality*'. Because the role is all-embracing, the general question of when disobedience is justified, is fully determined by the answer to the specific question when disobedience is justified within this role morality.

For the social contract to be the basis of a role morality, it must be grounded in a factual consent. But earlier we rejected theories which based the social contract on a factual consent, whether real or tacit. The alternative, a hypothetical contract,

is not unsound in the way the factual contract is, but it is simply not enough for the ruling theory of civil disobedience, for it is not a protected reason, as there is no real promise at all. The hypothetical contract can have a heuristic function, or imply a certain form of ideal-observer position for the justification and critical evaluation of moral principles, but those principles themselves don't get the necessary status of protected reason by this construction.

Simultaneously, this analysis shows why the social contract has for such a long time seemed an attractive starting point for the debate on civil disobedience. For it results in rather concrete norms for the evaluation of civil disobedience. The switch from a factual to a hypothetical contract, however, is a very risky one, owing to covert and unsound assumptions underlying it. It is therefore time to drop this contractarian basis. The myth of civil disobedience as something very difficult to justify, and as some very special exception to a general duty of obedience, has existed for too long.

8. A fresh approach to civil disobedience

So far we have summed up a number of reasons for obedience, and investigated their exact status. What remains for the analysis of civil disobedience is a simple balancing of good reasons, as is so often applied in ethics. We can't say very much in general about this balance. What role and what weight the different reasons for obedience in the balance have, cannot be determined in abstracto.

When a doctor considers whether or not to meet the demand of a terminal patient for a painless end of his or her suffering by euthanasia, the illegality of this action will usually only play a minor role. On the other hand, when one considers driving through a red traffic-light, the weight of the various reasons for obedience to the law will be relatively strong. We should not therefore expect a general ethical theory of civil disobedience that can produce concrete norms. Of course, it is possible to develop certain rather general principles, like "action must be in proportion to goal", and "less harmful means should have been tried first". Apart from these there is little more to be said in general.

When we take away the contractarian basis, civil disobedience turns out to be not such a very special thing. And when we look at modern western society, we notice that conscientious, but illegal acts are indeed very often accepted. It is time we demystify the state and reduce the 'political obligation' to an ordinary moral duty. The times of the divine right of kings have gone. Government should be obeyed because of the quality of the laws, and because of the quality of the democratic procedure. These two themes must be at the centre of the modern discussion on civil disobedience. The approach that has been defended in this paper, has this effect, and does not focus on the misleading question of whether or not the contract has been broken.

9. Government reaction to civil disobedience

Now government can no longer be seen as based on a social contract, we must find a new normative basis. But this does not create a great problem, because the construct of a social contract can be useful as a device to evaluate what general

principles should hold for state action.[32] And in this respect the result will not need to differ so much from that of the ruling theory. Thus the main ideal for government action must be, that government be democratic, and that it should guarantee the rule of law (the 'Rechtsstaat'). This democratic ideal demands that the government tries to meet the citizen: its policy should be based on the highest possible consensus. Civil disobedience can then be seen, at least in respect of those actions that have a political aim, as an important means of protest, or to speak with Jürgen Habermas: civil disobedience must be seen as a normal part of a mature democracy.[33]

Furthermore, an important aspect of government action is that a government should do good. It is on this point that the discussion with the activists must usually focus: is the controversial policy or law good, or not? The government must enter into such a discussion with its citizens. Sometimes this will result in a change of policy; sometimes it will result in dropping a criminal prosecution and sometimes the government will be able to persuade the citizens and thus accomplish a greater consensus. Very often, however, in the full of the battle, the relations between government and citizen are polarized, and the state is so little responsive that it can only regard the disobedient citizens as enemies. In such situations there can be an important role for an independent judge. Sometimes the judge will, unlike the government, come to the conclusion, that the disobedient citizen was (at least partially) right, and express this in the decision. This is a third aspect of the ideal of democracy – the rule of law implies that government action is controlled by law. In cases of civil disobedience especially, this can be of great importance, even if reality compels us to acknowledge that judges are seldom willing to take on this truly independent role.

Anyhow, the moral theory for individual action and the political theory for government action turn out to run fairly parallel. In both theories the most important elements of the discussion on civil disobedience are, first, whether the controversial decision or law is morally right, and second, whether the controversial law or policy was passed in a democratic way. Such a parallelism between political and moral theory can be found in the contractarian theory as well. But in contrast with this last position, that parallelism in the position we defended, is not the result of an artificial and therefore undesired limitation of the conflict.

10. Disobedience of government officials and politicians

A theme that until now has received very little attention in the discussion on civil disobedience, is that of the disobedience of government officials and politicians in the exercise of their function. We need not wonder about that, for the personal consequences can be very serious (e.g. being fired). Supererogatory actions can be admirable, but such a personal sacrifice cannot normally be expected. Leaving aside whether it can be effective, because in the likely case that the disobedient official is replaced, the controversial policy can continue without many problems. The most important circumstances in which official disobedience really forms a serious problem, are therefore rather extreme, as in cases of war or dictatorship. Usually the "Befehl ist Befehl" argument is then brought forward, an argument that has correctly been rejected by the Nürnberg trials. Nevertheless from a

systematic point of view the questions are interesting: How must we look at a government official who does not execute an order, or at a secretary of state or communal council, which refuses to carry out certain decisions? How do we judge a policeman, who refuses to apply violence against nonviolent demonstrators at a peace rally, or the mayor, who refuses to execute an expulsion order of a foreigner who has lived for years amongst the community?

Here the situation differs substantially from the case of an ordinary citizen. The official or politician accepted by his or her own free will the office or job. This implies a free consent to the role morality of the office, which is based on the normative principles for government action.[34] Therefore, disobedience must be justified within that role morality on the basis of the same principles.

This squares with our earlier analysis. An official makes an explicit promise, and therefore is bound to the content of that promise. That promise implies that the official will act in accordance with the norms of the office held, and that he or she should not act on the basis of personal moral convictions. Thus, the promise is an exclusionary reason. The same holds for an oath of allegiance. Even though the literal formulation is usually one of allegiance to the law or Constitution of the country, in our opinion this must be interpreted as allegiance to the law or constitutional law of the country. Because the law includes more than the written rules, referring implicitly to the principles of justice and democracy,[35] this oath must be interpreted as one of allegiance to the fundamental moral principles of the state, in connexion with the written laws, and hence as allegiance to the role morality of the civil servant.

Obviously the analysis for officials and politicians shows a great parallelism with the ruling theory of civil disobedience, which we rejected earlier. But, unlike the latter, in the case of the official or politician the role morality is usually sound, because it is based on a really free consent, whereas the role morality of the citizen in the ruling theory turns out to be based on a fictitious promise only, and therefore has to be rejected.

We should notice that role morality is not the same for every official position. Firstly, because of the allocation of tasks: a judge has certain special responsibilities, which an ordinary civil servant does not have, whereas the latter has yet other responsibilities. And secondly, because an elected official has certain special responsibilities to his or her own voters, which in practice implies a greater margin of action in accordance with political convictions. Nevertheless the main lines of the analysis are the same for all of them.

11. Conclusions

The ruling theory of civil disobedience is based on either an irrelevant or an unsound assumption of a social contract. Therefore it must be replaced by an approach that does not assume one general political obligation, instead taking the line that there are various conditional reasons for obedience.

The most important of these is the democratic procedure and the substantial quality of the policy or law. These two points must therefore be the core issues in the discussion between government and disobedient citizen in most of the cases. This is promoted by the model here proposed, an obvious advantage over the

contractarian approach. The latter, as we saw, focuses on the question of whether the contract has been broken or not, in which case initially a preliminary discussion on the exact conditions of the contract is necessary. The question whether there is a substantial or procedural legitimation, is then merely indirectly answered.

This alternative approach also implies a reversal of the burden of proof. It is not the citizen who must demonstrate that the contract has been broken, but the government that must show that the policy or law has a procedural or substantive legitimation. In contractarian theory the duty of obedience is assumed and the citizen is the one who must show that the government did not meet its obligations. In the approach that has been proposed in this article it is precisely the other way round. The government must earn obedience and demonstrate its legitimacy.

NOTES

1. I have benefited much from discussions on the subject with many people. Special thanks are due to Robert Heeger, Barbara Saunders, and Theo van Willenburg who read and criticized earlier drafts of this paper.

2. See John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), §§55–59.

3. In the Anglo-American world examples of this approach can be found in: Christian Bay, "Civil disobedience: prerequisite for democracy in mass society", in *Political Theory and Social Change*, ed. David Spitz (New York, 1967, 163–183; Hugo Adam Bedau, "Introduction", in *Civil Disobedience: Theory and Practice*, ed. Hugo Adam Bedau (Indianapolis, 1969), 15–26; Bertrand Russell, "Civil Disobedience and the Threat of Nuclear Warfare", in *Civil Disobedience: Theory and Practice*, ed. Bedau, 153–159; Carl Cohen, *Civil Disobedience: Conscience, Tactics and the Law* (New York, 1971); Michael Walzer, *Obligations: Essays on Disobedience, War and Citizenship* (Cambridge, Mass., 1971); Elliot M. Zashin, *Civil Disobedience and Democracy* (New York, 1972). In Germany (where in fact the law-and-order-view receives even more support than the contractarian view) e.g.: Jürgen Habermas, "Ziviler Ungehorsam – Testfall für den demokratischen Rechtsstaat. Wider den autoritären Legalismus in der Bundesrepublik", in: *Ziviler Ungehorsam im Rechtsstaat*, ed. Peter Glotz (Frankfurt am Main, 1983), 54–69; Helmut Simon, "Fragen der Verfassungspolitik", in *Ziviler Ungehorsam im Rechtsstaat*, ed. Glotz, 99–107, and the recent dissertation of Thomas Laker, *Ziviler Ungehorsam: Geschichte – Begriff – Rechtfertigung* (Baden-Baden, 1986). In the Netherlands especially: C. J. M. Schuyt, *Recht, orde en burgerlijke ongehoorzaamheid* (Rotterdam, 1972); and G. Manenschijn, *Burgerlijke ongehoorzaamheid: over grenzen aan politieke gehoorzaamheid in een democratische- en verzorgingsstaat* (Baarn, 1984).

4. Representants of this approach are among others Burton M. Leiser, *Liberty, Justice, and Morals: Contemporary Value Conflicts* (New York, 1973), and Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, 1979). In the Netherlands see Freek Bruinsma, *Het recht op verzet* (Leiden, 1983), and Wibren van der Burg, *Een andere visie op burgerlijke ongehoorzaamheid* (Deventer, 1986).

5. The theory of Kohlberg can illuminate the distinction. The conservative, law-and-order position can be seen as a position on the fourth level of argumentation; the contractarian view as one on the fifth level; whereas the alternative approach is on the sixth level. See M. H. van IJzendoorn, "Morele argumentatie en maatschappelijk protest", *Filosofie en Praktijk* (juni 1981), 66–78. This explains why the conservative position is best attacked from the contractarian position, and why the more radical position is usually only defended in the public debate once the contractarian view has become the ruling theory. Therefore, in the Federal Republic of Germany, it would now, for strategic reasons, be unwise to focus too much on the radical position, because it is too far from the still dominant law-and-order view.

6. See Schuyt, *Recht, orde en burgerlijke ongehoorzaamheid.*

7. Almost all the German literature on the subject cited in the thesis of Thomas Laker originates from after 1981.

8. Rawls, *A Theory of Justice*, 364.

9. Rawls, *A Theory of Justice*, 368. Characteristic of this older tradition is the famous essay of Henry David Thoreau, "Civil Disobedience" in *Civil Disobedience: Theory and Practice*. ed. Bedau, 27–48. The second, non-contractarian, approach to civil disobedience that I distinguished can be seen as the continuation of this older tradition.

10. Thomas Laker gives a good survey of the definition discussion (Laker, *Ziviler Ungehorsam: Geschichte – Begriff – Rechtfertigung* 121–187). He distinguishes three positions: broad definitions, "ruling" definitions, and narrow definitions. Broad definitions include the elements 'illegal', 'political-moral motivation', and either 'public', or nonrevolutionary'. The ruling definitions add to these the element 'nonviolent', while narrow definitions add the element 'acceptance of legal consequences' as well. However, it seems that the ruling and narrow definitions might better be taken together as one group. For John Rawls, the main representative of the ruling definitions, 'acceptance of legal consequences' is an implicit element of the concept of civil disobedience (Rawls, *A Theory of Justice*, 366). Thus the distinction between the narrow and ruling definitions is blurred.

11. For this critique on Rawls, see Peter Singer, *Democracy and Disobedience* (Oxford, 1973), 86–92.

12. Rawls, *A Theory of Justice*, 376.

13. Rawls, *A Theory of Justice*, 368.

14. Rawls, *A Theory of Justice*, 369.

15. Simon, "Fragen der Verfassungspolitik", 103.

16. For a critical review of consent and contract theories, see Christine Sypnowich, "Consent, Self-Government and Obligation", in *Praxis International* Vol. 6 no. 3 (October 1986), 256–276.

17. For Rawls' contractarian approach to civil disobedience, and a critical analysis of different readings, see L. W. Sumner, "Rawls and the Contract Theory of Civil Disobedience", in *Canadian Journal of Philosophy*, Suppl. Vol. III (1977), 1–48. Sumner construes a Kantian interpretation which however, must meet the same critique as Dworkin's interpretation of the hypothetical contract: it is too weak.

18. Cf. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass., 1977), 151:

> "A hypothetical contract is not simply a pale form of an actual contract, it is no contract at all."

19. However, this ideal observer must not be interpreted as a "God-like" sympathetic spectator, or as a Kantian legislator, but as an independent, disinterested judge.

20. Rawls, *A Theory of Justice* 342–343. See also George Klosko, "Presumptive Benefit, Fairness, and Political Obligation" in *Philosophy and Public Affairs*, 1987, 241–259.

21. The main reason for rejecting the broad scope of Klosko's principle of fairness turns on this point: there must be a close relation between the 'presumptive benefits' and the individual laws we have to obey. See also the reply by A. John Simmons, "The Anarchist Position: A Reply to Klosko and Senor" in *Philosophy and Public Affairs*, 1987, 269–279.

22. D. D. Raphael, *Problems of Political Philosophy* (London, 1970), 95.

23. Cf. Syonowich, "Consent, Self-Government and Obligation", 260. "The act of solemn commitment to government required by the consent-giving contract is in most liberal-democratic societies a rare event indeed."

24. Singer, *Democracy and Disobedience*, 45ff.

25. 'Illegality' must be understood in the broad sense that acts are included, which are thought to be contrary to law, but in the end are not illegal at all, because e.g. the courts side with the dissenters. Cf. Rawls *A Theory of Justice*, 365.

26. See among others Leiser, *Liberty, Justice, and Morals: Contemporary Value Conflicts*, 321–353; Alexander M. Bickel, *The Morality of Consent* (New Haven, 1975), p. 99, L. W. Sumner, "Rawls and the Contract Theory of Civil Disobedience", and the literature cited in Laker, *Ziviler Ungehorsam: Geschichte – Begriff – Rechtfertigung*, 143–148.

27. On different aspects of democracy in relation to the duty of obedience, see: Singer, *Democracy and Disobedience*; Habermas, "Ziviler Ungehorsam – Tesfall f[um]ur den demokratischen Rechts-staat. Wider den autoritären Legalismus in der Bundesrepublik" en Simon, "Fragen der Verfassungs-politik".

28. Raz, *The Authority of Law: Essays on Law and Morality*, 250–261.

29. Raz, *The Authority of Law: Essays on Law and Morality*, 17.

30. Raz, *The Authority of Law: Essays on Law and Morality*, 18. In Joseph Raz, "Authority

and Justification", *Philosophy and Public Affairs 14* (1985), 3–29, however, he introduces the term "preemptive reason".

31. For this reasoning see the abovementioned articles of Habermas and Simon. Singer is of a different opinion (*Democracy and Disobedience*, 20–22).

32. This is in line with Dworkin's interpretation of the social contract. Dworkin, *Taking Rights Seriously*, 150–183.

33. Cf. Habermas, "Ziviler Ungehorsam – Testfall für den demokratischen Rechtsstaat. Wider den autoritären Legalismus in der Bundesrepublik", 32.

34. For some of the characteristics of this role morality for government officials, see especially the articles by Stuart Hampshire, Bernard Williams, and Thomas Nagel, *Public and Private Morality*, ed. Stuart Hampshire (Cambridge, 1980).

35. This line of argument is inspired by Dworkin's theory of law, according to whom it is impossible to see law as a system of rules; in interpreting the law we cannot avoid reference to the fundamental principles of law. See Dworkin, *Taking Rights Seriously*; and Ronald Dworkin, *Law's Empire* (Cambridge, Mass., 1986).