

**A justification for violent protest in the grounds of law within democratic  
constitutions**

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Finally, to my late mother, Miss Susan Tims, I offer this: that I shall raise a glass, and promise that I shall not rest on my laurels. There is always more to be done.

## Abstract

This research examines the justification of violent protest in liberal democratic states. By identifying and critiquing principles of “constitutional morality” from which states make moral claims to legitimacy, the research frames state appeals to law as “legitimacy claims,” or moral arguments seeking obedience from citizens. Conversely, protest can act as a “legitimacy counterclaim” against morally irrational laws and policies which the state enforces, as protesters engage in democratic dialogue with the state and the wider public. Violence is deconstructed as a concept, its meaning being highly politicised and contextual, before “violent protest” itself is examined as a potential method for legitimacy counterclaims against perceived state injustices. A critical evaluation of arguments against violent protest – from deontological, consequentialist, pragmatic, and constitutional theoretical frames – reveals that these objections only present limitations on justifiable violent protest, rather than convincing reasons for its absolute moral prohibition. Taking an interdisciplinary approach incorporating legal theory, liberal democratic political theory, criminological and sociological literature and moral philosophy, the research examines notable examples of both violent and nonviolent protest movements internationally (including Black Lives Matter, Extinction Rebellion, *gilets jaunes*, Hong Kong pro-democracy protests and the Stansted 15). It is shown that violent protest can be an effective and morally coherent method of redress against unjustifiable state laws and policies, subject to certain moral and practical limitations.

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## Introduction

### Why violent protest?

On 9 August 2014, police in Ferguson, Missouri shot an unarmed Black man, Michael Brown, as he fled arrest.<sup>1</sup> Peaceful vigils and protests that night turned antagonistic, as participants complained of the disrespectful and heavy-handed police presence at those assemblies. Police in riot gear were soon deployed, and the “Ferguson Unrests” began. Up until 25 August, the day of Brown’s funeral, the city was the scene of almost continuous protest, rioting, looting and civil unrest. The Black Lives Matter movement (“BLM”), which had been gathering momentum as a peaceful activist group since 2013, was brought to international attention as both peaceful and violent protesters made claim to the movement’s mantras and demands.<sup>2</sup> Meanwhile, international news agencies broadcast footage of broken shop windows, streets occluded with tear gas, and projectiles volleyed between protesters and riot police.

It was not until November 2014, however, that the worst of the protest violence took place. That month, charges against the police officer who had shot Brown were dropped by a grand jury.<sup>3</sup> It was at this juncture – where the criminal justice system seemed, to protesters, to possess no capacity or will to address the injustices they saw – that it became clear to activists that Brown’s case was not an aberrant anomaly in an otherwise just system. It seemed to prove to them the BLM movement’s central claim, that the criminal justice system itself was aberrant, and unjust. The system that killed unarmed civilians within their community was the same system that acquitted those officers of criminal liability. Yet the question was asked: this injustice seems to explain the protest violence, but does it *justify* it?<sup>4</sup> The Ferguson Unrests formed a starting point in my decision to research beyond theories of civil disobedience and

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<sup>1</sup> Lowery, W. *They Can’t Kill Us All: The Story of Black Lives Matter* (Penguin, London 2017) 47-49

<sup>2</sup> Russell, R. ‘Black Lives Matter: Toward a Modern Practice of Mass Struggle’ (2016) 25 (1) *New Labour Forum* 34-42

<sup>3</sup> Lowery, W. *They Can’t Kill Us All: The Story of Black Lives Matter* (Penguin, London 2017) 47-49

<sup>4</sup> Szetela, A. ‘Black Lives Matter at Five: Limits and Possibilities’ (2020) 43 (8) *Ethnic and Racial Studies* 1358



peaceful protest, and instead to ask the question of whether uncivil, violent, outraged and indeed outrageous protest can be justifiable within a liberal democratic society.

Rhetorically, politicians often claim that violent protest does not “belong” to democratic states.<sup>5</sup> Yet the opposite is true, as a matter of fact. Violent protest is a common feature of liberal democracies. Since this doctoral project began in 2018, we have seen the *gilets jaunes* protests in Paris, pro-democracy riots in Hong Kong, the George Floyd protests in Minneapolis, the statue of Edward Colston plunged into the docks in Bristol, Churchill’s statue defaced at Parliament Square, resurfacing tensions in Northern Ireland, and the storming of the US Capitol, to name but a few instances globally. Lawrence and Karim in their introduction to *On Violence* remind us that it is “intrinsic rather than extrinsic” to social and political life.<sup>6</sup> If anything, violent protest seems to belong, *factually*, to life in liberal democratic states. Yet the question remains whether such violent protest “belongs,” *normatively*, to a political philosophy that decries violence, and seeks to uphold public institutions of justice and the rule of law.

## Research Statement

This research is an investigation into how, in liberal democratic theory, there can be a rational argument, grounded in constitutional moral principles, that justifies violent protest against the state’s immoral laws, actions or policy.<sup>7</sup>

In order to coherently address such a complex and composite research topic, it has been necessary to break down its components into thematic sections and consider how they link together. I begin my research with an analysis of what the moral presumptions are in liberal constitutional theory, broadly, and how “morality” is a core

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<sup>5</sup> C. Terwindt, *When Protest Becomes a Crime* (Pluto Press, London 2019); M. Soares, M. Barbosa, R. Matos and S.M. Mendes, ‘Public Protest and Police Violence: Moral Disengagement and Its Role in Police Repression of Public Demonstrations in Portugal’ (2018) 24 (1) *Peace and Conflict: Journal of Peace Psychology* 27

<sup>6</sup> Lawrence, B.B. and Karim, A. (eds) *On Violence: A Reader* (Duke University Press, London 2007), 12

<sup>7</sup> The phrase “state” will be used at times interchangeably with “administration,” “regime,” or “government,” but only in instances where these phrases are used to describe a public authority making claims to obedience.

component of its logics.<sup>8</sup> I am then able to discuss legitimacy, as the moral claim to authority by a liberal democratic regime, based on those findings.<sup>9</sup> It is then possible to consider the moral counterarguments made by protesters to perceived illegitimacy of purportedly immoral laws, framing protest as “democratic dialogue.”<sup>10</sup> Violence within protest, then, can be broadly defined, evaluated, and brought to scrutiny under a rational-normative analytic framework.

## Relevance and Background

In terms of positioning this research within the academic discourse, this thesis is of great relevance to existing approaches to theorising protest, while presenting a fresh and important shift in analytical dynamics. Historically, examples of protest over the twentieth century (including anti-Vietnam War protests and actions undertaken by the Campaign for Nuclear Disarmament) informed, and were informed by, legal theory on political obligation and disobedience contemporary to their time.<sup>11</sup> Notably, Rawls’ classic formulation of civil disobedience was heavily influenced by the predominantly peaceful, or nonviolent, Civil Rights Movement in the 1960s.<sup>12</sup> However, it has been argued that these formulations on civil disobedience and peaceful protest were themselves informed by media representations, and tactical choices made by social movement leaders at that time, not necessarily eschewing violence on moral grounds *per se*, but on instrumental grounds, so as not to “frighten the white majority.”<sup>13</sup> To

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<sup>8</sup> See *inter alia*: Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986); Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979); Simmons, A.J. *Justification and legitimacy: essays on rights and obligations* Cambridge University Press, Cambridge 2001)

<sup>9</sup> See *inter alia*: Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979); Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979)

<sup>10</sup> Guhathakurta, M. ‘Democratic Dialogue’ in Coghlan, D. and Brydon-Miller, M. *The SAGE Encyclopedia of Action Research* (2014) <<http://0-methods.sagepub.com.wam.leeds.ac.uk/reference/encyclopedia-of-action-research/n92.xml>> accessed 30/05/2019

<sup>11</sup> Zinn, H. *Disobedience and Democracy: Nine Fallacies on Law and Order* (2<sup>nd</sup> edn South End Press, Cambridge MA 2002); Russell, B. ‘From the Archive: Bertrand Russell on Civil Disobedience’ *New Statesman* (14/11/2013) <<https://www.newstatesman.com/2013/11/civil-disobedience>> accessed 01/03/2019

<sup>12</sup> Rawls, J. *Political Liberalism* (Columbia University Press, New York 1993) 363-368

<sup>13</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 27

rely upon conceptions of protest and disobedience which date from the middle of the previous century, at the height of the Cold War, and which were directly informed by the political milieu of those contexts, is to rely upon necessarily dated conceptions of those phenomena.<sup>14</sup>

More contemporary works demonstrate a similar connection between current events and political theory, but in the context of a shifting and more critical academic discourse.<sup>15</sup> There is a constantly evolving historical narrative of recent and ongoing protests internationally, which almost seem to resist attempts to be subjected to political analysis. The *gilets jaunes* protests in France from 2018-2019 were a reminder of the fluid, unpredictable nature of protest and protester identities, and the unsteady political role such protests hold in any given nation state.<sup>16</sup> Initially, in late 2018, the protesters – though not a hierarchically structured group – centred their movement against President Macron, triggered by concerns on rising fuel duty. By early 2019, the protesters had diversified their claims, issuing more all-encompassing claims against what they saw as the illegitimacy of centrist government, neoliberal governance, and political disenfranchisement of ordinary people.<sup>17</sup> The key point here is that claims made by states, and the counterclaims of protesters, are not always static. A new law or policy that fails to demonstrate its legitimacy to the public can form the basis of both wider claims against obedience to the state, *and* claims that violent protest is a justifiable response.

The matter of *justification* of violent protest, however, remains in many respects limited by orthodox perspectives of liberal democratic theory that render violence illegitimate per se. In the UK context, as with many liberal democratic states, this is clearly reflected in domestic law – most obviously in the prohibitions against violence

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<sup>14</sup> Dominguez, R. 'Electronic Civil Disobedience Post-9/11: Forget Cyber-Terrorism and Swarm the Future Now' (2008) 22 (5) *Third Text* 661

<sup>15</sup> See for example: Tchernalykh, N. 'Will Pussy Riot Dance on #Euromaidan? New Dissidence, Civic Disobedience and Cyber-Mythology in the Post-Soviet Context' (2014) 4 (2) *Religion and Gender* 215

<sup>16</sup> Willsher, K. 'Macron seeks to turn 'anger into solutions' in open letter to France' *The Guardian* (13/01/2019) <<https://www.theguardian.com/world/2019/jan/13/macron-seeks-to-turn-anger-into-solutions-in-open-letter-to-france>> accessed 15/03/2018

<sup>17</sup> Willsher, K. 'Macron seeks to turn 'anger into solutions' in open letter to France' *The Guardian* (13/01/2019) <<https://www.theguardian.com/world/2019/jan/13/macron-seeks-to-turn-anger-into-solutions-in-open-letter-to-france>> accessed 15/03/2018

in the Public Order Act 1986, and the common law rules regarding breach of the peace.<sup>18</sup> The incorporation of the European Convention on Human Rights through the Human Rights Act 1998 has not significantly altered the legal position, not least because Art.11 only protects “peaceful assembly.”<sup>19</sup>

Even outside of the narrow confines of legal analysis, contemporary sociological and political literature remains suspicious of justifications for violence, beyond perhaps revolutionary violence against an unambiguously tyrannical regime.<sup>20</sup> The chief bases for these attitudes can be summarised briefly. First, it is presumed that political violence is antithetical to democracy: to its peaceful institutions, to its systems of dispute resolution, and to its commitment to a free marketplace of ideas free from coercion.<sup>21</sup> Second, it is presumed that violence is antithetical to liberalism: its coercive effect on the individual, and its destructive potential for property and persons, mean that violence is principally considered an evil to be eliminated, or at least mitigated.<sup>22</sup> Liberal democratic theory, then, seems to consider political violence to be alien to its processes.

It is worth stating from the outset that it is violence by *non-state* actors that is chiefly considered antithetical to liberal democratic thought. Violence which forms the state, or that the state uses to perpetuate itself or achieve its functions, is frequently presumed by writers (such as Weber, Arendt and Cover) as necessary and, usually, legitimate.<sup>23</sup>

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<sup>18</sup> *R v Howell* [1982] QB 416

<sup>19</sup> *CS v Germany* (App 13858/88) EComHR inadmissibility decision 06/03/1989, at [2]. In *Ziliberberg v Moldova* the Court emphasised that it is the individual’s violent actions, not the violence of others within a protest, that can render a claim under Art.11 inadmissible: (App 61821/00) ECtHR inadmissibility decision 04/05/2004; Mead, D. *The new law of peaceful protest: rights and regulation in the Human Rights Act era* (Hart, Oxford 2010), 68-70.

<sup>20</sup> Schwarzmantel, J. ‘Democracy and Violence: A Theoretical Overview’ (2010) 17 (2) *Democratization* 217; Chenoweth, E. and Stephan, M.J. ‘Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict’ (2008) 33 (1) *International Security* 7

<sup>21</sup> Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 1971), 363-368; Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004), particularly at 7

<sup>22</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970); Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004); Owen, D.S. and Strong, T.B. (eds) *Weber, M. The Vocation Lectures: "Science as a Vocation", "Politics as a Vocation"* (Hackett Publishers, Indianapolis 2004)

<sup>23</sup> Owen, D.S. and Strong, T.B. (eds) *Weber, M. The Vocation Lectures: "Science as a Vocation", "Politics as a Vocation"* (Hackett Publishers, Indianapolis 2004); Arendt, H. *On*

It has been suggested by Tilly that, in deciding upon our choice of politics, we choose between different ways of organising and exercising violence: and the presumption is that liberal democratic states aim to employ that violence in ways which are defensible, accountable and subject to legal limitations and protections.<sup>24</sup> The question then is really to what extent that presumption, that excluding non-state violence is normatively justifiable, is falsifiable.

What is required is a fundamental reimagining of what political “violence” actually involves, as a matter of moral consequences: its harms, and *why* it is considered such a social evil in liberal democratic theory. Additionally, there must be a re-evaluation of the how state claims to legitimacy and obedience are framed, and likewise the counterclaims of protesters, with regard to laws, policies and state actions that seem to lack firm moral reasons for obedience and which can therefore give good moral reasons for disobedience and protest. The present thesis aims to accommodate both of these themes, in a robust analysis of how political violence *can* be justified in liberal democratic theory itself.

With regard to violence, the research will help to address an ongoing difficulty in theorising political violence: namely, the variability of definition. It has been said that “there is no general theory of violence apart from its practices.”<sup>25</sup> One recurring, problematic theme in the academic literature is identifying the targets of violence, such as persons and property, and using the target as an exclusionary definitional component of violence, before any further analysis can be conducted. By making definitions for inclusion within the frame of “violence,” the analyst constructs “nonviolence,” excluded by the binary definition, even in cases where excluded cases may demonstrate harmful and, per Raymond Williams, “violating” behaviour.<sup>26</sup> While some writers (from fields as diverse as sociology through to constitutional and political theory) consider violence necessarily to include harm to persons, other writers include

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*Violence* (1<sup>st</sup> edn Penguin, London 1970); Cover, R.M. ‘Violence and the Word’ (1986) 95 *Yale Law Journal* 1601

<sup>24</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 9

<sup>25</sup> Lawrence, B.B. and Karim, A. *On Violence: A Reader* (Duke University Press, Durham and London 2007), 7

<sup>26</sup> Williams, R. *Keywords: a Vocabulary of Culture and Society* (3<sup>rd</sup> edn Fontana, London 1988)

violence to property.<sup>27</sup> Some conflate the two, which generates the potential for analytic blurring when considering the moral consequences of these very different actions.<sup>28</sup> With regard to the moral logics necessary for the current thesis, where writers claim that violence limits the liberty of persons, for example, the contrasts between the liberties limited by personal or property violence become of paramount importance. As Galtung noted, the two have distinct normative consequences, especially if the property in question is not owned personally but by a company or state, for example.<sup>29</sup>

Conversely, some theorists take perhaps too broad a conception of violence for the purposes of this thesis on violent protest. Galtung himself described violence in such broad terms that it may include the “avoidable insult to basic human needs.”<sup>30</sup> This is perhaps a useful way of widening our understanding of violence to include structural violence and more indirect means of causing harm.<sup>31</sup> It is certainly useful for analyses of state violence and institutional violence. But it is unclear whether Galtung would have anticipated that such a definition would be used in the context of specifically *political* violence, or protest violence.

As Chapter 4 explores in some detail, there has historically been considerable incoherence in the literature in terms of definitions, examples, and evaluation of political violence in liberal democratic theory. Given the importance of the question, it is important to have a fresh and rigorous review based upon a coherent moral-logical approach. The present research aims to do so precisely by not excluding any definition of violence, but by taking a “paradigmatic,” inclusive approach.<sup>32</sup> A non-exclusionary

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<sup>27</sup> Feierabend, I.K., Feierabend, R.L. and Gurr, T.R. (eds) *Anger, Violence and Politics: Theories and Research* (Prince Hall, Englewood Cliff NJ 1972)

<sup>28</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 168-172

<sup>29</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 168-172

<sup>30</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 171

<sup>31</sup> Other scholars have explored the phenomenon of structural violence in greater detail than can be discussed here. See for example: Mackinnon, C. *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge MA 1987); Crenshaw, K. *Critical Race Theory: the key writings that formed the movement* (New Press, New York 1995)

<sup>32</sup> Audi, R. (ed) *The Cambridge Dictionary of Philosophy* (Cambridge University Press, New York 1995), 558

approach to identifying violence presumes that there are some features common to various manifestations of violence, however described, but that we do not need to create arbitrary criterial definitions for the purpose. Such features can include (but again, need not entirely comprise of) threat or use of physical force, or coercion; causing others to apprehend the use of physical force; or causing physical injury to persons, or damage to or loss of property. Some instances of violence are perhaps more demonstrably approximate to this paradigm – punching a person, or setting fire to a government building. Others may not be so obviously approximate to the paradigm, yet still be sufficiently proximate for coherent moral argument with relation to violence and its harms: for example, hacktivism and damage to data.<sup>33</sup>

The paradigm allows inclusion, rather than exclusion – and allows different manifestations of violence to be tested not according to their targets or other definitive characteristics, but their moral consequences. It may include intention to injure, different targets, different consequences, various actors, and so forth. Crucially the definition itself is unimportant: it is the negative consequence caused by the purported violence in question, which is subject to analysis in this thesis. Violence to the self, such as protest self-immolation as studied by Grojean, would not be excluded by this model.<sup>34</sup> Only its normative consequence – or what will be called “moral harm” throughout the thesis – would be relevant to the analysis of justifying protest if appeals are made, for example, to the sanctity of life or the liberty of the victim. This not only makes for a more expedient investigation into violence in protest in the present instance, precluding extraneous semantic argumentation, but also helps to make coherent the wider discourse on political violence in future, by cutting through the cross-purpose debates on definitions for rational-normative analysis.

## Theoretical Frame and Parameters

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<sup>33</sup> Brantly, A.F. ‘The Violence of Hacking: State Violence and Cyberspace’ (2017) 2 (1) *The Cyber Defense Review* 73

<sup>34</sup> Grojean, O. ‘Self-immolations by Kurdish Activists in Turkey and Europe’ (2012) 25 *Revue d’Etudes Tibétaines* 159-168; Grojean, O. ‘Violence Against Oneself,’ in Snow, D.A.; della Porta, D., Klandermans, B. and McAdam, D. (eds.) *The Blackwell Encyclopedia of Social and Political Movements* (Blackwell, Oxford 2012)

The research methodology incorporates critical analysis of existing legal theory, political theory, and sociological and legal studies of protest and violent protest within liberal democratic states. As such this study takes an interdisciplinary evaluation of theoretical legal and moral concepts, which underpin moral claims to obedience and to violent protest.

Each substantive Chapter presents a concise review of the literature relating to its subject matter. This includes such topics as protest, legitimacy, constitutional democratic political theory, rational normativity, and (broadly) instances of political violence in historical context. Throughout this process, an “ideology critique” is conducted, which examines the coherence and usefulness of our conceptions of violence, legitimacy, and protest.<sup>35</sup> These literature reviews and ideology critiques, in pursuit of effective definitions and ideological evaluations, are the foundations of most of the thesis Chapters.

The use of historical and contemporary case studies of instances of both nonviolent and violent protest has been chosen carefully and selectively. The aim is to demonstrate the pertinence and relevance of the theory being advanced, with regard to violent protest in liberal democracies. However, within this research, case studies cannot be used as a research design to demonstrate empirical evidence of the thesis argument. As isolated instances, the data gathered from such sporadic studies, without much more rigorous processes, would be ungeneralisable and unreliable.<sup>36</sup> Instead, they are used as illustrations of the thesis’ overall relevance, and of the types of legitimacy claims made by states and protesters. The case studies help to ground the theoretical focus of the thesis argumentation in relatable examples, and to demonstrate how the legitimacy claim heuristic can be analytically applied to concrete cases.

“Rational normativity” is the analytic device used in order to frame the logical coherence of moral claims to obedience and disobedience, including violent protest.<sup>37</sup>

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<sup>35</sup> Geuss, R. *The Idea of a Critical Theory: Habermas & the Frankfurt School* (Cambridge University Press, Cambridge 1981)

<sup>36</sup> Matthews, B. and Ross, L. *Research Methods: A Practical Guide for the Social Sciences* (1<sup>st</sup> edn Longman, Harlow 2010), 128

<sup>37</sup> Raz, J. ‘Explaining Normativity: on Rationality and the Justification of Reason’ (1999) 12 (4) *Ratio* 354



It presumes that there are “moral reasons for action,” “moral principles,” or “grounds of obligation” – the terms can be used interchangeably – which are moral reasons to act and starting axioms in logical argument.<sup>38</sup> In the context of constitutional morality, states often cite justice, equality, and liberty as numbering amongst their legitimating moral grounds.<sup>39</sup> After citing moral axioms, moral claimants create a syllogism, or chain of argument, which reaches a conclusion as to what is morally required as a result. Rational normativity is the moral logic that allows for the formulation and evaluation of such arguments, and helps humans, as moral agents, to decide what is the best moral stance or action to take. As Raz puts it, “an account of rationality is an account of the capacity to perceive reasons and to conform to them.”<sup>40</sup> This research uses this conception of rational normativity not only to examine state claims to legitimacy, but also protester claims to their own moral justifiability.

The research is limited to liberal democratic states, although again a broad, paradigmatic approach is taken with regards to this concept. Generally such a state or regime is understood in terms of a recognised nation state, the constitution of which enshrines both a) direct or representative democracy,<sup>41</sup> and b) institutions of human rights, civil liberties, or a combination of the two.<sup>42</sup> Importantly, the focus of the research is not to evaluate definitions of democracy, and space precludes a full investigation beyond what received understandings can acceptably be examined and adapted from writers on democratic constitutional and political theory.<sup>43</sup>

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<sup>38</sup> On moral reasons for action, as grounds of political obligation, see *inter alia*: Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 38-48; Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 5; Buchanan, A. ‘Political Legitimacy and Democracy’ (2002) 112 (4) *Ethics* 689, 703

<sup>39</sup> *ibid.* With relation to fairness as another moral ground, see Cullity, G. ‘Moral Free Riding’ (1995) 24 (1) *Philosophy and Public Affairs* 3; regarding justice, see Kolers, A. ‘The Priority of Solidarity to Justice’ (2014) 31 (4) *Journal of Applied Philosophy* 420; and regarding the duty to assist others in need, or the Samaritan duty, see Wellman, C.H. ‘Liberalism, Samaritanism and Political Legitimacy’ (1996) 25 (3) *Philosophy and Public Affairs* (3) 211

<sup>40</sup> Raz, J. ‘Explaining Normativity: on Rationality and the Justification of Reason’ (1999) 12 (4) *Ratio* 354

<sup>41</sup> See for example Redfield-Ortiz, K. ‘Government by the People for the People - Representative Democracy, Direct Democracy, and the Unfinished Struggle for Gay Civil Rights’ (2011) 43 (4) *Arizona State Law Journal* 1367

<sup>42</sup> Dworkin, R. *Taking Rights Seriously* (6<sup>th</sup> edn Duckworth, London 1991); Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 41

<sup>43</sup> Very few writers attempt to define such a contentious term. See Raz, J. *Ethics in the Public Domain* (rev edn Clarendon, Oxford 2001), 62: “Generalization regarding the basic features of the society of the here and now are not definitive of the boundaries of the exercise.”

This thesis is, however, not limited to any one particular state, nor solely to “Western” liberal democracies. By focusing on the core conceptual features of liberal democracy itself, the thesis addresses the fundamental constitutional and moral bases common to all purported instances of liberal democracy. Rather than setting arbitrary criteria for what constitutes a liberal democracy, a “paradigmatic” framework (similar to that used for “violence,” above) instead allows for analysis of any state falling within this framework that might purportedly be a liberal democracy. In this sense a liberal democratic state *generally* observes some of the principles, and has some of the institutions, discussed in the first Chapter. Focus on this “paradigm” case of liberal democracy creates an inclusionary approach, rather than an exclusionary definitive approach, meaning that the research findings may apply to a wide range of different democracies without stipulating arbitrary criteria for inclusion.<sup>44</sup>

The study does not investigate revolutionary legitimacy claims: that is, claims by protesters who seek to overthrow the state, its constitution, its government, or its fundamental constitutional morality.<sup>45</sup> Whereas protesters generally make “partial claims” regarding specific laws or policies, or general failures of the government, revolutionary activists make what Walzer terms “total claims” which question the legitimacy of the state or its government at large.<sup>46</sup> Revolutionary legitimacy claims often involve positing moral grounds, as axioms in moral logical syllogism, which are different to those applied in the legitimacy claims of the state. For instance, as Tosini has observed with regard to suicide terrorism, a religious fundamentalist claim may appeal to theological moral axioms for its moral claims, where a secular state would not.<sup>47</sup> Without axiomatic agreement, the normative-rational claims of both parties talk

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<sup>44</sup> For a similar approach regarding a non-definitional approach to civil disobedience, see Brownlee, K. ‘Features of a Paradigm case of Civil Disobedience’ (2004) 10 (4) *Res Publica* 337, 338-339

<sup>45</sup> Bullock, A. and Trombley, S. (eds) *The New Fontana Dictionary of Modern Thought* (3<sup>rd</sup> edn Harper Collins, London 1999), 754; Brownlee, K. ‘Civil Disobedience’ *Stanford Encyclopedia of Philosophy* (Fall 2017 edn) <<https://plato.stanford.edu/archives/fall2017/entries/civil-disobedience>> accessed 19/03/2019

<sup>46</sup> Walzer, M. ‘The Obligation to Disobey’ (1967) 77 (3) *Ethics* 163, 167

<sup>47</sup> Tosini, D. ‘Calculated, Passionate, Pious Extremism: Beyond a Rational Choice Theory of Suicide Terrorism’ (2010) 38 *Asian Journal of Social Science* 394

at cross-purposes and cannot be easily compared.<sup>48</sup> It is also justifiable to focus on the legitimacy of specific laws or actions, rather than the state or government's very existence itself, on a moral-logical perspective. Per Buchanan, one's duty to obedience of any particular law, and indeed our reasons for actions as moral agents more generally, depend less on the qualities of the issuer than "the quality of reasons to comply," all moral factors being considered.<sup>49</sup> We can distinguish, as Tyler does, between legitimacy as "allegiance to the authorities," from legitimacy as comprising an "obligation to obey" a particular law.<sup>50</sup> The present research focuses primarily on duties to obey or disobey laws, rather than the legitimacy of the state itself. For the sake of brevity and analytic clarity, therefore, only non-revolutionary claims relating to specific laws and policies will be considered, here.<sup>51</sup>

An important feature of the research's analytic approach is that it claims neither a positivist nor a non-positivist theoretical framework to law and legal validity.<sup>52</sup> The current thesis aims to sidestep positivist or natural law arguments about sources of law, legal validity, or the conceptual separation of law and morality. Instead, it focuses on what, as a matter of moral logic, protesters can defensibly do within a democratic society. This is justifiable given a) that the research is not, and does not need to be, an interrogation of the vast positivist, non-positivist or natural law literature; and b) that a rational-normative account of *legitimacy* does not depend upon positivist, natural law or any other test of *legal validity*.<sup>53</sup> The current research focuses on moral argumentation concerning whether moral obligations of obedience or disobedience

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<sup>48</sup> On axiomatic moral logic more generally, see de Lazari-Radek, K. and Singer, P. *The Point of View of the Universe* (Oxford University Press, Oxford 2014); Harris, J.W. *Legal Philosophies* (2<sup>nd</sup> edn Butterworths, London 1997), 13

<sup>49</sup> Buchanan, A. 'Political Legitimacy and Democracy' (2002) 112 (4) *Ethics* 689, 695

<sup>50</sup> Tyler, T.R. *Why People Obey the Law* (Princeton University Press, Princeton 2006), 33; see also Wellman, C.H. 'Liberalism, Samaritanism and Political Legitimacy' (1996) 25 (3) *Philosophy and Public Affairs* 211 – there Wellman uses "political legitimacy" to refer to the distinct matter of the justifiability of the existence and institutions of the state in question, as distinct from the "political obligation" of obedience to a just law.

<sup>51</sup> There is some blurring between non-revolutionary and revolutionary protest, particularly as the former can often overspill into the latter. However, the present thesis only examines the former in detail, for the sake of analytic clarity. See: Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017)

<sup>52</sup> Hart, H.L.A. *The Concept of Law* (2<sup>nd</sup> edn Oxford University Press, New York 1994); Friedman, N. and Cornell, D. 'The significance of Dworkin's non-positivist jurisprudence for law in the post-colony: essay' (2010) 4 (1) *Malawi Law Journal* 1

<sup>53</sup> Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 10

apply to purportedly immoral laws, which is a separate inquiry altogether to testing whether a purportedly immoral law is legally valid.<sup>54</sup>

This research looks to protest responses against state laws, policies, their enforcement, and other actions of the state – and its agents – that would interfere with the moral autonomy of citizens.<sup>55</sup> Although most of the literature on political obligation looks specifically to how laws can have binding force, it is important to note that their implementation in policy, their interpretation by judges and other authorities, and state actions purporting to be under lawful authority, can all have a similar effect on the ability of the citizen to live in accordance with their own moral judgement. However, frequently “law” will be used here as a shorthand to describe any rule, policy or action from the state or its agents purporting to have such a binding effect.<sup>56</sup>

### Conceptual presumptions

The research is framed by several conceptual presumptions that determine its scale and scope. Firstly, the research presumes the existence of a democratic nation state, with identifiable moral constitutional principles and coercive powers to enforce obedience. Although this risks an Anglo-American or Eurocentric bias to the conception of the state, this does (perhaps regrettably) reflect the vast majority of existing literature on liberal democratic theory, and is not inconsistent with many other

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<sup>54</sup> Hart, H.L.A. *The Concept of Law* (2<sup>nd</sup> edn Oxford University Press, New York 1994); Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 23

<sup>55</sup> “Citizens” is used frequently in this thesis to identify those who are deemed to have political obligations to the state, including duties of obedience, and to whom the state has reciprocal duties as members of its political community - Dworkin, R. *Justice for Hedgehogs* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 2011). However, many of the arguments posited in this thesis apply to non-citizens, or those whose identity as members of the political community is problematised (or politicised). Protest by non-citizens can have important value as democratic dialogue both in terms of critique of the law’s legitimacy, and of challenging wider institutions and the very nature of political identity and community itself: Celikates, R. ‘Constituent power beyond exceptionalism: Irregular migration, disobedience, and (re-)constitution’ (2019) 15 (1) *Journal of International Political Theory* 67

<sup>56</sup> This includes instances where an omission to effect law, policy or action on the part of the state is protested. Such omissions themselves are also capable of moral irrationality, if there are moral imperatives to act, and these omissions are also frequently the subject of protest. See for example: Varda, S.J. ‘Sit-in as argument and the perils of misuse’ [2019] *Argumentation and Advocacy* <<https://doi.org/10.1080/10511431.2018.1528122>> accessed 24/03/2022

writers' core presumptions on liberal democratic statehood.<sup>57</sup> Secondly, by extension, the research takes a state-centric approach, dependent upon its presumptions of the Weberian, hierarchical, centralised state.<sup>58</sup> The thesis presumes that the state, by virtue of its legislative and executive powers, is the best-placed entity to frame analyses of legitimacy and disobedience. Thirdly, the rational-normative argument focuses on state moral-constitutional claims, and counterclaims against the state by violent protesters, which precludes a fuller analysis of protests against private organisations and actors.

These limitations are nevertheless justifiable within the spatial limitations afforded to this research. Its core aim is to understand and critique the internal moral logics made by claims to legitimacy. Although the subject focus will rest on democratic states, it does not preclude applicability of legitimacy claim logics to other circumstances as a heuristic device. It is not impossible to apply this technique to claims made in revolutionary, non-democratic or non-Western states: indeed Sultany applies a similar "legitimation-worthiness" approach in examining revolutionary movements during the Arab Spring.<sup>59</sup> The rational-normative approach adopted may even apply to non-state moral logic claims, where a private organisation, trade union, or other powerful non-state body appeals to moral reasons when undertaking certain actions which exercise control over individuals' possible freedoms; and it may apply to protests, and violent protests, against such claims too.<sup>60</sup> Nonetheless, legitimacy, within its received understanding in political philosophy, depends upon a concept of authority to demand obedience from subjects, which is at present chiefly associated with a state or government.<sup>61</sup>

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<sup>57</sup> For example, with regard to Arab states, Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), xxv-xxvi; Hammond, A. and Ross, R.A. 'The Evolution of Ethnocentrism' (2006) 50 (6) *Journal of Conflict Resolution* 926

<sup>58</sup> This conception of the state has been thoroughly challenged elsewhere. For example, Braithwaite, J. 'The new regulatory state and the transformation of criminology' (2000) 40 (2) *British Journal of Criminology* 222; Davies, M. *Law Unlimited* (Routledge, Abingdon 2017).

<sup>59</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 7

<sup>60</sup> See Raz, J. 'Authority and Consent' (1981) 67 (1) *Virginia Law Review* 103, 106

<sup>61</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 38-69; Simmons, A.J. 'Justification and Legitimacy' (1999) 109 (4) *Ethics* 739

With regard to the Anglo/Eurocentric approach to defining and applying normative rationality, it can once again be argued that, although its application within this specific research is (inevitably) ethnocentric, it can be modified and hybridised with other conceptions of rationality. Sultany, on the one hand, demonstrates that a mixed normative/sociological approach to “legitimation-worthiness” may be suitable in conceptualising moral legitimacy claims made during the Arab Spring.<sup>62</sup> On the other hand, it may be possible to alter the “axiological rationality” calculus used beyond the narrow confines of secular rational-normative thought to include, for example, more theological or religious axioms.<sup>63</sup> However, these ideological contrasts, welcome though they would be, would fall outside of the scope of the initial, core, and narrowly defined principal investigation, into whether legitimacy claims can be a coherent heuristic device for understanding competing moral claims surrounding violent protest, based on the moral grounds to which states generally make claims. The thesis is ultimately using liberal democratic theory’s own biases and presumptions against itself, and asking whether, according to *its own logics*, violent protest can ever be justifiable.

As a final concern, it must be stressed that the research is not intended to justify any particular instance of violence or law-breaking, or to encourage the like. It is instead a theoretical analysis of the legitimacy claims made by states, and an examination of whether, should their moral-rational argumentation prove internally inconsistent, it could ever be internally morally logical to consider violence in protests against them.

## Chapter Synopsis

In order to lay the groundwork for this inquiry, the first two Chapters will discuss aspects of the constitutional moral theory behind liberal democratic states in general – firstly, the moral principles to which these states make claim, and secondly, the mechanisms by which states make claims to legitimacy through their laws, policies and actions. In the third and fourth Chapters, protest will be presented as a method of

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<sup>62</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 7

<sup>63</sup> Tosini, D. (2010) ‘Calculated, Passionate, Pious Extremism: Beyond a Rational Choice Theory of Suicide Terrorism’ (2010) 38 *Asian Journal of Social Science* 394, 404

democratic and moral dialogue that engages with the state and its moral principles, and violent protest will be shown to possess the very same dialogic function. The final two substantive Chapters then examine the common objections to violent protest in liberal democracy, but will show that these objections do not successfully demonstrate that *no* violent protest is ever justifiable. Instead they impose important “limitations” on the justifiable use of violent protest.

More specifically: in Chapter 1, there is an examination of the sorts of moral principles that liberal democracies actually do cite, in their constitutional settlements – what can be called principles of “constitutional morality.”<sup>64</sup> It is shown that these states normatively must, and in fact do, make reference to these principles in order to seek legitimacy as self-styled “liberal democracies.” In Chapter 2, the precise mechanisms for seeking obedience from morally autonomous subjects are explored in greater depth. These “legitimacy claims” are arguments, implied when laws are issued, which states must make in order to convince rational moral agents that obedience is morally justifiable.<sup>65</sup> Rational legitimacy claims give citizens good moral reasons for obedience. By contrast, where these legitimacy claims prove incomplete or irrational, they may fail to provide good reasons for obedience. Indeed, per Delmas, morally incoherent laws may even generate moral duties of *disobedience*.<sup>66</sup> This being so, failed legitimacy claims can provide protesters with reasons for lawbreaking as part of their activism: this then provides a basis of justifying unlawful, and potentially even violent, protest.

Chapter 3 then examines how protest acts as moral and democratic dialogue: protest identifies purported legitimacy claim failures from the state, and presents a counterargument to the state, and the wider public, seeking redress.<sup>67</sup> Even peaceful, lawful protest can be disruptive and intrusive of the liberties and freedoms of other

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<sup>64</sup>Béteille, A. ‘Constitutional Morality’ (2008) 43 (40) *Economic and Political Weekly* 35

<sup>65</sup> The phrase “legitimacy claim” has been adapted from its use in Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017): see Chapter 2.

<sup>66</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018)

<sup>67</sup> Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179; Ganesh, S and Zoller, H.M. ‘Dialogue, Activism and Democratic Social Change’ (2012) 22 (1) *Communication Theory* 66

citizens. Nonetheless we accept that this dialogic role of protest is vital for the healthy function of a robust democracy. Chapter 4, then, argues that “violent” protest performs the same function. It highlights perceived injustices, generates democratic dialogue, and presents arguments for redress.<sup>68</sup> Importantly though, this Chapter interrogates the evil of violence. Violence, it is argued, should be understood by the moral harms it creates or risks – to persons, property, and so forth – but these sorts of moral harms should not allow us to presume that all and any violence is antithetical to constitutional moral principles. Certain forms of violence to property in protest, for example, may cause negligible harm compared to the injustices and harms that they seek to address.<sup>69</sup> Conversely, nonviolent actions can be just as harmful to the interests of other citizens as certain limited acts of violence – for example, a strike taken by medical professionals or other key workers.<sup>70</sup> What must be examined, in a moral justification for protest, is not whether it is violent or nonviolent, but the moral consequence of that activism.<sup>71</sup>

Following this, Chapter 5 explores more deeply the arguments that violent protest, so-called, creates moral harms that render it unjustifiable.<sup>72</sup> The most common objections to protest violence stem from deontological, consequentialist, and prudential arguments about the harms that violence can cause. These arguments, it is shown, actually fail to present convincing arguments that violence in protest is universally unjustifiable. Rather, they merely impose *limitations* on what types and levels of violence might be justifiable. What these objections truly suggest is that, no differently to *nonviolent* protest, in principle, those engaging in violent protest must be conscientious of the moral consequences of their actions.

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<sup>68</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384

<sup>69</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167

<sup>70</sup> Benjamin, W.; Demetz, P. (ed), Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995), 292

<sup>71</sup> D’Arcy, S. *Languages of the Unheard: why militant protest is good for democracy* (Zed Books, London 2014)

<sup>72</sup> See principally: Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970); Gregor, M. (tr.) Kant, I. *The Metaphysics of Morals* (Cambridge University Press, Cambridge 1991); Chenoweth, E. and Stephan, M.J. ‘Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict’ (2008) 33 (1) *International Security* 7



Chapter 6 then asks: even if violence can be justified morally in the abstract, does it not still fundamentally undermine the core principles of liberal democracy, specifically? Those principles in question – such as the rule of law, democracy, and liberty – are themselves foundational principles of “constitutional morality.”<sup>73</sup> If violence undermines these principles, does it not therefore undermine the very moral principles to which activists appeal in their moral arguments with the state, and render violent protest a morally incoherent and self-defeating position? It is nonetheless demonstrated that these principles are not necessarily undermined by violent protest – under certain conditions, protesters can act violently in ways which do not significantly undermine constitutional morality. Indeed, it is demonstrated that in certain circumstances, protest violence can do a better job of upholding principles of justice and democracy than peaceful protest again, or even obedience to, a morally aberrant law.<sup>74</sup>

The Conclusion draws together the main findings from the substantive Chapters, and presents an example of how this thesis can practically be applied to analyse a real-world scenario: specifically, the US Capitol Hill uprising in January 2021.<sup>75</sup> Further avenues of future research are then discussed, alongside considerations for how this research can be used to practical effect in creating less destructive protest violence, and policy implications that may arise as a result of its main findings.

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<sup>73</sup> Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 1971); Lenhardt, D. and Nicholsen, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990); Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004)

<sup>74</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 52-54

<sup>75</sup> BBC, ‘US Capitol Riots’ (2021) <<https://www.bbc.co.uk/news/topics/c37r4jqnn21t/us-capitol-riots>> accessed 10/02/2021

## Chapter 1: Constitutional Morality

This Chapter discusses the moral grounds for obedience claimed by states under a liberal democratic constitution. First, an overview is given of the core principles of democratic theory which justify, or claim to justify, liberal democratic governance. It is demonstrated that there is a recurrent dilemma in liberal theory, regarding how to justify a democratic state's coercion of supposedly morally autonomous subjects.<sup>76</sup> Second, a potential justification of this coercion can be observed in the constitutions, laws, and practices of democratic states, in their appeal to what can be called "constitutional morality." This encompasses several (contestably defined, but widely accepted) principles of political morality, or grounds of political obligation. Reference will be made to B eteille regarding the core concept, which is that state constitutions make claim to set moral criteria and rely upon them to wield moral authority constitutionally.<sup>77</sup> Examples are given of the overlapping, and contrasting, moral constitutional principles claimed by different liberal democratic nation states: not with a view to empirically quantifying them, but by way of demonstration of the general concept as it applies to existing liberal democracies. Thirdly and finally, the Chapter discusses how mere appeals to constitutional morality are insufficient to justify coercion into obedience, absent a consistent approach by the state to uphold those moral axiomatic principles. The findings of this first Chapter are important foundations for the subsequent second Chapter, on the "legitimacy claims" through which states appeal to these moral constitutional principles, in pursuit of claims to legitimate authority and therefore rights of obedience.<sup>78</sup>

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<sup>76</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 29-74; Michelman, F.I. 'Constitutional Authorship' in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 76-82. This discussion of how autonomous citizens can rationally be obliged to obey laws is elaborated in greater detail in the second Chapter.

<sup>77</sup> B eteille, A. 'Constitutional Morality' (2008) 43 (40) *Economic and Political Weekly* 35; Stilz, A. 'Why Does the State Matter Morally? Political Obligation and Particularity' in Ben-Porath, S.R. and Smith, R.M. (eds) *Varieties of Sovereignty and Citizenship* (University of Pennsylvania Press, Philadelphia 2013)

<sup>78</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 127

It is first necessary to explain that this Chapter does not exhaustively explore the principles of constitutional morality of any given liberal democratic state: they are too numerous, and too contentiously defined, to cover here. Nor does this Chapter explore in depth the difficulties of moral epistemology, that is, whether moral “truths” can exist, or whether they are indeed hopelessly subjective and non-absolute.<sup>79</sup> However, it is unnecessary to do so. The Chapter argues that states must in theory, and do in practice, make claim to such moral principles. It demonstrates that it is rationally consistent for them to do so in accordance with the liberal democratic theory to which they make appeal, in order to govern: and rather than examining each and every liberal democracy to observe this, it is sufficient to demonstrate that, by nature of what it means to be a “liberal democracy,” any such state will operate under similar normative logics.<sup>80</sup> Whether or not (outside of the state’s claim) moral truth is discoverable or possible, is beside the point. States *do* make moral claims to justify coercive power, contrary to the supposed moral autonomy of their subjects, within the liberal democratic paradigms to which they appeal.<sup>81</sup> If states seek the obedience of subjects, whom they claim are morally autonomous, the burden falls upon the states’ moral arguments to make a claim for obedience.<sup>82</sup> If we are to entertain their claims, they must present acceptable moral axioms and reasonable logical arguments that lead to a strong case for justifying coercion.<sup>83</sup> Where these moral claims fail, disobedience and protest – and even violent protest – may ensue.

The focus of this thesis is on analysing claims to “legitimacy” of laws, as a moral concept.<sup>84</sup> Again, this is not necessarily a question of legal validity of any given law, rule or action, but its moral normative force. Constitutional morality is not here used to determine the positive existence or validity of laws, but instead to understand the

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<sup>79</sup> See Railton, P. *Facts, Values, and Norms: Essays Toward a Morality of Consequence* (Cambridge University Press, Cambridge and New York 2003)

<sup>80</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 179

<sup>81</sup> Wall, S. ‘Political Morality and Constitutional Settlements’ (2013) 16 *Critical Review of International Social and Political Philosophy* (4) 481-499, 482; Wall, S. ‘Political Morality and the Authority of Tradition’ (2016) 24 (2) *Journal of Political Philosophy* 137

<sup>82</sup> Michelman, F.I. ‘Constitutional Authorship’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 76-82

<sup>83</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 38-69

<sup>84</sup> Weinberger, O. ‘Legal Validity, Acceptance of Law, Legitimacy: Some Critical Comments and Constructive Proposals’ (1999) 12 (4) *Ratio Juris* 336, 347

moral claims to obedience they entail, based upon the moral principles from which they derive their normative force.

### Liberal Democratic Theory: An Overview

Liberal democratic theory, being a multifaceted conceptual scheme of political philosophy, present across numerous very different jurisdictions, has no single source for its definition.<sup>85</sup> It has, throughout its vast literature, evaded anything approximating a comprehensive definition. It comprises a number of what Gallie refers to as “essentially contested concepts,” such as democracy, equality, and liberalism.<sup>86</sup> Nonetheless, accepting – rather than problematising – its “open and contestable signification” is an important aspect of this thesis.<sup>87</sup> Part of the life of a liberal democracy is actively debating what these concepts mean. Understanding that these terms are themselves open to political and moral contestation is a significant part of understanding why claims to authority and obedience must be deconstructed in light of the presumptions of liberal theory.<sup>88</sup> As Raz puts it, many writers (including himself) explicitly avoid “a precise or exhaustive analysis of the features of modern constitutional democracies,” precisely for these reasons.<sup>89</sup> However, as the present research is itself an examination of the claims that liberal democratic states and theorists make, it shall draw primarily from the literature of its proponents.

In broad terms, there are several aspects of liberalism which are central to its appeals and recur consistently across the relevant literature. These include the moral autonomy of humans as moral agents: that is, individuals are able to decide and pursue their own

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<sup>85</sup> Davidson, D. ‘On the Very Idea of a Conceptual Scheme’ (1973-1974) 47 *Proceedings and Addresses of the American Philosophical Association* 5; Michelman, F.I. ‘Constitutional Authorship’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 86

<sup>86</sup> Gallie, W.B. ‘Essentially Contested Concepts’ (1995) 56 *Proceedings of the Aristotelian Society, New Series* 167

<sup>87</sup> Brown, W. *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Zone Books, New York 2015), 20-21

<sup>88</sup> Gallie, W.B. ‘Essentially Contested Concepts’ (1995) 56 *Proceedings of the Aristotelian Society, New Series* 167

<sup>89</sup> Raz, J. *Ethics in the Public Domain* (rev edn Clarendon, Oxford 2001), 62

understandings of what is good, and a worthy or meaningful existence.<sup>90</sup> Their liberty to do so is the next presumption: that is, the individual is, and should be, innately free in their actions.<sup>91</sup> This may in social life be limited by the needs of operating within a society, in which many groups of people have different and competing conceptions of how best to exercise their freedoms.<sup>92</sup> Often cited is Mill's "harm principle," whereby the exercise of such freedom should be limited by the state only to such an extent that exercising those freedoms might adversely affect the liberties of other persons.<sup>93</sup> This reflects another component, the presumed equality among liberal agents. No individual's conceptualisations of 'the good' are superior to another's, and their freedom to pursue those freedoms, and the protections afforded by the state, should similarly be of equal parity between subjects.<sup>94</sup>

Modern democratic theory extends from these liberal presumptions and, though similarly contestable and diverse in application, generally adds the following presuppositions. First is the need for collective solutions to political and social problems notwithstanding (or indeed, because of) the inevitable conflict between subjects' differing conceptualisations of the good.<sup>95</sup> Second, the mechanism by which

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<sup>90</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 38-69; Rousseau, J.-J. 'The Social Contract' in Gourevitch, V. (ed) *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge 1997); Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton N.J. 1979), 3; Raz, J. 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 (4) *Minnesota Law Review* 1003, 1012; Wall, S. 'Political Morality and the Authority of Tradition' (2016) 24 (2) *Journal of Political Philosophy* 167

<sup>91</sup> Mill, J.S. *On Liberty* (Oxford University, Oxford 1859); Macpherson, C.B. (ed) Locke, J. *Second Treatise on Government* (Hackett, Indianapolis 1980); Rousseau, J.-J. 'The Social Contract' in Gourevitch, V. (ed) *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge 1997); Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton N.J. 1979); Dworkin, R. *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, New York 1996), 26

<sup>92</sup> Chambers, S.A. and Carver, T. (eds) Connolly, W. *Democracy, Pluralism and Political Theory* (Routledge, Abingdon 2008)

<sup>93</sup> Mill, J.S. *On Liberty* (Oxford University, Oxford 1859)

<sup>94</sup> Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004); Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 217-244; Dworkin, R. *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, New York 1996), 27

<sup>95</sup> Waldron, J. *The Dignity of Legislation* (Cambridge University Press, Cambridge 1999); Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004); Wall, S. 'Political Morality and Constitutional Settlements' (2013) 16 *Critical Review of International Social and Political Philosophy* (4) 481-499

this problem-solving and decision-making is best achieved is through a system whereby everyone has notionally equal participatory rights within the civil and political processes. This usually entails equal suffrage, some political freedom of expression and participation, or assembly, and so forth.<sup>96</sup> Thirdly, it is presumed that the decisions of this process are, and must be, fair, in order to allow for a majoritarian supremacy: that is, for the majority vote to be able to override the moral autonomy of minority-voting (or non-voting) participants.<sup>97</sup>

Fourth and finally, democratic theory presumes the existence of another core concept to this discussion, a constitution according to which these mechanisms are codified and from which they derive their normative force.<sup>98</sup> The nature of the constitution (whether it is written, its mechanisms of enforcement, its terms of amendment, and so forth), and its contents (whether it provides codified civil or human rights, the moral principles to which it appeals, and so on), differ between states.<sup>99</sup> As Wall succinctly put it, “any general account of a constitutional settlement is bound to look incomplete.”<sup>100</sup> Generally, Raz suggests (as a matter of descriptive observation), constitutions comprise of seven components: defined powers and organisations of government; temporal durability; some social source, written or otherwise; the quality of being “superior law” hierarchically over ordinary legislation; incorporation within judicial processes and adjudication of state powers; being more entrenched than ordinary legislation, and so less easily revoked; and certain principles of government including democracy, civil political rights and so on, which “are generally held to express the common beliefs of the population about the way their society should be

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<sup>96</sup> *ibid.* Dworkin, R. *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, New York and Oxford 1996)

<sup>97</sup> Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2001); Waldron, J. *The Dignity of Legislation* (Cambridge University Press, Cambridge 1999); Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004)

<sup>98</sup> Wall, S. ‘Political Morality and Constitutional Settlements’ (2013) 16 (4) *Critical Review of International Social and Political Philosophy* 481, 486-494

<sup>99</sup> Alexander, L. ‘Introduction’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998)

<sup>100</sup> Wall, S. ‘Political Morality and Constitutional Settlements’ (2013) 16 (4) *Critical Review of International Social and Political Philosophy* 481, 486

governed.”<sup>101</sup> It is important to understand that, crucially, the constitution is hierarchically “superior” to ordinary law within the jurisdiction, and as such embodies superior or axiomatic normative reasons for those subordinate laws to exist and operate.<sup>102</sup> State law and action is only normatively justifiable if it derives from, or is consistent with, the normative force of the constitutional settlement.

There are countless writers who will contest the terms of these liberal democratic presumptions, and have questioned their veracity. Scholars in feminist theory have demonstrated the inherent inequalities within many of the liberal assumptions underpinning liberal democracies.<sup>103</sup> In Fineman’s vulnerability theory, the core Enlightenment presumptions of autonomy and objectivity are interrogated to the extent that liberal theory seems wholly inadequate to pursue the ideals of freedom and equality to which it makes claim.<sup>104</sup> Writers like Crenshaw within Critical Race Theory have, over decades of scholarship, made sustained critiques on how these liberal presumptions have been crafted by white, economically affluent demographics to justify systematic oppression of minority groups.<sup>105</sup> Other critical approaches to liberal theory focus on its more recent neoliberal bent in democratic politics, and how neoliberal governance can lead to the democratic mechanisms of problem-resolution being hollowed out by corporate interest.<sup>106</sup>

This Chapter’s main purpose, however, is to critique liberal democratic theory based on its own claims. Its scope is necessarily limited in accepting *prima facie* liberal theory’s presumptions, in order to assess whether their claims to obedience follow their internal logic. As such, although the work of these other critical approaches is of

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<sup>101</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 153-154

<sup>102</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 172-175

<sup>103</sup> Mackinnon, C. *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge MA 1987)

<sup>104</sup> Fineman, M. ‘Vulnerability and Inevitable Inequality’ (2017) 4 *Oslo Law Review* 133

<sup>105</sup> Crenshaw, K. *Critical Race Theory: the key writings that formed the movement* (New Press, New York 1995)

<sup>106</sup> Brown, W. *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Zone Books, New York 2015)

great value to our understanding and critique of liberal theory more broadly, it is not necessary to the analysis in hand to explore it in detail.

Given these presumptions, liberal theory suffers from a long-standing theoretical dilemma: namely, for current purposes, of how a liberal state justifies coercion against supposedly morally autonomous subjects – whether they are minority dissenters or otherwise.<sup>107</sup> “Practical reason,” or being able to make decisions based upon a calculus of relevant moral principles and considerations, requires us as moral agents to consider our moral goals and act in pursuit of them as individuals.<sup>108</sup> Conversely, as Raz explains at length in *The Morality of Freedom*, laws require us to recalibrate, or alter entirely, our behaviour, at times contrary to our autonomous calculus of practical reason.<sup>109</sup> Part of the legitimating framework, or the appeal, of liberal democracy is that it claims to leave intact the moral autonomy of agents, to decide upon their own conceptualisations of the good and to live in accordance with them.<sup>110</sup> At the same time, however, the state must be able to regulate behaviour in accordance with law, often contradicting individual moral choices and if necessary coercing subjects into obedience.<sup>111</sup> This paradox is problematic for liberal democratic theory: how can it enshrine both the individual’s ability to make their own moral choices, and the authority necessary to compel obedience?

There are a few suggestions for how this paradox is solvable without undermining the moral autonomy of individuals, which is logically prior to – and a necessary condition for the consequent justificatory logics of – liberal democratic governance. Several theories are based on a social contractarian, or consent-based approach, where the individual’s willing participation in liberal democracy waives any moral claim to

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<sup>107</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 29-30; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>108</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979); Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986); Waluchow, W. ‘Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism’ (2000) 6 (1) *Legal Theory* 45, 61-63

<sup>109</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>110</sup> Dworkin, R. *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford University Press, New York 1996), 26

<sup>111</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 75-100



dissent from democratic decisions.<sup>112</sup> Other theories are based on the moral necessity of compliance, due to the moral demands of fairness within political obligation: that it would be unfair to other citizens to unilaterally decide not to obey law, oneself.<sup>113</sup> They are all, by necessity, *moral* arguments regarding the normative, prescriptive nature of political obligation; they entail moral logical reasons why compliance is normatively required. However, these explanatory theories have often been criticised for a lack of either factual or empirical realism, or theoretical plausibility.<sup>114</sup> Perhaps most usefully for this thesis, there are other arguments which use rational-normative moral logics in order to justify obedience to law as being rational, despite moral autonomy of subjects, in certain circumstances.<sup>115</sup> More is to be said of these challenges in the next Chapter, regarding claims to legitimacy within the framework of the law and its coercive powers, before this can then be implemented within the dynamics of violent protest against perceived injustices.

It can be demonstrated for current purposes that democratic states make moral claims to justify obedience to law. They do so by appealing to specific moral principles as grounds of political obligation, in justification of their constitutional morality. It is through this framework that contractarian, democratic-fairness, and other rational-normative arguments for obedience ultimately function, as will be demonstrated in the next Chapter.

### Moral grounds and constitutional morality

The phrase “constitutional morality” has been adopted, for the purposes of this thesis, from Bêteille, who quotes from Ambedkar’s contributions to the Constituent Assembly debates on the introduction of the post-colonial Indian Constitution.<sup>116</sup> At

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<sup>112</sup> Macpherson, C.B. (ed) Locke, J. *Second Treatise on Government* (Hackett, Indianapolis 1980); Rousseau, J.-J. ‘The Social Contract’ in Gourevitch, V. (ed) *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge 1997); Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979)

<sup>113</sup> Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004)

<sup>114</sup> Space prevents a full analysis of this critique, but see: Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 75-100

<sup>115</sup> For example the service conception of authority: Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>116</sup> Bêteille, A. ‘Constitutional Morality’ (2008) 43 (4) *Economic and Political Weekly* 35

that time, Ambedkar was trying to explain the extra-textual moral principles and cultural attitudes necessary for a nascent democratic constitution to function and deliver its subjects' expectations, despite the caste-based, postcolonial Indian society upon which the constitution was, arguably, being superimposed.<sup>117</sup> This includes presumptions of the equality of citizens, a belief in the rule of law and justice, and other principles necessary for a constitutional legal order to be more than merely nominally “democratic.” Bêteille conceives of the cultural and moral elements of democratic constitutionalism as being extra-textual, requiring the principles of equality and democracy to be enshrined within the culture of the constitution in order to be viable in accordance with its own democratic liberal claims.<sup>118</sup>

Subsequent writers, such as Raz, might have referred to this as constitutionalism in the “thick” sense: beyond pure written texts, embedded in a moral normative culture, and given normative rationality by virtue of constitutional moral principles.<sup>119</sup> For Bêteille, in order for a democratic order to be recognised and legitimated, it must enshrine and abide by such moral considerations, or else it would be no more legitimate, for an emerging independent democracy, than arbitrary rule.<sup>120</sup> What is important about this understanding of constitutional morality is that moral principles are not necessarily qualifications for legal validity under the constitutional order. They are however, as Wall argues, necessary to its success as a legitimate order, inasmuch as it can then reasonably command the respect and obedience of its subjects.<sup>121</sup>

Across constitutionalist literature, the phrase “constitutional morality” itself is not a widely and consistently applied term of art in the sense used in this Chapter. “Constitutional morality” has for example taken a slightly more specific meaning with relation to US jurisprudence, on the applicability of moral principles in adjudication.<sup>122</sup> Other writers refer to the same concept either in different terms of art,

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<sup>117</sup> Constituent Assembly Debates, *Official Report* (Lok Sabha Secretariat, New Delhi 1989)

<sup>118</sup> Bêteille, A. ‘Constitutional Morality’ (2008) 43 (4) *Economic and Political Weekly* 35, 36

<sup>119</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 153

<sup>120</sup> Bêteille, A. ‘Constitutional Morality’ (2008) 43 (4) *Economic and Political Weekly* 35

<sup>121</sup> Wall, S. ‘Political Morality and the Authority of Tradition’ (2016) 24 (2) *Journal of Political Philosophy* 137, 149-150

<sup>122</sup> See for example Frohnen, B. P. and Carey, G. W. *Constitutional Morality and the Rise of Quasi-Law* (Harvard University Press, Cambridge MA 2016)

or in the abstract without a particular nomenclature for the concept. Dworkin would refer to it as the body of principles of “political morality” that define the political community and give justification to its laws.<sup>123</sup> For Raz, they are the “moral principles” which give constitutions and their subsequent law normative force “as long as they remain within the boundaries set by [those moral principles].”<sup>124</sup> For Lyons they can also be called “moral presumptions” which explain arguments for or against obedience.<sup>125</sup> These moral grounds are variously referred to in the literature (often interchangeably) as grounds of political obligation,<sup>126</sup> moral reasons for action,<sup>127</sup> or grounds of moral obligation.<sup>128</sup> They provide the constitutional order with the legitimacy to be able to make compelling arguments for obedience from otherwise morally autonomous subjects.

This cultural, or institutional, adoption of moral principles as part of a constitutional morality should be understood not just in terms of individual actors trying to impose their own moral principles upon the constitutional order. Wall has referred to the concept of political morality as “the full set of moral considerations that inform judgments of justice and legitimacy” within the state’s constitutional regime.<sup>129</sup> Constitutionalism can be understood as the marriage of such political and social values, incorporated into formalised mechanisms and processes.<sup>130</sup> Constitutionalism cannot simply be legitimate because it is a convenient method of ensuring the resolution of conflicts: to satisfy morally autonomous subjects, it must do so in accordance with some recognised and respected political and social values.<sup>131</sup>

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<sup>123</sup> Dworkin, R. *Law’s Empire* (1<sup>st</sup> edn Hart, Oxford 1998)

<sup>124</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 173

<sup>125</sup> Lyons, D. ‘Reason, Morality, and Constitutional Compliance’ (2013) 93 (4) *Boston University Law Review* 1381, 1382

<sup>126</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018)

<sup>127</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>128</sup> Simmons, A.J. *Justification and legitimacy: essays on rights and obligations* Cambridge University Press, Cambridge 2001)

<sup>129</sup> Wall, S. ‘Political Morality and Constitutional Settlements’ (2013) 16 (4) *Critical Review of International Social and Political Philosophy* 481, 483

<sup>130</sup> *Ibid*; Bêteille, A. *Democracy and its Institutions* (Oxford University Press, New Delhi 2012)

<sup>131</sup> Loughlin, M. ‘The Concept of Constituent Power’ (2014) 13 (2) *European Journal of Political Theory* 218-237; Alexander, L. ‘Introduction’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998)

Constitutional morality, then, depends upon the identifiable principles under the state's political morality.

One must then ask which principles belong to the corpus of political moral principles, and how to identify them. Sources of constitutional morality, in the sense of where it can be found in claims to authority, may include constitutional documents, constitutional case law, legislative debate, academic commentary, and specific pieces of legislation and executive action which make reference to moral principles.<sup>132</sup> It may be that there are moral or political principles within the constitution which cannot be easily identified within these sources, or which belong to the political community without written codification: but the advantage of using such sources to identify these moral principles is that the state, or the proponents of the liberal democratic order in question, posit them. This again is useful for demonstrating the state's claims to constitutional morality, which moral aims it is attempting to pursue, and therefore its political-moral authority.<sup>133</sup> For the purposes of examining the claims to obedience from such states, this is a convenient starting-point.

What follows is not an exhaustive empirical investigation into the discourse of states and their constitutional moral sources. Instead the aim here is to demonstrate that logically, states making claims for obedience must make claim to certain moral principles; and that they can, and do, in fact make such claims.

There are certain moral principles that appear near-universal across all self-proclaimed liberal democracies. One notable example is justice.<sup>134</sup> The ubiquity of Departments of Justice, or Ministries of Justice; the rhetorical device of "justice," as a euphemism for law enforcement; the names of criminal justice statutes, of prisons, of all manner of state-mandated laws and practices in pursuit of law-enforcement: all of this depends upon a claim to the pursuit of (at least juridical) justice as a moral aim, a justification for state interference with individuals' liberty, and as a ground for political obligation,

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<sup>132</sup> B eteille, A. *Democracy and its Institutions* (Oxford University Press, New Delhi 2012)

<sup>133</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 42-52

<sup>134</sup> This not only includes the state's juridical justice, but also its institutions which seek to uphold social, moral and economic justice. Teubner, G. 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' (2009) 72 *Modern Law Review* 1

over mere amoral enforcement of rules.<sup>135</sup> A state that made empty claims to law enforcement, without justification for imprisonment or other sanctions founded on justice-based moral considerations, would be impossible to reconcile with the moral autonomy concomitant to liberalism. Indeed an absence of a robust claim to justice would render a liberal democracy's legal system unintelligible, and incapable of commanding moral authority sufficient for obedience to coercion.<sup>136</sup> This is one principle of constitutional morality, then, which is clearly identifiable across many different liberal democratic states.

Another crucial moral constitutional principle, of definitive importance to a modern democracy, must be (at least some minimal concept of) equality amongst citizens.<sup>137</sup> Writers on liberal theory and democracy tend to espouse a belief in the fundamental importance of equality in justifying the constitutional order of any given liberal state, at least inasmuch as all citizens should have some participatory rights.<sup>138</sup> Authors such as Waldron, Raz, Dworkin, Rawls, Nozick, and more, all employ equality as an axiomatic concept in their jurisprudence on liberal democratic legal theory: the list of commentators is endless. There is of course a necessary reason for this to be so. In order for liberal theory to work, it needs a relative moral worth of human actors as participants. For democracy to gain legitimacy as a mechanism of decision-making and problem-solving, it also requires equal rights of participation.<sup>139</sup> As such, it is rare to find a democracy which does not declare the importance of at least formal, civil and political, equality among citizens. Whether such promises manifest in reality, or whether they extend to substantive justice or social justice over the merely formal, political aspect of equality, is another matter. Crucially, the *claim* to at least this minimal political equality must be evident before liberal democratic states can make

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<sup>135</sup> Harris, J.W. *Legal Philosophies* (2<sup>nd</sup> edn Butterworths, London 1997), 280

<sup>136</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 74

<sup>137</sup> Dworkin, R. *Law's Empire* (1<sup>st</sup> edn Hart, Oxford 1998), 381-382; Rousseau, J.-J. 'The Social Contract' in Gourevitch, V. (ed) *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge 1997)

<sup>138</sup> Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004)

<sup>139</sup> Waldron, J. *The Dignity of Legislation* (Cambridge University Press, Cambridge 1999), 236; Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004)

a case for the legitimacy of laws they enact, especially in cases where groups find themselves outvoted by the electoral majority.<sup>140</sup>

Not all states will necessarily enshrine the same moral principles, however: nor will they proclaim, interpret, or apply them in similar ways.<sup>141</sup> Acknowledgement must be made of the regional variations in moral concepts to which states may make claims. Cultural and constitutional deviations exist between many liberal democracies – some examples of which will be discussed in greater depth presently.<sup>142</sup> Regardless these local variations, all these states and their governments nevertheless make claims to some “moral grounds” to justify coercion and to legitimise their authority apropos of certain laws and policies.<sup>143</sup>

A brief note should be made here to avoid undesirable historiography. Whether states are descriptively or historically “founded” with reference to moral principles, or whether these concepts are imposed later upon social and political advances, is not of great importance to the operation of constitutional morality. Gearty reminds us that developments in the UK constitution for example, inasmuch as it has ever had intentional rectification or partial codification – through the passing of the Human Rights Act 1998, for example – may well have been driven by political or practical motivations rather than moral constitutional ones.<sup>144</sup> It does not prevent a rational-normative analysis of the constitutional settlement in question and the *moral claims* it now makes.<sup>145</sup> These states all refer to moral grounds in their claims to moral

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<sup>140</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 169-177

<sup>141</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 152

<sup>142</sup> For example, contrast can be made to “Dignity” as a concept in the German constitution, as against representative democracy and the Rule of Law – in their peculiarly British manifestations – in the UK. See Germany *Basic Law for the Federal Republic of Germany* (23/05/1949) <<https://www.refworld.org/docid/4e64d9a02.html>> accessed 15/05/2019; Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2001); Murkens, J.E.K. ‘Democracy and the Legitimising Condition of the UK Constitution’ (2018) 38 *Legal Studies* 42

<sup>143</sup> Blackburn, R. ‘Britain’s unwritten constitution’ *The British Library: Magna Carta* (13/03/2015) <<https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution>> accessed 03/03/2019

<sup>144</sup> Gearty, C. *Liberty and Security* (Polity Press, Cambridge 2013), 4

<sup>145</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 159

authority, and use this explicitly in their discourse in order to make intelligible claims for obedience.<sup>146</sup>

To begin a brief sample of constitutional moral principles in specific liberal democratic states, the United States of America presents strong examples of widely-accepted moral constitutional principles at play within liberal democratic theory and discourse. In the context of US constitutionalism, “constitutional morality” has often been used in an analogous but narrow, jurisdiction-specific manner by legal scholars such as Frohnen and Carey.<sup>147</sup> Much is made of constitutional morality in the sense of adherence to moral principles founded within the written text and interpretive practice of the US constitution during judicial review. Often, US constitutional theory demonstrates a contest between alternative interpretive theories, such as originalism or moral interpretivism, depending upon the writer’s own interpretation of the written text of the Constitution, and its application in court judgements.<sup>148</sup>

Even this narrow sense of the phrase “moral constitutionalism” or “constitutional morality” is nonetheless still grounded in the same sorts of moral axioms to which reference has been made, here. Famously, the Declaration of Independence prefaces its claim to legitimate authority on the presumption that all men are created equal. Appeals to liberty, equality, fairness and justice pervade the text of the Constitution, as well as its interpretation by judges, and its wider claims to authority through legislation and executive enforcement.<sup>149</sup> When American jurists debate originalism, they do so on the precise basis that there are correct and incorrect ways for jurists to apply received moral principles, by examining constitutional texts and Supreme Court decisions.<sup>150</sup> It is from these sources that one can identify the moral principles to which the state makes its appeals and, therefore, from which jurists derive arguments about

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<sup>146</sup> *ibid.*, 179

<sup>147</sup> Frohnen, B. P. and Carey, G. W. *Constitutional Morality and the Rise of Quasi-Law* (Harvard University Press, Cambridge MA 2016)

<sup>148</sup> Fleming, J. E. *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms* (Oxford University Press, Oxford 2015); Frohnen, B. P. and Carey, G. W. ‘Constitutional Morality and the Rule of Law’ (2011) 26 (4) *Journal of Law and Politics* 497

<sup>149</sup> Perry, M.J. ‘What is the Constitution?’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 104; Carey, G. W. *The Federalist: Design for a Constitutional Republic* (University of Illinois Press, Urbana IL 1989)

<sup>150</sup> Frohnen, B. P. and Carey, G. W. *Constitutional Morality and the Rise of Quasi-Law* (Harvard University Press, Cambridge MA 2016)

the interpretation of those moral principles in adjudication.<sup>151</sup> That scholars differ in their interpretation of these concepts is, as previously mentioned, important but not fatal to the crucial point. States must and do make claim to such principles in pursuit of legitimate authority, and, in a manner which relates to B eteille’s theory, this in turn explains the juridical culture of US constitutionalism.<sup>152</sup> Also importantly, for the purposes of this thesis, it is not only legal scholars within America who make claim to these constitutional moral principles: protesters, including civil disobedients and even violent protesters, make reference to these same principles within their discourses. This includes Black Lives Matter activists and Civil Rights movement leaders, as subsequent Chapters (especially Chapter 3) demonstrate in greater depth.<sup>153</sup>

Other national constitutions demonstrate different moral grounds, or manifest them in different ways. The constitution of Germany explicitly enshrines the concept of dignity, notable for being a moral principle not codified across many other liberal democracies, and for being a constitutional condition of legal validity in Germany.<sup>154</sup> This is in contrast to the US constitution: although writers such as Dworkin would stress that the concept of dignity is in fact central to the understanding of American political theory, it is less explicitly enshrined and juristically enforced in positive law than in Germany, where the relevant Article has been crucial to numerous constitutional judgements, and where the breach of which can lead to legislation being struck down as invalid.<sup>155</sup> German constitutional writers such as Enders have even called dignity “axiomatic” within the constitution, a starting principle from which logics of obedience and morality then follow.<sup>156</sup> It has become a core part of

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<sup>151</sup> Carey, G. W. *The Federalist: Design for a Constitutional Republic* (University of Illinois Press, Urbana IL 1989); Frohnen, B. P. and Carey, G. W. *Constitutional Morality and the Rise of Quasi-Law* (Harvard University Press, Cambridge MA 2016)

<sup>152</sup> B eteille, A. ‘Constitutional Morality’ (2008) 43 (40) *Economic and Political Weekly* 35

<sup>153</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), xv-xvii; Lowery, W. *They Can’t Kill Us All: The Story of Black Lives Matter* (Penguin, London 2017), 45

<sup>154</sup> Germany *Basic Law for the Federal Republic of Germany* (23/05/1949) <<https://www.refworld.org/docid/4e64d9a02.html>> accessed 15/05/2019]

<sup>155</sup> Dworkin, R. *Justice for Hedgehogs* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 2011); Enders, C. ‘Human Dignity in Germany’ in Becchi, P. and Mathis, K. (eds.) *Handbook of Human Dignity in Europe* (Springer, Cham 2018); Eberle, E.J. ‘Observations on the Development of Human Dignity and Personality in German Constitutional Law’ (2013) 33 *Liverpool Law Review* 201

<sup>156</sup> Enders, C. ‘Human Dignity in Germany’ in Becchi, P. and Mathis, K. (eds.) *Handbook of Human Dignity in Europe* (Springer, Cham 2018), 6



understanding the culture of political morality within German constitutionalism. This is a strong example of how constitutional moral principles can differ between states, both in terms of their explicit claims, and their use or interpretation.<sup>157</sup>

Elsewhere, the UK manifests constitutional morality differently due to the oddities of its unwritten, convention-oriented constitution. It has historically never crystallised a moral declaration as to its purpose or moral legitimacy, in the more overt sense of the constitutional republics aforementioned, and therefore lacks a core, definitive constitutional text to declare its moral claims.<sup>158</sup> Nonetheless, numerous writers have identified implicit or explicit moral principles which underpin the United Kingdom's legitimacy and moral, political authority, visible throughout legislation, court judgements and executive policy.<sup>159</sup> These scholarly arguments, from the likes of Allan and Lakin, identify moral grounds including the rule of law, liberty, legality, and fairness, to which UK governments must appeal in order to demonstrate the legitimacy of their laws and actions.<sup>160</sup> The absence of a written constitution, therefore, does not undermine the importance of constitutional morality to the UK state: perhaps, indeed, a *culture* of political morality is crucial to its continued legitimacy and function. During the anti-prorogation protests in mid-2019, chants of "Whose democracy? Our democracy!" echoed widespread demonstrator narratives that the legitimating democratic principles underpinning the UK constitution itself, including fairness, parliamentary sovereignty, legality and democratic accountability, were under threat.<sup>161</sup> This not only goes to show the importance attached to these moral principles when the UK constitution is going through a period of political challenge:

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<sup>157</sup> See also Ebert, R. and Odour, R.M.J. 'The Concept of Human Dignity in German and Kenyan Constitutional Law' (2012) 4 (1) *Thought and Practice: A Journal of the Philosophical Association of Kenya* 43

<sup>158</sup> Lakin, S.J. 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 (4) *Oxford Journal of Legal Studies* 709, 723; Lakin, S.J. 'Legality as the Separation of Powers' (2017) 8 (3) *Jurisprudence* (3) 653

<sup>159</sup> Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2001); Murkens, J.E.K. 'Democracy and the Legitimizing Condition of the UK Constitution' (2018) 38 *Legal Studies* 42

<sup>160</sup> Allan, T.R.S. 'Citizenship and Obligation: Civil Disobedience and Civil Dissent' (1996) 55 (1) *Cambridge Law Journal* 89; Lakin, S.J. 'Legality as the Separation of Powers' (2017) 8 (3) *Jurisprudence* 653; Lakin, S.J. 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 (4) *Oxford Journal of Legal Studies* 709

<sup>161</sup> BBC, 'Parliament suspension: Thousands protest across UK' (31/08/2019) <<https://www.bbc.co.uk/news/uk-49534940>> accessed 17/09/2019

it also demonstrates that protesters do, as a matter of fact, make reference to these underlying justificatory principles in their discourse. More on the subject of protesters' claims to constitutional morality is discussed in Chapter 3.

For current purposes, it is sufficient to demonstrate that states themselves – and proponents of liberal democratic theory, who appeal to the legitimacy of the state – refer to identifiable moral grounds in order to justify liberal governance itself. It is evident that these moral grounds differ but variously include appeals to justice,<sup>162</sup> fairness,<sup>163</sup> equality,<sup>164</sup> dignity,<sup>165</sup> the rule of law,<sup>166</sup> liberty,<sup>167</sup> and so forth.<sup>168</sup> Further research may more fully explore the various grounds of constitutional morality across contemporary liberal democracies. It is not however necessary at this stage to assess the definitions or imperatives presumed by, say, justice or equality, in any depth. Nor is it necessary to address whether these moral principles exist objectively, from a moral realist perspective, or not.<sup>169</sup> Crucially, states do make claim to them as a matter of fact: if they did not, their claims to *moral* authority would be unintelligible.<sup>170</sup> Claims relating to the state, its government, its institutions, its monopoly on force, its coercive power, and its subsequent law, policy and actions, when they require subjects to surrender moral autonomy in obedience, are only morally intelligible if they are in pursuit of some moral grounds to which the state makes claim.<sup>171</sup> Although these moral grounds are variously referred to in the literature as grounds of political obligation, moral reasons for action, or grounds of moral obligation, these principles, however phrased, are crucial in understanding the importance of constitutional

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<sup>162</sup> Kolers, A. 'The Priority of Solidarity to Justice' (2014) 31 (4) *Journal of Applied Philosophy* 420

<sup>163</sup> Cullity, G. 'Moral Free Riding' (1995) 24 (1) *Philosophy and Public Affairs* 3; Renzo, M. 'Fairness, Self-Deception and Political Obligation' (2013) 169 (3) *Philosophical Studies* 467

<sup>164</sup> Dworkin, R. *Law's Empire* (1<sup>st</sup> edn Hart, Oxford 1998)

<sup>165</sup> Becchi, P. and Mathis, K. (eds.) *Handbook of Human Dignity in Europe* (Springer, Cham 2018)

<sup>166</sup> Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2001)

<sup>167</sup> Feinberg, J. *Harm to Others* (Oxford University Press, New York 1984)

<sup>168</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979); Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018)

<sup>169</sup> Railton, P. *Facts, Values, and Norms : Essays Toward a Morality of Consequence* (Cambridge University Press, Cambridge and New York 2003)

<sup>170</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 38-69

<sup>171</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979)

morality.<sup>172</sup> They are not simply empty symbols, or rhetorical devices used to encourage enthusiastic approval: they are the starting point of moral arguments for obedience.

It is worth noting as well that the competing justifications for intrusion into liberal democratic subjects' moral autonomy are also based upon appeals to constitutional morality. For example, consent-based, social contractarian theories base their justification on the principles of liberty – one's freedom to enter into a (social) contract – and fairness, regarding the duties one owes not to renege on a contract.<sup>173</sup> Whether one considers contractarian theory viable, given its criticisms, is another matter, and not one which needs exploring here.<sup>174</sup> More will be discussed about the legitimacy claims for social contractarian theory in the next Chapter. It suffices to say, for now, that it is only intelligible as an explanatory theory *if it too* makes appeal to such moral grounds.

Similarly, the concept of majoritarianism – of democratic majorities having the legitimate authority to coerce the minority voters into obedience – depends upon moral claims to fairness.<sup>175</sup> This is despite the fact that some writers such as Waldron, who aim to justify the innate fairness of the democratic system, stress that moral truth, necessarily contestable as moral principles are, is unnecessary to its logic.<sup>176</sup> Waldron argues that competing views over the good, or definitions of moral principles, are a first-order disagreement which is resolved by second-order processes, so that no one

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<sup>172</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018); Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986); Simmons, A.J. *Justification and legitimacy: essays on rights and obligations* Cambridge University Press, Cambridge 2001)

<sup>173</sup> Rousseau, J.-J. 'The Social Contract' in Gourevitch, V. (ed) *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge 1997); Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 75-100; Raz, J. 'Authority and Consent' (1981) 67 (1) *Virginia Law Review* 103

<sup>174</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 75-100; Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 22-60

<sup>175</sup> Dworkin, R. *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, New York and Oxford 1996), 19-21

<sup>176</sup> Waldron, J. *The Dignity of Legislation* (Cambridge University Press, Cambridge 1999); Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004), 174

conception of what is just, godly, good, or indeed fair, need be superior to any other.<sup>177</sup> Hence the need for a fair second-order moral rationale for democratic decision-making. This does however presume the “fairness” of the process, and makes direct appeal to the moral notion of fairness to explain and justify the phenomenon. Again, whether one agrees or not with the analyses of these democratic theorists is beside the point. They too are only intelligible as moral claims to a moral principle of fairness, notwithstanding their claims to neutrality on first-order moral disagreement.<sup>178</sup> As such, even these prima facie value-neutral explanations of the normative justificatory force of democratic constitutions *must* themselves make appeal to principles of constitutional morality, if they are to make rational-normative conclusions on authority and obedience.

Moral principles form the basis of intelligible moral behaviour. That said, moral principles are rarely absolute, and as Simmons argues, they seldom operate in isolation.<sup>179</sup> Often there are multiple moral considerations, based on multiple concurrent moral principles and imperatives, in any decision we make. Occasionally, moral principles appear to conflict in practice.<sup>180</sup> This is very much the dilemma of moral rationality, and the difficulty of being a “good” human. Instead they are driving principles, “reasons for action,” which must be balanced and can be overridden by countervailing moral considerations.<sup>181</sup> The same is doubtless true of constitutional morality, as within any given state numerous competing, overlapping moral claims to authority will be made: fairness against justice, the rule of law against liberty, and so

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<sup>177</sup> Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004); Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 70-106

<sup>178</sup> Dworkin, R. *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford University Press, New York and Oxford 1996), 19-21

<sup>179</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979); Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 7

<sup>180</sup> Dworkin suggests that any conflict in values – or moral principles – is only surface-level, and that a rigorous interpretive approach to identifying and considering those values will ultimately lead to moral coherence. If so, then the point remains the same: that it therefore falls to us, as morally autonomous agents, to do the hard work of interpreting and considering those principles and what they require in order to reach moral coherence. Dworkin, R. *Justice for Hedgehogs* (1st edn Harvard University Press, Cambridge M.A. 2011)

<sup>181</sup> *Ibid.* Also Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979)

forth.<sup>182</sup> That the balancing act of competing moral principles may prove difficult does not, however, render constitutional morality unintelligible, nor does it allow us to abdicate responsibility for determining the complex moral claims being made of us. To the contrary, it furnishes us with an imperative to critically analyse and evaluate claims to obedience in light of their justificatory force.<sup>183</sup>

### Difficulties with constitutional moral principles

It has been demonstrated that moral logics of liberal democracy depend upon a rational normative appeal to moral principles, in order to justify the existence and coerciveness of the state.<sup>184</sup> Examples of these principles of constitutional morality have been explored, and it has been shown that, for obedience to be a rational choice on behalf of the morally autonomous subject, these principles do need to be in evidence.<sup>185</sup> Crucially though, while appeals to moral principles may be a necessary component in obedience, they may not be sufficient to justify obedience.

Firstly, the moral principles as concepts need to be questioned on a number of bases. Again, *per* Gallie, they are essentially contested concepts.<sup>186</sup> They have several elusive definitions: as Waldron reminds us, one man's definition of justice will differ from another's, as a matter of quite "reasonable disagreement," as will their determination of when the requirements of those definitions will have been met in any given case.<sup>187</sup> The state itself is not a unified, Herculean mind capable of holding any one conception of justice, equality or fairness in mind consistently, either; nor does it use the same definitions consistently across its various organs.<sup>188</sup> As such, demanding the consistent

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<sup>182</sup> Lakin, S.J. 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 (4) *Oxford Journal of Legal Studies* 709, 723-725

<sup>183</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), in particular 161-166

<sup>184</sup> Raz, J. 'Authority and Consent' (1981) 67 (1) *Virginia Law Review* 103

<sup>185</sup> Lakin, S.J. 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 (4) *Oxford Journal of Legal Studies* 709, 723-725

<sup>186</sup> Gallie, W.B. 'Essentially Contested Concepts' (1995) 56 *Proceedings of the Aristotelian Society, New Series* 167

<sup>187</sup> Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004), 164-186

<sup>188</sup> Raz, J. 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 (4) *Minnesota Law Review* 1003, 1020-1025

use and application of moral principles as axioms in moral logic may seem unrealistic. Worse still, such concepts may not exist in absolute realist terms: we may be talking entirely at cross-purposes about morality, when making claims to fairness or equality.<sup>189</sup> Even if they did exist in absolute relative terms, such that this complete moral scepticism can be put to one side, the inability to definitively “discover” moral fact and prove moral reasoning beyond reasonable dispute makes using moral principles as absolute axioms for argument problematic.<sup>190</sup>

All this notwithstanding, constitutional moral principles *are* used by liberal democratic states under a rational-normative logic. For current purposes, it is sufficient to demonstrate that states themselves refer to identifiable moral grounds in order to justify liberal governance itself: theirs is a political order that is unintelligible in its claims, without reference to moral concepts, however divisively defined.<sup>191</sup> Claims relating to the state, its government, its institutions, its monopoly on force, its coercive power, and its subsequent law, policy and actions, are only understandable as normatively prescriptive upon subjects if they are in pursuit of those very moral grounds to which the state makes claim, and we accept in some manner the debatable existence of those moral principles.<sup>192</sup>

Furthermore, the fact that these terms are innately contestable may in fact be of greater help than harm to liberal democratic thought. Debating contestable terms is itself a core component of a liberal democratic milieu: these debates over the scope and content of moral principles are indeed an important factor of how moral rational debates are allowed, and how they flourish, under a robust liberal democracy.<sup>193</sup> For Waluchow, moral principles need not exist as Platonic, universal, *real* facts to be meaningful: they are found and develop within the community in question.<sup>194</sup> Justice,

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<sup>189</sup> Harris, J.W. *Legal Philosophies* (2<sup>nd</sup> edn Butterworths, London 1997), 24-25

<sup>190</sup> Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004), 164-186

<sup>191</sup> Kay, R.S. ‘American Constitutionalism’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 23, 82

<sup>192</sup> Coleman, J. *The Practice of Principle* (Oxford University Press, Oxford and New York 2001), 120-133; Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979)

<sup>193</sup> Perry, M.J. ‘What is the Constitution?’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 114-119

<sup>194</sup> Waluchow, W. *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press, Cambridge 2007)

for example, need not exist in absolute, universal, realist terms for it to be a meaningful social concept to which appeals are demonstrably made in pursuit of political and social goals.<sup>195</sup> As such, though these moral principles will always, inevitably, require debate and agonistic definitions, that is no absolute barrier to their use within moral-rational debate, and therefore in liberal-democratic constitutional logics. Indeed, under a Habermasian analysis of political morality, these moral principles *can only* be construed and interpreted intersubjectively, between citizens, through dialogue and rational argument.<sup>196</sup> Part of the very purpose of liberal democratic politics is to create and sustain fora for these moral concepts to be debated.

A second problem is that even if we accept workable received understandings of moral principles used by the state, subjects may not agree with the principles espoused. An anarchist like Wolff might for example take umbrage with state claims founded on concepts of democracy, or the fairness of majoritarian decision-making.<sup>197</sup> If so, the state's moral appeal would appear to fail the dissenter.<sup>198</sup> The dissenter may indeed find that they can only adhere to their own moral principles by defying those espoused by the laws of the state.<sup>199</sup> In the next Chapter, a discussion about the dynamics of this axiomatic conflict will be given. The rest of the thesis does, however, continue by focusing on arguments where the existence and normative force of the state's given constitutional moral principles is agreed and accepted *prima facie*. Rather than examining a potentially unsolvable axiomatic conflict, between state and dissenter, we will instead explore the internal logic of state claims to legitimacy for those who sincerely agree with the moral principles the state claims to serve, but who find specific laws or policies aberrant to those same principles.

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<sup>195</sup> Space precludes any greater discussion of this vast and interesting debate, but Dworkin has explored at length how moral scepticism itself is necessarily a form of moral argument, and that our debates over the existence and meaning of moral principles is inherently an interpretive practice which seeks ultimately to affirm their existence as values. Dworkin, R. *Justice for Hedgehogs* (1st edn Harvard University Press, Cambridge M.A. 2011)

<sup>196</sup> Lenhardt, D. and Nicholse, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990), 60-62

<sup>197</sup> Wolff, R. P. *In Defense of Anarchism* (1<sup>st</sup> edn Harper & Row, New York 1970)

<sup>198</sup> Raz, J. 'Explaining Normativity: on Rationality and the Justification of Reason' (1999) 12 (4) *Ratio* 354

<sup>199</sup> Honoré, T. 'Must We Obey? Necessity as a Ground of Obligation' (1981) 67 (1) *Virginia Law Review* 39, 44

Thirdly, and most importantly, inasmuch as we accept the concepts of constitutional morality to which the state appeals, they must be seen to be delivered.<sup>200</sup> Empty Orwellian appeals to “Truth,” “Love,” “Peace,” or “Plenty,” inspire no confidence in morally autonomous subjects.<sup>201</sup> Failure to meet the bare expectations of these constitutional moral principles “hollows out” the state’s claims to legitimacy and the subjects’ trust in its institutions: Wendy Brown explores this phenomenon in detail with relation to how the advance of neoliberal thought and governance has undermined democracy’s claims to principles such as “freedom, equality and popular rule.”<sup>202</sup> Beyond this prominent modern example, one can find a rich literature on dissent and disobedience which tacitly or explicitly relies upon the logics of failed moral claims by the state.<sup>203</sup> The legitimacy of the law’s intrusions into moral autonomy depends upon successful appeals to constitutional moral principles, and demonstrating adherence to them. The method of determining the success to claims to legitimacy will be extensively detailed in the next Chapter.

## Chapter 1 Conclusion

To be morally intelligible in their coercive nature, by their own standards, liberal states need to make moral claims as the basis of their constitutional settlement and subsequent justifications for existence and action.<sup>204</sup> They make appeals to various complex but specific moral grounds, and their actions are only morally intelligible and logical if they follow a coherent argument, that their actions are premised on reasoning consistent with those moral principles: this is what constitutional morality ultimately entails. It is the intermediate part of the moral-logical chain – how axiomatic constitutional moral principles affect legitimacy, and therefore can generate moral obligations of obedience – to which the next Chapter turns. Only once this is

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<sup>200</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 4-11

<sup>201</sup> Orwell, G. *Nineteen Eighty-Four: A Novel* (Harcourt, Brace & Co, New York 1949)

<sup>202</sup> Brown, W. *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Zone Books, New York 2015), 9

<sup>203</sup> Brownlee, K. ‘Features of a Paradigm case of Civil Disobedience’ (2004) 10 (4) *Res Publica* 337; Lefkowitz, D. ‘On a Moral Right to Civil Disobedience’ (2007) 117 (2) *Ethics* 202; Allan, T.R.S. ‘Citizenship and Obligation: Civil Disobedience and Civil Dissent’ (1996) 55 (1) *Cambridge Law Journal* 89

<sup>204</sup> Michelman, F.I. ‘Constitutional Authorship’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 76-82



understood can one understand obedience, and therefore by contrast (should these moral claims fail) disobedience, protest, and, ultimately, the place of violent protest and violent disobedience in a liberal democratic regime.

## Chapter 2: Legitimacy

### Introduction

In this Chapter, the principles of constitutional morality are incorporated into an analysis of the “legitimacy claims” made by liberal democratic states. These are moral arguments (usually embodied in laws, policies and other state actions) directed to morally autonomous subjects, seeking to incur obligations of obedience to the state as a legitimate authority. It is argued that compliance with the grounds of constitutional morality (which here will interchangeably also be called moral grounds, reasons for action, and moral principles) lends legitimacy to state laws and policies, and forms the basis of reasonable claims to obedience. It is further argued that absence of such compliance undermines the state’s legitimacy claims, and allows other legitimacy counterclaims to arise regarding those laws and policies by protesters, who may advocate disobedience and protest – including violent protest – against a perceived legitimacy deficit.

In the first part of this Chapter, there is a review of some key conceptions of the legitimacy of laws, as regards their capacity to impose binding duties of obedience on citizens. In particular, consensual, sociological, and normative approaches will be detailed. It can be demonstrated that, although rational normative approaches are the only way to understand the moral, normative implications of legitimacy, they suffer from an inability to delineate which moral principles one should apply when making a moral argument about duties of obedience. Reference is then made back to the grounds of constitutional morality to resolve this dilemma: that rational-normative analysis should look to the coherence of state legitimacy claims with the moral grounds they themselves espouse. It is argued that the grounds of morality from Chapter 1 act as moral axioms for the state’s own claims. It can then be found that “legitimacy claims,” as frames for rational normative claims to moral authority, are the most useful tool for examining this moral argumentation. Limitations of this heuristic device are then considered before conclusions are drawn, in advance of the next Chapter, where legitimacy claims will be used to explain protest as democratic and moral dialogue.

## Conceptions of Legitimacy

This section provides an “ideology critique” of the concept, and conceptions, of legitimacy in legal theory.<sup>205</sup> The aim is to survey the ways in which this concept is understood and to find a coherent conception of legitimacy which will help to critically engage with morality claims against, or for, violence in protest, for the purposes of this research. Consensual, sociological, and rational-normative theories of legitimacy are explored.<sup>206</sup> It will be found that a normative conception of legitimacy, based upon moral logics, and capable of framing “legitimacy claims,” will be the most effective conception for the purposes of explaining and justifying arguments for obedience to law.<sup>207</sup>

Legitimacy is often taken to suggest a specific type of political and moral authority.<sup>208</sup> By this it is often meant the moral authority of a government or state, or its agents, to impose obligations including obligations of obedience,<sup>209</sup> or “political obligations,” without the consent of the individual.<sup>210</sup> Many writers, such as Buchanan, frame legitimacy around the state as an institution, or that of its government, regime, or administration: that is to say, its right to govern.<sup>211</sup> Here however, as discussed in the Introduction, we are not focusing on the qualities of the state that render it capable of political legitimacy. The focus here is on the *duty to obey* certain laws, which, as

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<sup>205</sup> Geuss, R. *The Idea of a Critical Theory: Habermas & the Frankfurt School* (Cambridge University Press, Cambridge 1981)

<sup>206</sup> For a succinct critique of the normative and sociological approaches, see Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 58; for a critique of the consent-based approach to legitimacy, see *inter alia* Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 57-100; Raz, J. ‘Authority and Consent’ (1981) 67 (1) *Virginia Law Review* 103

<sup>207</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 6

<sup>208</sup> For a general discussion on the topic see Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>209</sup> Sevel, M. ‘Obeying the Law’ (2018) 24 (3) *Legal Theory* 191

<sup>210</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979)

<sup>211</sup> Buchanan, A. ‘Political Legitimacy and Democracy’ (2002) 112 (4) *Ethics* 689

Buchanan noted, therefore draws our moral analysis away from the “issuer” of rules.<sup>212</sup> Our focus is on the legitimacy of certain laws, actions and policies that a state effects, in the sense that they are capable of creating duties of obedience. Where the state’s laws are considered legitimate, they may prove morally binding notwithstanding an individual’s qualms as to their precise content.<sup>213</sup> Where there is a legitimacy deficit, as perceived by those governed, their discourse and political activism tend to highlight those perceived deficits, and they may even advocate means of disobedience. The binding force of law, then, is comprehensible as having its moral roots in some conception of legitimacy.

But what conceptions of legitimacy are there that can explain duties of obedience to laws? The sources and explanations of the moral authority of legitimacy are debated, but a survey of the literature may help inform a meaningful, useful conception of it. As Simmons explores at great length, liberal political theory struggles to rationalise conceptions of legitimacy, as the authority to be able to impose obligations on subjects, because of its focus on the moral autonomy of agents.<sup>214</sup> Liberal theory presumes that all humans are “naturally free” until they generate obligations through their own volition, founded upon consent of the autonomous individual; and that individuals must be allowed to have their own conceptions of what is morally right and wrong in order to be free in this manner.<sup>215</sup> In the absence of explicit consent from subjects to the laws being imposed, some convincing theory is needed to explain political obligations of obedience to the state, including obedience to law, from subjects who are otherwise under no obligation according to this liberal ideology, and who may

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<sup>212</sup> Buchanan, A. ‘Political Legitimacy and Democracy’ (2002) 112 (4) *Ethics* 689, 695; Tyler, T.R. *Why People Obey the Law* (Princeton University Press, Princeton 2006), 33

<sup>213</sup> For a different account of legitimacy and duties of obedience using rational normative reasoning see Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>214</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979)

<sup>215</sup> Rousseau, J.-J. ‘The Social Contract’ in Gourevitch, V. (ed) *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge 1997); Chambers, S.A. and Carver, T. (eds) Connolly, W. *Democracy, Pluralism and Political Theory* (Routledge, Abingdon 2008). Note that it is controversial whether obligations can only arise from the consent of the liberal subject – Dworkin argues that many duties, such as those to our friends and family, and our duties as citizens, are associational and not consensual. His answer however is to take a rational-normative approach to identifying how duties of obedience emerge, based on fundamental values, and an analogous approach based on constitutional morality will be discussed in subsequent sections of this Chapter accordingly. Dworkin, R. *Justice for Hedgehogs* (1st edn Harvard University Press, Cambridge M.A. 2011)

question the morality of those obligations.<sup>216</sup> It is argued here that the consent-based theories and sociological approaches to legitimacy fail empirically to demonstrate what is commonly understood from legitimacy, and fail theoretically to explain the moral reasons for obedience to law. Consequently, the enquiry can then proceed on the basis that legitimacy is best understood as a rational normative construct, as shall be discussed presently.

### Consent

It does not appear that legitimacy derives from “consent” of the governed, even within liberal democracies. Firstly, as Raz has noted, empirically there is little evidence of “consent” being sought for laws broadly enough, and without additional influence of duress, to suggest that any given citizen has “consented” to the generation of political obligations including the duty to obey all laws by the state.<sup>217</sup> It would be illogical to argue that we consent to laws which were passed before we were born, for example, or of which we have no knowledge. In particular, consensual theories fail to explain why minority voters should feel they have consented to laws they oppose.<sup>218</sup> As Buchanan put it, consent theories of political obligation are founded on an “unsatisfiable demand” that does not reflect political reality.<sup>219</sup>

Secondly, theoretically, consent may be unnecessary for the generation of obligations, and so potentially political obligations can arise without it. Examples may include the “Samaritan” duty to assist those in dire need where to do so would cause no significant loss to the individual, as discussed by Wellman.<sup>220</sup> Alternatively, Dworkin has made a robust explanation of non-consensual duties emerging as a result of the associations we have between friends, family, and other citizens more broadly.<sup>221</sup> If obligations

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<sup>216</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 3-6

<sup>217</sup> Raz, J. ‘Authority and Consent’ (1981) 67 (1) *Virginia Law Review* 103, 126

<sup>218</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 71-72; Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 22-60

<sup>219</sup> Buchanan, A. ‘Political Legitimacy and Democracy’ (2002) 112 (4) *Ethics* 689, 699

<sup>220</sup> Wellman, C.H. ‘Liberalism, Samaritanism and Political Legitimacy’ (1996) 25 (3) *Philosophy and Public Affairs* 211

<sup>221</sup> Dworkin, R. *Justice for Hedgehogs* (1st edn Harvard University Press, Cambridge M.A. 2011)

such as these might be generated without consent, this poses a significant question over whether consent itself is a necessary ground for moral obligation, political or otherwise.

There is moreover a fundamental difficulty with consent theories in that they necessarily overlook a key aspect of political obligation, as it is generally understood. If (*per Raz*) by “authority” one precisely means the power to impose obligations *without* the consent of the subject, no consensual theory can meaningfully explain it.<sup>222</sup> Such a political obligation must, presumably, arise outside of consent. Theories of “tacit consent,” that the individual implies consent to being governed (and to obedience to law) through not emigrating a jurisdiction or by receiving benefits of the state’s liberal governance, are also counterfactual and artificial.<sup>223</sup> They effectively reduce to explicit consent through involuntary action or inaction, and undermine the volitional aspect of consent theory which makes it attractive to liberal theorists in the first place.<sup>224</sup> As such, consent theories either falsely presume the volitional aspect of consent necessary to make law meaningfully binding on most people, or they do not go towards explaining political obligation at all.

There has been a resurgence in recent literature, from writers such as Loughlin, on a related aspect of consent-based theory, namely the concept of constituent power, particularly with relation to protests against perceived legitimacy deficits.<sup>225</sup> This approach suggests that legitimacy within the constitutional order comes from the will of the people, and the constituted state’s legitimacy (including its constitutional settlement and subsequent laws and policies) depends upon this constituent power.<sup>226</sup> Once constituted, so the theory argues, the state is politically and morally empowered to legislate and enforce laws with binding effect. This theory does however open

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<sup>222</sup> Raz, J. ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 (4) *Minnesota Law Review* 1003

<sup>223</sup> Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 25

<sup>224</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 75-100

<sup>225</sup> e.g. Niesen, P. ‘Resistance, Disobedience, or Constituent Power? Emerging Narratives of Transnational Protest’ (2019) 15 (1) *International Political Theory* Special Issue 1; Loughlin, M. ‘The Concept of Constituent Power’ (2014) 13 (2) *European Journal of Political Theory* 218

<sup>226</sup> Loughlin, M. ‘The Concept of Constituent Power’ (2014) 13 (2) *European Journal of Political Theory* 218

several debates about whether and to what extent constituent power ends upon crystallisation in a “constituted” constitutional order. Moreover, there are further unresolved questions about who the constituents are, who speaks for them, whether it is actually not necessarily a democratic concept at all, whether the constituents are ever sufficiently homogenous for the concept to be analytically useful, and so forth.<sup>227</sup> Frequently, these counterarguments relate to the autonomy and self-determination issues raised about consensual theories generally, addressed above, regarding who in fact consents to being governed, or whether this volitional aspect which justifies the theory is in fact an untenable fiction. The theory therefore provides us with more questions than answers, and fails to produce a coherent and convincing account of political obligation.

### Sociological theories

An alternative range of explanations are based on factual, social acceptance of the authority in question.<sup>228</sup> In essence, these theories suggest legitimacy is a social fact gathered from repeat obedience, socialisation, and trust in demonstrated government efficacy. Government trust generates what Easton calls a “reservoir of favourable attitudes,” which in turn generates toleration of laws imposed against one’s will.<sup>229</sup> LaFree, Morris and Forest have reviewed several sociological studies of how confidence and perceptions of legitimacy among citizens lead to attitudes of toleration, which then provide governments with the capacity to enact laws and seek obedience to them from the public.<sup>230</sup> These attitudes can empirically be measured by social scientists using indices of trust and perceived legitimacy.<sup>231</sup> This is of particular importance in studying the likelihood of protest, and especially violent protest. In examining indices of public trust and legitimacy in Latin America, for example, Bury

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<sup>227</sup> Scheuerman, W.E. ‘Constituent Power and Civil Disobedience: Beyond the Nation-State?’ (2019) 15 (1) *International Political Theory* Special Issue 49

<sup>228</sup> See for example Applewhite, H.B. Political Legitimacy in Revolutionary France, 1788–1791’ (1978) 109 (2) *The Journal of Interdisciplinary History* 245

<sup>229</sup> Easton, D. *A Systems Analysis of Political Life* (Wiley, New York 1965), 278

<sup>230</sup> LaFree, G., Morris, N.A., and James, F. ‘Does Legitimacy Matter?: Attitudes Toward Anti-American Violence in Egypt, Morocco, and Indonesia’ (2012) 58 (5) *Crime and Delinquency* 689

<sup>231</sup> See for example Tyler, T.R. *Why People Obey the Law* (Princeton University Press, Princeton and Oxford 2006)

found that “legitimacy proved to be the strongest negative correlate of organised violence,” and that although the data could not demonstrate a causative relationship, widespread belief in the legitimacy of a government correlated strongly with lower levels of collective violence.<sup>232</sup> This being so, a sociological theory of legitimacy could prove helpful in a wider understanding of the likelihood of violent protest in liberal democratic states.

A purely social theory of legitimacy does however have significant problems, both empirically and theoretically, which render it undesirable as a model for understanding the normative aspects of protest and disobedience. Empirically, factual obedience does not seem like a both necessary and sufficient condition for legitimate authority, or for legitimate laws. As Raz notes, a stable status quo renders neither a regime legitimate, nor its laws legitimate, by itself.<sup>233</sup> Social stability is not the same as political stability, either, and temporary reasons to maintain a failing order (such as corruption, bribery, and other self-interested practices) can keep an illegitimate power “legitimate” by these sociological criteria. Theoretically, the sociological conception is not analytically helpful as it seems its normative requirements are either weak, or non-existent: it does not distinguish the fact of obedience from reasons for compliance.<sup>234</sup> In a classic Hartian sense, understanding any system of law depends upon some acknowledgement that it is an internalised system of rules.<sup>235</sup> Habitual obedience is insufficient to demonstrate legitimacy. One may routinely obey a mafia’s orders, for example, without considering the mafia or its orders legitimate.<sup>236</sup> Tyler stresses that routine performance is not the same as accepting moral obligation, which is the only coherent way to understand an authority as being legitimate.<sup>237</sup> There appears to be no

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<sup>232</sup> Bury, D.P. ‘Political Instability in Latin America: the Cross-Cultural Test of a Causal Model’ in Feierabend, I.K., Feierabend, R.L. and Gurr, T.R. (eds) *Anger, Violence and Politics: Theories and Research* (Prince Hall, Englewood Cliff NJ 1972)

<sup>233</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 175

<sup>234</sup> Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 6

<sup>235</sup> Hart, H.L.A. *The Concept of Law* (2<sup>nd</sup> edn Oxford University Press, New York 1994), 89-91

<sup>236</sup> Smith, S.D. ‘Hart’s Onion: The Peeling away of Legal Authority’ (2006) 16 *Southern California Interdisciplinary Law Journal* 97

<sup>237</sup> Tyler, T.R. *Why People Obey the Law* (Princeton University Press, Princeton and Oxford 2006), 3-4



convincing conception of legitimacy without some reference to internalised normative criteria.

### Normative rationality

This is the application of moral reasoning to assess the logical integrity of moral claims, with reference to their underlying justificatory norms and practices.<sup>238</sup> One starts with a moral principle, or the moral ground which gives reason for action *per se*, such as fairness. This is the axiom in the argument, the presumed starting point.<sup>239</sup> Subsequent behaviour and argument must remain coherent to that moral ground for the behaviour or argument to be internally logically consistent. If for example one espouses the equality of human persons as a moral axiom, participating in subsequent discriminatory segregation would appear inconsistent with the moral principle cited. Arguments of a similar nature were often used during the rhetoric of protesters during the Civil Rights movement.<sup>240</sup> Internal consistency, conversely, makes for a more robust and convincing moral argument. As long as the argument remains internally consistent, the normative rationality is logical, and justifiable at least on its own terms.<sup>241</sup>

Legitimacy can be understood using this rational-normative logic, and a number of writers have presented plausible accounts of political obligation based on this approach. For example, Buchanan has argued that any tenable theory of political obligation – including duties of obedience to law – must refer to justice as a moral reason for action.<sup>242</sup> Where the law protects the basic rights of its subjects, and pursues justice without “usurping” or unduly undermining other moral principles such as

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<sup>238</sup> On rational normativity see Raz, J. ‘Explaining Normativity: on Rationality and the Justification of Reason’ (1999) 12 (4) *Ratio* 354; on the separate matter of rationality as the foundation of legitimate political regimes see Weber, M. *Economy and Society* (Bedminster Press, New York 1968); McCarthy, T. (tr) Habermas, J. *The Theory of Communicative Action Polity*, Cambridge 1984)

<sup>239</sup> Harris, J.W. *Legal Philosophies* (2<sup>nd</sup> edn Butterworths, London 1997), 13

<sup>240</sup> Washington, J.M. (ed) King, M.L. Jr. *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* (Harper Collins, New York 2003): further exploration of this follows in this Chapter, and in Chapter 3.

<sup>241</sup> Harris, J.W. *Legal Philosophies* (2<sup>nd</sup> edn Butterworths, London 1997), 13; Raz, J. ‘Explaining Normativity: on Rationality and the Justification of Reason’ (1999) 12 (4) *Ratio* 354

<sup>242</sup> Buchanan, A. ‘Political Legitimacy and Democracy’ (2002) 112 (4) *Ethics* 689, 703-709

fairness, the law in question gives citizens good reasons to obey notwithstanding their individual criticisms of the law in question. In short, a law that pursues justice *by that virtue alone* gives citizens good reasons for obedience, and therefore a moral duty to obey, as rational moral agents.<sup>243</sup>

Another prominent and perhaps more nuanced example of a rational normative account of duties of obedience is Raz's service conception of authority. This gives some explanation of how a state can impose obligations of obedience without the consent of the governed, whilst going further than Buchanan in providing an account for how the law can give content-independent reasons for obedience – that is to say, grounds for obligation other than merely the fact that the law so happens to reflect the principles of justice. It requires a) the “dependence thesis,” that the law or act of the state is pursuant to an identifiable moral reason for action (a moral good, such as justice, happiness, order, and so on); and b) the “normal justification thesis,” that obedience to the state is the best way of achieving that moral reason for action. Where this applies, Raz argues, c) the “pre-emptive reason thesis” takes effect and the law becomes a content-independent reason for action.<sup>244</sup>

Under this conception of authority, therefore, the laws of a state are only legitimate inasmuch as they pursue moral reasons for action, and whether they are better equipped to do so than the individual varies between states, contexts, and even the individual subjects under governance. Where either the dependence thesis or normal justification thesis fails, the obligation to obey may not take effect for the subject. This is not a question of the law's legal validity: it is a question of its legitimacy, or its ability to generate moral obligations independently of the consent of the subject, based upon its consistency with achieving the requirements of normative reason. Being able to generate normative justifications, to which the individual's moral reasoning can relate, is the only way, Raz argues, that liberal political theory can maintain the moral autonomy of the individual and generate political obligations of obedience.<sup>245</sup> It is

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<sup>243</sup> Buchanan, A. ‘Political Legitimacy and Democracy’ (2002) 112 (4) *Ethics* 689, 703-705

<sup>244</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>245</sup> Raz, J. *Between Authority and Interpretation* (Oxford University Press, Oxford 2009), 213

ultimately an appeal to the moral reasoning of the individual.<sup>246</sup> A law which upholds certain moral principles, and which the state is well placed to make, will give the morally rational citizen good reason to respect it and therefore act in accordance with it, as a moral agent.

There are nevertheless several potential difficulties with this particular conception of legitimacy as a rational normative construct. Raz concedes that it allows for the possibility of multiple, conflicting authorities and reasons for action, for example.<sup>247</sup> More fundamentally, this is a moral conception based upon claims to moral “goods,” as moral grounds and reasons for action, which is dependent upon subjectively choosing one’s moral axioms. Sultany argues that such rational-normative accounts of legitimacy risk creating criteria for qualifying legitimacy that are “abstract and controversial.”<sup>248</sup> People can disagree as to which moral principles they will find appealing.

That is, however, an unavoidable aspect of moral reasoning in a heterogeneous society.<sup>249</sup> The non-universality of normative criteria is inevitable where their conceptions are necessarily dependent on individual reasoning and conceptualisation.<sup>250</sup> Raz accepts that the extent to which any individual will find a law legitimate will vary depending upon the authorities they will identify, the moral reasons and axioms they will identify, and their evaluation of the state’s ability to meet said criteria. Legitimacy will vary, he concedes, between persons.<sup>251</sup> But one does not need to discover universal moral principles in order to evaluate a line of moral reasoning, where the moral principles are posited as axioms and the only aspect being examined is the state’s moral argument following from those criterial principles.

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<sup>246</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 17-27

<sup>247</sup> Raz, J. ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 *Minnesota Law Review* (4) 1003-1044, 1020-1021

<sup>248</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 6-7

<sup>249</sup> Michelman, F.I. ‘Human Rights and the Limits of Constitutional Theory’ (2000) 13 *Ratio Juris* (63) 70-74

<sup>250</sup> McCarthy, T. (tr) Habermas, J. *The Theory of Communicative Action* (Polity, Cambridge 1984), 168-174

<sup>251</sup> Raz, J. ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 (4) *Minnesota Law Review* 1003, 1020-1029

Testing the state’s internal logical coherence may not establish any universal moral truths, but it does test the consistency and persuasiveness of its claims to obedience.<sup>252</sup> Given that normative rationality provides an analytic tool to test the internal coherence of state moral claims to legitimacy, it appears to be an acceptable methodological approach, at least in terms of interrogating the moral claims to authority a state may itself make.

It is worth noting that many variations of rational-normative approaches to political obligation exist. One recent book on the subject, which relates moral obligation and political obligation directly to protest and disobedience, is Delmas’ *A Duty to Resist*. With regard to the “obligations of obedience” that legitimacy may entail, it is interesting to note that Delmas, unlike Raz, does not explicitly explore legitimacy itself in great detail.<sup>253</sup> Instead she looks directly to moral authority, which she claims stems from coherence with fundamental moral principles. Her “grounds of political obligation” are equivalent to the “moral grounds” in constitutional morality in Chapter 1: although they are not explicitly linked to the constitutional morality of specific liberal democratic states, they are axiomatic to arguments about the moral justificatory force of certain laws, and of protester actions. These grounds of obligation for Delmas are fairness, justice, Samaritanism, and the preservation of dignity for members of the political community.<sup>254</sup> The law’s coherence with these grounds may indeed lead to obligations of obedience. Incoherence may generate obligations of disobedience, including protest and lawbreaking – potentially, Delmas seems to suggest, even principled violent protest.

As both Raz and Delmas give moral-rational accounts for the existence of political obligation, they both require rational coherence between moral grounds and subsequent law for state legitimacy claims to be intelligible and capable of being morally binding. There are nevertheless a few points of apparent difference between their approaches. The first is that Raz does not explicitly posit specific moral reasons for action, whereas Delmas stipulates four. This need not itself be of great importance,

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<sup>252</sup> Harris, J.W. *Legal Philosophies* (2<sup>nd</sup> edn Butterworths, London 1997), 13

<sup>253</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 10

<sup>254</sup> *ibid*, 5

however, as Delmas explicitly states that other moral grounds of political obligation may exist. One which she concedes may be true is Raz's concept of the respect for law, as a moral principle in itself. (Interestingly, Delmas suggests that even "respect for law" may be appealed to for purposes of disobedience, where the law in dispute itself seems to run counter to principles of legality).<sup>255</sup> Crucially both writers argue only that there must be moral reasons for action in order to justify political obligation, and spend little time trying explicitly to define all such potential grounds in exhaustive detail.

The second potential area of difference is that Raz's service conception provides that laws can themselves be pre-emptive reasons for action. Except for a minimal check that the law is in pursuit of some moral rationale or good, as part of the dependence thesis, the pursuit of moral grounds and the entire moral equation becomes "modified" by the existence of the law, which becomes the new, pre-emptive reason for action.<sup>256</sup> One has moral reason, and therefore a duty, to obey, notwithstanding one's own personal disagreement with the law in question. In contrast, for Delmas, the law itself is not a moral reason for action.<sup>257</sup>

It may be possible to reconcile Raz with Delmas, in the examination of the dependence thesis. If the state is not going (or able) to pursue moral grounds in its laws and actions, then the service conception is not satisfied and obedience is not required. Both writers would expect the individual citizen to investigate and decide if the dependence thesis is satisfied; that is, both would expect citizens to ask if the law was pursuing, or consistent with, some principles of constitutional morality. If not, both would consider it feasible for the individual citizen to give arguments supporting morally-reasoned "principled disobedience".<sup>258</sup>

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<sup>255</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 11; Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979) ch. 12-13

<sup>256</sup> Raz, J. (2001) *Ethics in the Public Domain* (rev edn Clarendon, Oxford 2001)

<sup>257</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 11

<sup>258</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 21

Notwithstanding therefore contrasts in the moral pre-emptiveness of laws as reasons for action, from both Raz and Delmas we can see how legitimacy can be understood on a rational normative basis, where one examines moral axioms as normative reasons for action. That said, Delmas, Raz, and other theorists besides, differ both in terms of the potential moral grounds of obligation, and how one tests the normative rationality of claims made to moral grounds for obedience. The aim of this Chapter is not, however, to survey further their differences in rational normative explanations of legitimacy, nor to discover an exhaustive list of relevant moral principles. Instead it is suggested here that, at base level, all rational-normative argumentation on duties of obedience to law can be framed by the heuristic and analytical device of a legitimacy claim model.

### Legitimacy Claims

Given that moral claims depend upon competing moral axioms, and no law or society can ever perfectly attain such lofty ideals as perfect justice – and therefore, perfect legitimacy – the best that can be achieved is to examine what Michelman calls the “legitimation-worthiness” of governments and their claims.<sup>259</sup> The “legitimacy claims” of governments, seeking to demonstrate this legitimation-worthiness for their laws, will themselves comprise of normative arguments, founded on moral grounds as axioms, and evidence that their law or policy meets those axioms.<sup>260</sup> Sultany uses the phrase “legitimacy claim” twice in *Law and Revolution*, and uses the noun-phrase less as a term of art than as an overall conception of wider state appeals to authority, including both sociological legitimacy criteria and instrumental or pragmatic argumentation. It will be suggested here however that because the legitimacy of laws is best understood under a rational-normative conception, as discussed above, “legitimacy claims” should be construed principally as normative rational arguments. In this narrower, normative sense, legitimacy claims are fundamentally arguments which appeal to moral principles, and their strength depends upon the internal logical coherence of the claims being made.

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<sup>259</sup> Michelman, F.I. ‘Human Rights and the Limits of Constitutional Theory’ (2000) 13 (63) *Ratio Juris* 70

<sup>260</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 127

A legitimacy claim, then, is a claim to authority – being the moral authority to impose moral obligations on subjects without consent – made by a state which takes the form of a moral argument. A moral ground, or several, will be presented as axiomatic, and the state will produce an argument for obedience as a normatively rational behaviour on the part of a morally autonomous subject because the legitimacy claim is coherent and appeals to a posited moral reason for action.<sup>261</sup> The more coherent that chain of reasoning is, the better reason citizens will have to obey that law.<sup>262</sup>

That rational normative approaches struggle with the concept of universal moral principles, or that writers such as Raz or Delmas might not agree as to definitions of those principles, does not undermine their usefulness, here. Moral principles and rationales vary, and so agreement can be difficult or impossible, especially in heterogenous modern societies. This is not contested by many moral-rationalist theorists, including Raz, but he does contend that there is the possibility for rational, coherent moral dialogue, rather than believing that all moral discussion is just actors talking at cross-purposes.<sup>263</sup> Moral reasons for action will differ between subjects, but are only intelligible if they are in pursuit of worthy aims, and the intelligibility of behaviour depends therefore upon the extent to which that behaviour in question is consistent with the principles cited.<sup>264</sup> To state that normative theories of legitimacy are problematic, because there is disagreement on the moral terms of legitimacy, is essentially redundant. The legitimacy claims of every state are contested by some political group or another: to expect a normative theory of legitimacy to require unanimous support of certain moral principles is to expect theory to no longer reflect

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<sup>261</sup> That a moral ground is a reason for action, that compliance with the state's laws will achieve the aims of that reason, and that therefore compliance is morally obligatory, is crucial to Raz's explanation of how liberal states can generate obligations of obedience on autonomous subjects: Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 27

<sup>262</sup> For the application of the legitimacy frame heuristic to a contemporary protest movement see Greenwood-Reeves, J. 'The Democracy Dichotomy: Framing the Hong Kong 2019 Street Protests as Legitimacy Counterclaims against an Incoherent Constitutional Morality' (2020) 21 (1) *Asia-Pacific Journal on Human Rights and the Law* 35

<sup>263</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 162

<sup>264</sup> *ibid*, 140-144

reality.<sup>265</sup> These competing views are themselves “legitimacy claims” – Raz is merely trying to present one rational-normative framework for understanding these claims.

There is a way one can side-step this problem of moral relativism, at least for the purposes of analysing a state’s own arguments for obedience. If we accept the moral axioms of the state *prima facie*, and instead examine the internal coherence of the legitimacy claims made by states, we can focus on the logical merits of the legitimacy claims themselves. It therefore seems as though “legitimacy claims” are a suitable way of framing the rational normative claims to legitimacy made by states. These can now be used as heuristic devices to frame and examine such claims to obedience.

In summary then: the sociological and consensual accounts of legitimacy fail to explain how states can impose moral obligations on morally autonomous citizens. The rational-normative account of legitimacy can at least explain why morally autonomous subjects would feel obliged to follow commands of the state, but it is open to the accusation of allowing chaotic moral subjectivity regarding the moral principles or grounds to which appeals are made.<sup>266</sup> Understanding claims to authority as “legitimacy claims,” as a tool to frame such moral arguments, allows us to test the rational normativity of moral claims to authority. It is also closely analogous to the types of arguments made by protesters, against state legitimacy, seen in sociological studies of social movements, which suggests it will be helpful to the subsequent discussion about protest.<sup>267</sup> Frequently protesters do cite moral axioms and critique inconsistency in state claims for obedience: the Civil Rights movement is perhaps the most iconic example of this, with relation to claims of universal human equality, as Chapter 3 demonstrates.<sup>268</sup>

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<sup>265</sup> Chambers, S.A. and Carver, T. (eds) Connolly, W. *Democracy, Pluralism and Political Theory* (Routledge, Abingdon 2008); Gallie, W.B. ‘Essentially Contested Concepts’ (1995) 56 *Proceedings of the Aristotelian Society, New Series* 167

<sup>266</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 6-7

<sup>267</sup> Elsbach, K.D. and Sutton, R.I. ‘Acquiring Organizational Legitimacy Through Illegitimate Actions: A Marriage of Institutional and Impression Management Theories’ (1992) 35 (4) *The Academy of Management Journal* 699

<sup>268</sup> See for example Washington, J.M. (ed) King, M.L. Jr. *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* (Harper Collins, New York 2003)



Therefore, the legitimacy of a law can for our purposes be defined as the adherence of that particular law, policy or action, to fundamental moral norms (“moral grounds”) which generate grounds for political obligation and reason for action, which renders that law capable of generating obligations of obedience from its subjects. We can use “legitimacy claims” as a heuristic device to frame the moral arguments states make, which are founded on these moral grounds.

### Legitimation and Constitutionality

It can now be seen that Chapter 1 therefore informs the findings of this Chapter: that the moral grounds within constitutional morality are used as axioms by states as moral reasons for action, as grounds of political obligation, and as justification in claims to obedience in legitimacy claims.

Legitimacy depends upon moral grounds for action, for most writers on legitimacy who understand it in moral terms.<sup>269</sup> Any legitimate state action needs to be in pursuit of some moral grounds for action.<sup>270</sup> States that deviate from their stated constitutional moral grounds are easily accused of hypocrisy and illegitimacy, as is reflected throughout the discourse of protest movements historically.<sup>271</sup> States must therefore make claims to the legitimacy of their actions by reference to their posited moral grounds for their claims for obedience to be persuasive, and to stave off counterclaims for protest and disobedience.

The chief critique of rational normativity, as discussed above, was how best to decide from competing moral axioms, in the absence of empirically provable, universal moral principles.<sup>272</sup> One need not go so far, when testing legitimacy claims of the state, as to

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<sup>269</sup> For example, Dworkin, R. *Justice for Hedgehogs* (1<sup>st</sup> edn Harvard University Press, Cambridge MA 2011); Wall, S. ‘Political Morality and Constitutional Settlements’ (2013) 16 (4) *Critical Review of International Social and Political Philosophy* 481; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>270</sup> Raz, J. *Between Authority and Interpretation* (Oxford University Press, Oxford 2009), 188

<sup>271</sup> For example, see Washington, J.M. (ed) King, M.L. Jr. *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* (Harper Collins, New York 2003). More of this is discussed in detail in Chapter 3.

<sup>272</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 6-7

examine whether the state abides by whatever moral grounds or principles one personally wishes to see imposed upon it. One instead need simply use the moral grounds to which *the state itself* appeals in its legitimacy claims, such as justice or the rule of law, and to determine the claim's internal logical coherence.<sup>273</sup> If the state's own moral argumentation for legitimacy fails, because it fails to meet the standards it itself relies upon for justification (in pursuit of its moral grounds), then its claim fails *on its own terms*.<sup>274</sup> This approach obviates the critique of talking cross-purposes about moral axioms. If one accepts *prima facie* the axioms of the state's moral grounds, and simply tests the moral coherence of its laws to those grounds, one avoids the primary critique of rational normativity.

Briefly stated, and to simplify for the purposes of clarity, legitimacy claims therefore comprise of the following components.

- 1) Moral principle(s) – found in the constitutional morality of the state
- 2) Chain of reasoning, or syllogism – an implicit or explicit argument that the law in question is coherent with the principle(s) stated in 1) above
- 3) Resolution – for more coherent legitimacy claims, this will entail greater reasons for obedience; for less coherent claims, this will entail greater reasons for disobedience.

We can take a more concrete example of a legitimacy claim heuristic in action with the Civil Rights movement, to illustrate the practical effect of this line of reasoning when a legitimacy claim fails. As outlined in Chapter 1, the USA espouses the principle of equality among citizens.<sup>275</sup> This (formal, civil and political) equality is explicit in its constitutional morality, with sources in the Declaration of Independence and the Constitution itself. Any law or policy that then discriminated against certain persons would then be incoherent with that justifying moral principle. To take a

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<sup>273</sup> For an example of critiquing a state's law based on its own cited constitutional moral principles see Hendry, J. and King, C. 'Expediency, Legitimacy and the Rule of Law' (2016) 11 (4) *Criminal Law and Philosophy* 733, 737.

<sup>274</sup> Weinberger, O. 'Legal Validity, Acceptance of Law, Legitimacy: Some Critical Comments and Constructive Proposals' (1999) 12 (4) *Ratio Juris* 336, 347

<sup>275</sup> Again, the fact that it may *fail* to live up to this principle is beside the point. It does and must make claim to equality, however defined, in order to make legitimate claims to authority and to obedience.

Dworkinian phrase, the law would simply not fit.<sup>276</sup> The civil disobedience of the Civil Rights movement reflected a very similar moral reasoning.<sup>277</sup> Segregationist laws and policies that marginalised Black citizens were contradictory to the *very moral claims* that the USA espouses in its claims to legitimacy. As such they would be justifiably treated as aberrant to the principles from which claims to legitimacy, and obedience, derive their moral force; and as such, those laws and policies presented poor moral reasons for obedience. Indeed activists had good reason to *disobey* given the clear and unjustifiable moral incoherence of those laws, and the harms they caused.

Note as well that although a particular law or policy may prove morally incoherent and so therefore be subject to legitimacy counterclaims, protesters may choose to protest that law in ways which break other laws which may not themselves be subject to debate. Brownlee has discussed how, in many cases of “indirect civil disobedience,” activists may not be able to breach the laws with which they take issue directly (for example, if they relate to foreign policy, government spending, or other matters which do not require the direct involvement of the citizens in question).<sup>278</sup> Even under Rawls’ classic formulation of civil disobedience, it is accepted that protesters will often engage in tactics which break other laws in order to demonstrate their dissent: violating traffic laws, trespassing in order to protest, and so on.<sup>279</sup> The justifiability of this type of lawbreaking will be similar to those instances of direct disobedience against the law or policy which is actually in contention, and will depend upon the same moral considerations – the nature of which will be discussed in Chapters 5 and 6.

As a final point: agents of the state do not explicitly use these phrases, of legitimacy claims and moral coherence, when making claims to obedience. Instead, they present a request for obedience – a law, policy, instruction from a police officer, and so on –

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<sup>276</sup> Dworkin, R. *Taking Rights Seriously* (6th edn Duckworth, London 1991)

<sup>277</sup> Washington, J.M. (ed) King, M.L. Jr. *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* (Harper Collins, New York 2003); Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017)

<sup>278</sup> Brownlee, K. *Conscience and Conviction: the Case for Civil Disobedience* (Oxford University Press, Oxford 2012), 19-20

<sup>279</sup> Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 1971), 364-365

and its claim to legitimacy is implicit.<sup>280</sup> Laws are not published with explanations as to why they ought to be obeyed: their legitimacy, in terms of worthiness of obedience, is often tacit. The claim for obedience is usually embodied in the law or action itself. The legitimacy claim framework is simply a way of reading that claim for obedience as a moral argument, and therefore determining the extent to which is capable of creating duties of obedience.

In the next Chapter this heuristic is used to frame and analyse protest as a manifestation of a legitimacy “counterclaim” by protesters, that the state is acting in contrast to its cited moral grounds and therefore presenting a weak argument for obedience. But before protest and violent protest can be understood as legitimacy counterclaims, it is necessary to consider some potential criticisms of the heuristic in question.

### Limitations to this concept

#### State Legitimacy

The legitimacy claim device described above examines the consistency of claims that a specific law, action or policy is legitimate, rather than examining the legitimacy of the state itself, or its institutions.<sup>281</sup> A great many notable writers, such as Rawls and Nozick, have focused on the latter, foundational aspect of legitimate authority, over the former, particular one of the legitimacy of specific laws.<sup>282</sup> The legitimacy claim heuristic, which addresses the legitimacy of particular laws, policies and state actions, therefore might be considered too narrow to allow for analysis of the foundational legitimacy of states themselves.

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<sup>280</sup> Sevel, M. ‘Obeying the Law’ (2018) 24 (3) *Legal Theory* 191

<sup>281</sup> A similar approach is taken by many theorists who take a rational-normative approach to legitimacy, for example: Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986); Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018); Simmons, A.J. *Justification and legitimacy: essays on rights and obligations* Cambridge University Press, Cambridge 2001); Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977)

<sup>282</sup> See *inter alia* Nozick, R. *Anarchy, State and Utopia* (1<sup>st</sup> edn Oxford: Blackwell, Oxford 1974); Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge MA 1971)

This may however oversimplify the scope of the rational-normative analysis in question. On the one hand, one can still use this device to interrogate the particular actions of the purportedly illegitimate state on its own terms, if one were willing to accept its moral grounds for the purposes of that analysis. That is to say, one could use the legitimacy claim heuristic to critique the specific laws of the state, regardless its supposed “fundamental” illegitimacy as an authority. On the other hand, one might nevertheless use a legitimacy claim approach to test the very foundational grounds of legitimacy that the state itself is claiming. If the state justifies its very existence on some foundational moral principles, a similar investigation can be made as to whether its continued existence and actions are coherent with those principles.<sup>283</sup> A state which cites equality in such a foundational manner, as the US Declaration of Independence demonstrates, could be examined on a similar basis.<sup>284</sup> It is possible, therefore, that this conception of legitimacy, and the legitimacy claim device, can be used even for broader foundational questions. However, for the purposes of this research this latter investigation will not be examined in great detail. The restrictive focus here, to examine whether legitimacy claims allow disobedience towards purportedly immoral laws rather than unjustifiable states writ large, is defensible as it is comparable to many works in the wider political philosophical literature on the question, which similarly focus on the particular legitimacy of laws, rather than foundational questions of a state’s moral legitimacy.<sup>285</sup>

There is also a separate but connected question of the quantity and extent of illegitimate acts necessary to deprive the government or state itself of foundational legitimacy. Several theories on legitimacy focus on the state’s legitimacy as an

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<sup>283</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 185

<sup>284</sup> Washington, J.M. (ed) King, M.L. Jr. *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* (Harper Collins, New York 2003); Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 143

<sup>285</sup> Writers who have narrowed their scope on questions of legitimacy to the particular, rather than the foundational, are numerous and illustrious: Dworkin, R. *Law’s Empire* (1<sup>st</sup> edn Hart, Oxford 1998); Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986); Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018); Simmons, A.J. *Justification and legitimacy: essays on rights and obligations* (Cambridge University Press, Cambridge 2001)

institution, rather than on the legitimacy of its individual actions.<sup>286</sup> Here, we are focused not on critiques as to the legitimacy of the state or government *per se*, but their laws, policies and actions. Claims attacking the legitimacy of the state on a revolutionary or anarchical perspective, due to their enormous scope, must unfortunately fall outside the remit of this research.<sup>287</sup> Even so, it is presumed that any moral argument against the legitimacy of the state itself will rely upon moral principles which must either a) contrast with those posited by the state, and so fall outside of the legitimacy claim heuristic due to a failure to accept the state's posited axioms; or b) be moral grounds to which the state makes appeals, but which it is purportedly failing to serve consistently.<sup>288</sup> If so, these latter counterclaims fall within the legitimacy claim heuristic anyway, but simply on a larger scale with regard to the best method of redress: not to disobey or protest, but to depose an ineffectual government.

What if the state's claims involve moral grounds which differ to those of the individual? A government could enforce a law requiring students to salute the national flag, for example, and justify this with relation to a principle of "patriotism," which the individual student may not espouse. In essence the individual is still analysing a legitimacy claim, but takes issue with the axioms, well before examining any subsequent moral syllogisms the state must make for obedience. This means it is highly unlikely the individual will find reason for action within the claims made by the state, and so find it of sufficient authority to merit obedience.<sup>289</sup> It does not, however, make the legitimacy claim either invalid or unhelpful as a technique for rationalising the state's own claim to obedience as a self-contained argument. It also helps frame the counterargument of the dissident, to understand the point of conflict as being axiomatic rather than logical. This makes for greater analytical clarity in understanding the claims to legitimacy and illegitimacy that states and dissidents

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<sup>286</sup> For example, Nozick, R. *Anarchy, State and Utopia* (1<sup>st</sup> edn Oxford: Blackwell, Oxford 1974)

<sup>287</sup> For example, see Wolff, R. P. *In Defense of Anarchism* (1<sup>st</sup> edn Harper & Row, New York)

<sup>288</sup> Examples where revolutionaries have both questioned the consistency of a state's moral claims to moral principles, and the very principles in question, include Gandhi's tracts on the British Empire's inconsistent conceptualisations of liberty, and its oversight of the Indian people's own moral cultures and self-determination: Gandhi, M. *Young India* 1919-1922 (B.W. Huebsch, New York 1923)

<sup>289</sup> Raz, J. 'Explaining Normativity: on Rationality and the Justification of Reason' (1999) 12 (4) *Ratio* 354

make. For the remainder of this research, focus will be given solely to legitimacy claims where there is no significant axiomatic conflict between state and protester: it will be difficult or impossible to reconcile such foundational axiomatic conflict, and it may prove unnecessary, in analysing the vast majority of protest and violent protest, to examine claims to moral principles not cited by the state itself in most liberal democratic constitutions.<sup>290</sup>

One last point to note is that even if there is a fundamental axiomatic disagreement with the state as to certain constitutional moral grounds, this itself need not preclude the individual from having other good reasons for obedience to law. One can still have good moral reason to obey law, if on balance it would be in keeping with other relevant moral principles to do so: moral principles are not absolute, and are often subject to evaluation and interpretation in the context of other moral imperatives.<sup>291</sup> It is therefore possible to overstate the possibility of a fatal logic error in rational normativity, where the state espouses a principles one does not, or vice versa.

### Chaos

One might argue that if everyone becomes the judge of whether a particular law is legitimate, similarly to how this particular model requires, this would pose a threat to public order. This is a concern which has been levelled at numerous rational-normative accounts of legitimacy more generally.<sup>292</sup> The evaluation of legitimacy claims would have to be individualistic in order to avoid morally arbitrary obedience, or to avoid

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<sup>290</sup> The majority of domestic protests in liberal democracies are not over moral principles which the state espouses, but the manner in which the state acts. Greater axiological differences can be found in a colonial context, however: see Gandhi, M. *Young India* 1919-1922 (B.W. Huebsch, New York 1923)

<sup>291</sup> Simmons, A.J. *Justification and Legitimacy: Essays on Rights and Obligations* Cambridge University Press, Cambridge 2001); Raz, J. 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 189

<sup>292</sup> See general discussions on this dilemma, see for example: Honoré, T. 'Must We Obey? Necessity as a Ground of Obligation' (1981) 67 (1) *Virginia Law Review* 39; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 100-105; Brownlee, K. 'The Communicative Aspects of Civil Disobedience and Lawful Punishment' (2006) 1 (2) *Criminal Law and Philosophy* 179, 190; Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 53-54

depriving the individual of the moral autonomy that liberal theory seeks to conserve.<sup>293</sup> As such, decisions would be variable across individuals. Honoré argues that this is undesirable: that “obedience is healthy,” and indeed normal, in liberal democratic political life, and that a lack of unity could cause disorder, with potentially explosive socio-political potential.<sup>294</sup> Numerous examples abound but for one, reference might be made to 1970s Italian leftist violence, which was frequently coupled with the terrorists’ legitimacy claims against the state, often in extreme contrast to those of many members of the public.<sup>295</sup> An individualist determination of legitimacy, and of duties of obedience, could open the floodgates to widespread turmoil.

The first response to this line of criticism is that, as previously discussed, any theory of legitimacy must involve moral argumentation, and moral argumentation is necessarily prone to subjectivity and disagreement. No one conception of legitimacy is unanimously agreed upon in fact anyway: it is contestable by definition.<sup>296</sup> Understanding legitimacy as a moral *claim*, that each individual must assess, is not to advocate for mass disobedience: it is simply the only logically coherent manner by which to understand the phenomenon of authority under liberal governance, where the moral autonomy of the individual must be reconciled with the concepts of political obligation.<sup>297</sup> In the first instance therefore, *all* conceptualisations of legitimacy come from an individual’s own rationalisations. Argument over moral grounds as axioms is unavoidable – within *or without* legitimacy claim heuristics – if one is to consider legitimacy under a normative account.<sup>298</sup>

Even if agreement is met on those moral grounding principles, nonetheless, how does one start the moral inquiry of defining them, and judging qualitatively or quantitatively

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<sup>293</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 103

<sup>294</sup> Honoré, T. ‘Must We Obey? Necessity as a Ground of Obligation’ (1981) 67 (1) *Virginia Law Review* 39, 44

<sup>295</sup> Ruggiero, V. ‘Armed Struggle in Italy: The Limits to Criminology in the Analysis of Political Violence’ (2010) 50 (4) *The British Journal of Criminology* 708

<sup>296</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 6

<sup>297</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 100-105; Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 171

<sup>298</sup> Raz, J. ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 (4) *Minnesota Law Review* 1003, 1024



whether they are being satisfied? The definitions of “justice” and “fairness” are endlessly debatable, and their requirements necessarily contestable.<sup>299</sup> This is as difficult a question as any moral dilemma, and is at base level the most fundamental problem of moral philosophy.<sup>300</sup> Just as much as the pertinence of moral grounds as axioms must be considered by the individual, however, so too must the evaluation of their coherent use if liberal political theory is to justify its claims to maintaining the moral autonomy of subjects as liberal agents.<sup>301</sup> All moral inquiry asks us to make difficult moral rationalisations, which may be better than arbitrary obedience: particularly where there are grounds for concern that obedience to purportedly immoral laws may itself cause unjustifiable moral harms.<sup>302</sup>

Crucially, as Habermas argues in *Moral Consciousness and Communicative Action*, norms are not facts.<sup>303</sup> They are intersubjectively construed, created and evaluated between persons in public dialogue – which protest facilitates. The legitimacy claim heuristic allows us to evaluate the coherence of these intersubjective moral constructions of these moral principles, and arguments relating to whether the law does or does not satisfy the demands of these moral principles. There may indeed be no such achievable end as “perfect justice.”<sup>304</sup> Notwithstanding this, as Wall observes, a powerful, efficient state will be good at providing evidence of its claims and be persuasive, even if they are doing so imperfectly, such that very often the state’s legitimacy claim may broadly be respected by its public, with regard to that law or policy.<sup>305</sup>

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<sup>299</sup> Many writers explicitly avoid even an attempt at defining such terms as justice (Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 73-78); or democracy (Rawls, J. *Political Liberalism* (Columbia University Press, New York 1993); Raz, J. *Ethics in the Public Domain* (rev edn Clarendon, Oxford 2001), 61-63)

<sup>300</sup> Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 171

<sup>301</sup> Tyler, T.R. *Why People Obey the Law* (Princeton University Press, Princeton and Oxford 2006), 23

<sup>302</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 103

<sup>303</sup> Lenhardt, D. and Nicholsen, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990), 60-62

<sup>304</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 6

<sup>305</sup> Easton, D. *A Systems Analysis of Political Life* (Wiley, New York 1965); Wall, S. ‘Political Morality and Constitutional Settlements’ (2013) 16 (4) *Critical Review of International Social and Political Philosophy* 481, 488-493; see also Tyler, who observes that support of a

Ultimately, these problems about chaos or disobedience exist *notwithstanding* the legitimacy claims heuristic: it does not create these questions, which have raged on for centuries and will rage on notwithstanding the legitimacy claim heuristic.<sup>306</sup> Indeed it is crucial to our (albeit inevitably contestable) understandings of liberal democracy that they should continue to do so.<sup>307</sup> Legitimacy claims are simply a device for framing and analysing the arguments made by states and dissenters, which are made regardless, and to place them within a rational-normative logic fit for comprehension and analysis.

The objection that chaos might ensue from an individualistic perspective of legitimacy also suggests an empirical claim of widening disorder. Writers like Waldron warn us that, as a result of questioning the extent to which any law satisfies moral criteria the state depends upon for authoritativeness, the ability of the state to operate may fail, and greater harms might emerge in terms of deprivations of liberty through widespread crime and disorder.<sup>308</sup> This is a slippery-slope argument of a consequentialist nature.<sup>309</sup> It does not however seem to be backed by a great body of evidence.<sup>310</sup> Mass disorder is not the inevitable result of principled analysis of a law's legitimacy.<sup>311</sup> Mass disorder is not even the necessary consequence of principled disobedience.<sup>312</sup> Indeed, as Delmas argues, it may well be that arbitrary *obedience* may itself cause

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seemingly robust state often correlates with obedience and reasons for obedience: Tyler, T.R. *Why People Obey the Law* (Princeton University Press, Princeton 2006), 33

<sup>306</sup> Moore, Barrington Jr. *Injustice: The Social Bases of Obedience and Revolt* (1<sup>st</sup> edn Macmillan, London 1978), 3-18

<sup>307</sup> Lefkowitz, D. 'On a Moral Right to Civil Disobedience' (2007) 117 (2) *Ethics* 202; Chambers, S.A. and Carver, T. (eds) Connolly, W. *Democracy, Pluralism and Political Theory* (Routledge, Abingdon 2008), 239-247

<sup>308</sup> Waldron, J. *The Dignity of Legislation* (Cambridge University Press, Cambridge 1999), 59-62; Sabl, A. 'Looking Forward to Justice: Rawlsian Civil Disobedience and its Non-Rawlsian Lessons' (2001) 9 (3) *Journal of Political Philosophy* 331

<sup>309</sup> Walton, D. 'The Basic Slippery Slope Argument' (2015) 35 (3) *Internal Logic* 273

<sup>310</sup> Grant, D.S. and Wallace, M. 'Why Do Strikes Turn Violent?' (1991) 96 (5) *American Journal of Sociology* 1117; Dudouet, V., Cunningham, K.G., and Chenoweth, E. 'Dynamics and Factors of Transition from Armed Struggle to Nonviolent Resistance' (2013) 50 (3) *Journal of Peace Research* 401; Chenoweth, E. and Stephan, M.J. 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2008) 33 (1) *International Security* (1) 7

<sup>311</sup> Buchanan, A. 'Political Legitimacy and Democracy' (2002) 112 (4) *Ethics* 689, 703-704; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 94-106

<sup>312</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 103

unforeseeable harm and chaos, cloaking state violence with a veneer of legitimacy while presuming moral defectiveness on the part of individual's conscientious action.<sup>313</sup> More will be discussed in the next Chapter of the ways in which protest and disobedience may in fact play important parts in maintaining community, civility and a robust state.<sup>314</sup> For now it suffices to say that these arguments, that individualist rational-normative approaches to legitimacy would therefore bring unjustifiable chaos, overlook the core importance of moral autonomy to the justification of the liberal political model, and are in any event not based in any empirical evidence that the moral harms caused by questioning authority, or even disobeying it as a result, are worse than morally arbitrary obedience.<sup>315</sup>

### Does a poor legitimacy claim generate automatic duties to disobey?

Another response may be that a legitimacy claim heuristic suggests a binary choice between obeying a legitimate law and disobeying an illegitimate one. If one conceives of legitimacy claim errors as creating fatal logic errors, a simplistic interpretation might then conclude that one has no obligation to obey any laws supported by failed legitimacy claims. This argument nevertheless overlooks the fact that there are often multiple, overlapping moral reasons for action quite apart from political obligations based on the legitimacy of a particular law. As such, though one may lack the particular political obligation to obey a specific law, after a failed state legitimacy claim, one may have other normative rational reasons for obeying the law in question, or other moral grounds may be relevant in the individual's analysis.<sup>316</sup> A law might not perfectly effect fairness or justice, but where disobedience to that law might be inconsistent with those or other moral grounds for action, obedience may on balance be morally justifiable.<sup>317</sup> One may disagree with the fairness of a particular tax law, for example, whilst continuing to pay one's taxes on the premise that it will cause

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<sup>313</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 29-35

<sup>314</sup> Brownlee, K. 'The Communicative Aspects of Civil Disobedience and Lawful Punishment' (2006) 1 (2) *Criminal Law and Philosophy* 179; Beesley, C. 'Euromaidan and the Role of Protest in Democracy' (2016) 49 (2) *Political Science and Politics* 244

<sup>315</sup> Raz, J. *Ethics in the Public Domain* (rev edn Clarendon, Oxford 2001), 103; Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 171

<sup>316</sup> Buchanan, A. 'Political Legitimacy and Democracy' (2002) 112 (4) *Ethics* 689, 697

<sup>317</sup> Raz, J. 'Authority and Consent' (1981) 67 (1) *Virginia Law Review* 103, 104-105

greater harm to deprive the public purse of resources; or that it would offend the principle of fairness to fellow citizens not to pay one's share of taxes. More than one moral principle will be relevant to the way one treats a failed legitimacy claim, just as one must balance multiple moral factors when making any difficult moral decision, including any rational-normative analysis of one's political obligations.<sup>318</sup> Furthermore, evaluations of legitimacy are themselves seldom binary decisions between legitimacy and illegitimacy. The *relative* persuasiveness of reasons for obedience, and therefore the perceived legitimacy of the law in question, give rational citizens *relative* reasons for obedience or disobedience.<sup>319</sup> The floodgates of disobedience to imperfect laws do not necessarily open upon this analysis.

#### Amoral constitutions and states

A criticism – which might also be levelled against this research's conceptualisation of constitutional morality in Chapter 1 – could come to bear in relation to legitimacy claims, being that constitutions may not be founded on moral principles. For example, again, as Gearty argues, the UK constitution is arguably more a product of historical accident than a concerted moral code, with its moral aspects superimposed only relatively recently in history to meet political demands.<sup>320</sup> If so, one might consider a legitimacy claim heuristic as naïve or misguided as to the role that morality plays at a constitutional level, and as axiomatic in demands for obedience. One might on this basis argue that moral principles are irrelevant to the de facto authority implied within legitimacy, taking a political realist view of political philosophy.<sup>321</sup>

However, such an argument would overlook two important considerations crucial to our understanding of legitimacy as morally distinct from mere political power.<sup>322</sup>

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<sup>318</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 25-27; Raz, J. 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 (4) *Minnesota Law Review* 1003, 1025-1026

<sup>319</sup> Sreedhar, S. and Delmas, C. 'State legitimacy and political obligation in Justice for Hedgehogs: the radical potential of Dworkinian dignity' (2010) 90 (2) *Boston University Law Review* 737, 758

<sup>320</sup> Gearty, C. *Liberty and Security* (Polity Press, Cambridge 2013), 4

<sup>321</sup> Williams, B. *In the Beginning was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, Princeton N.J. 2005)

<sup>322</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 4-11

Firstly, inasmuch as moral principles might be superimposed on a constitution politically, even if they are contested, they are now valid considerations of what we prescriptively want to see from our liberal democratic states – rather than what we merely descriptively, or historically, can observe as the political root of state authority. As writers such as Allan and Murken demonstrate, the unwritten UK constitution depends upon concepts of the rule of law and democracy in its constitutional law and claims to legitimacy.<sup>323</sup> Such states *claim* moral authority, and use this moral authority at the very least in their *moral* arguments for obedience. Secondly, observing that morality may not have a role in establishing a de facto political power does not prevent moral or normative considerations being relevant to an evaluation of the state’s moral legitimacy, or its laws’ legitimacy, and therefore the state’s ability to impose moral obligations as an authority: an invading power or authoritarian regime can claim political supremacy without also claiming moral authority, or legitimacy, in a normative or moral sense.<sup>324</sup> What Sultany calls a “normatively thin” claim to legitimate authority, one based on social or political fact only, makes a weak case for generating moral obligations to forsake one’s own moral autonomy and to obey.<sup>325</sup> Authority as normatively binding, capable of imposing obligations of obedience, is unintelligible without some sort of moral authority as part of its legitimacy.<sup>326</sup>

It is certainly true that most states do explicitly make claims to obedience not founded on moral principles, but which are made explicitly on a threat basis. They declare that a reason to obey the law is that the state will punish deviance.<sup>327</sup> But, if so, this is not a moral argument in itself: it is an argument of a more instrumental nature, appealing to the prudence and self-interest of the subject, and not one which generates a moral obligation per se.<sup>328</sup> It is conceded that people obey laws for reasons beyond simply

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<sup>323</sup> Allan, T.R.S *Constitutional Justice: A Liberal Theory of the Rule of Law*. (Oxford: Oxford University Press, Oxford 2001); Murkens, J.E.K. ‘Democracy and the Legitimizing Condition of the UK Constitution’ (2018) 38 *Legal Studies* 42

<sup>324</sup> Buchanan, A. ‘Political Legitimacy and Democracy’ (2002) 112 (4) *Ethics* 689, 689-690; Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 175

<sup>325</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 6

<sup>326</sup> Raz, J. ‘Authority and Consent’ (1981) 67 *Virginia Law Review* (1) 103-131, 106-107

<sup>327</sup> Crawford, A. and Hucklesby, A. ‘Introduction’ in Crawford, A. and Hucklesby, A. *Legitimacy and Compliance in Criminal Justice* (Routledge, New York and London 2013)

<sup>328</sup> *Ibid.*; Tyler, T.R. *Why People Obey the Law* (Princeton University Press, Princeton and Oxford 2006), 21-23

moral ones. What appeals to legitimacy do, however, is make appeals precisely to the moral reasons for obedience.<sup>329</sup> If a state's demands for obedience truly do not make reference to any moral reason for obedience other than threat of punishment – which itself seems highly unlikely in a self-styled liberal democratic regime – its normative appeal to obedience would be very weak indeed.

A more nuanced response might be to argue, per Waldron, that the law in question may not perfectly embody the ground of morality to which appeals by both state and protester are made, but that it was made by democratically elected officials in accordance with democratic institutions, practices and principles.<sup>330</sup> This is an appeal to the legitimate authority of the state, rather than the legitimacy of the specific law in question. If so, notwithstanding that a given law might fail in a legitimacy claim to some underlying moral principle, it is underwritten by political obligations to obey founded on concepts of democracy or fairness, which themselves are moral principles which give moral reasons for action and obedience.<sup>331</sup>

Even so, this *itself* is an appeal to some normative principle by the state, one written into its constitutional morality, in order to create a rational-normative claim to obedience due to the pedigree of the law in question.<sup>332</sup> As Kay argues, this itself is only one reason to obey the law in question, as “democracy” is only one principle of constitutional morality to which legitimacy claims may refer.<sup>333</sup> Any claim to the pedigree of the law in question referring to its institutional source is either an appeal to democracy as a constitutional ground, or to fairness, equality, or other moral principles being used precisely as grounds for law, and moral grounds for obedience.<sup>334</sup> And an appeal to the democratic credentials of the institution, or even to the wider milieu of liberal democratic politics in which it is situated, is insufficient to

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<sup>329</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 5-14

<sup>330</sup> Waldron, J. *The Dignity of Legislation* (Cambridge University Press, Cambridge 1999)

<sup>331</sup> Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977)

<sup>332</sup> Raz, J. ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 185

<sup>333</sup> Kay, R.S. ‘American Constitutionalism’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 25-26

<sup>334</sup> For example see Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 101; Michelman, F.I. ‘Constitutional Authorship’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 76

create an indefeasible duty to obey the law in question. As Singer observed, the mere existence of these institutions cannot ensure that the laws they create and enforce are morally acceptable, and therefore capable of creating moral duties of obedience.<sup>335</sup> More on this particular dynamic – that protesters’ lawbreaking can undermine the very moral principles to which protesters make claim – is discussed in Chapter 6.

Similarly, where the state seeks obedience on the basis of public order and security, these reasons are instrumental to the preservation of the liberties of subjects, which themselves are moral grounds and reasons for action.<sup>336</sup> Indeed, with relation to controversial emergency powers, it is implicit within liberal democratic theory that although prerogative powers may cause an affront to justice or the rule of law, they may be justifiable by countervailing moral reasoning founded on liberty and the continued self-determination of the people.<sup>337</sup> If so, it is still entirely reasonable to examine the claim to obedience as a legitimacy claim, but one involving multiple moral grounds. Indeed, the moral ground of liberty, secured through obedience, may outweigh the flaws regarding the failed moral grounds of justice or the rule of law – or indeed, it may not, if the normative consequences of obedience would be onerous.<sup>338</sup>

## Chapter 2 Conclusion

The chief finding from Chapter 1, that a state’s moral authority is enshrined and effected by its cited constitutional principles, has been translated into the current Chapter to demonstrate that as a rational argument for obedience, constitutional morality provides moral grounds to which appeals for obedience to law are made.

It has been demonstrated that in order to be comprehensible as incurring moral obligations to obey, legitimacy in liberal democracies is best understood not from

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<sup>335</sup> Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 6

<sup>336</sup> Mill, J.S. *On Liberty* (Oxford University, Oxford 1859); Harris, J.W. *Legal Philosophies* (2<sup>nd</sup> edn Butterworths, London 1997), 129

<sup>337</sup> Malcolm, N, (ed) Hobbes, T. *Leviathan* (Oxford University Press, Oxford 2012); Neocleous, M. *Critique of Security* (Edinburgh University Press, Edinburgh 2008); c.f. Neocleous, M. ‘Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics.’ (2007) 6 (2) *Contemporary Political Theory* 131, 144

<sup>338</sup> Raz, J. ‘Authority and Consent’ (1981) 67 (1) *Virginia Law Review* 103, 104-105

consent or sociological approaches, but normative rationality.<sup>339</sup> It has then been shown that a useful and analytically justifiable way to frame and understand normative claims is through moral logic and “legitimacy claims,” as these present both the moral grounds for action and the subsequent arguments which seek for obedience. The moral grounds constitute the moral reasons for action which underpin the legitimacy claims of the state, acting as the axioms in the moral-logical syllogism. It would therefore appear that weak legitimacy claims by the state leave opportunities for rival legitimacy counterclaims apropos of questionable laws and policies.

The next Chapter (Chapter 3) investigates protest as democratic dialogue within this dynamic.<sup>340</sup> Specifically it analyses protest, and in particular principled disobedience and lawbreaking, as a form of legitimacy *counterclaim*. This will in turn inform the remaining Chapters, which analyse violent protest as a device for legitimacy counterclaims, and the moral coherence of using violence in pursuit of addressing perceived moral wrongs and failures of legitimacy in state law, policy and action.

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<sup>339</sup> Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 6-7; Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979)

<sup>340</sup> Guhathakurta, M. ‘Democratic Dialogue’ in Coghlan, D. and Brydon-Miller, M. *The SAGE Encyclopedia of Action Research* (2014) < <http://0-methods.sagepub.com.wam.leeds.ac.uk/reference/encyclopedia-of-action-research/n92.xml>> accessed 30/05/2019



## Chapter 3: Protest as a legitimacy counterclaim in democratic constitutions

In the previous Chapter, “legitimacy claims” were presented as a heuristic device for framing the moral arguments made by states so as to provide reasons for obedience to their laws. Constitutional moral principles are treated as axioms, or normative reasons for action: the state then makes a claim to the legitimacy of its laws based on those moral grounds. Citizens then have more reason to follow morally coherent legitimacy claims than incoherent ones. This Chapter aims to present protest as not only an important political phenomenon in liberal democracies in general, but more specifically as part of the “moral dialogue” of legitimacy claims made by the state, and counterclaims made by protesters, when the state’s legitimacy claims are deemed to be incoherent.<sup>341</sup>

Here, an overview of the political roles of protest presents it as a controversial, but instrumentally useful and politically important, institution within a democracy.<sup>342</sup> Reference is made to concepts which help to evaluate its role and purpose in democratic states, such as accountability, democratic dialogue, transparency, and human rights. Examples of protest activities include *inter alia* civil disobedience, lawful and unlawful protest, and riots.<sup>343</sup> The aim here is not to explore these qualities or types of protest in great depth, but instead to demonstrate that there are many forms of disobedience and resistance, which have different normative consequences.

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<sup>341</sup> Etzioni A. ‘Moral Dialogues’ in: *Library of Public Policy and Public Administration Happiness is the Wrong Metric, vol 11* (Springer, Cham 2018); Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179

<sup>342</sup> For a general overview of the importance of protest in democratic states see: Rucht, D. ‘The Changing Role of Political Protest Movements’ (2010) 26 (4) *Western European Politics* 153; Beesley, C. ‘Euromaidan and the Role of Protest in Democracy’ (2016) 49 (2) *Political Science and Politics* 244; Chambers, S.A. and Carver, T. (eds) Connolly, W. *Democracy, Pluralism and Political Theory* (Routledge, Abingdon 2008)

<sup>343</sup> Klein, G.R. and Regan, P.M. ‘Dynamics of Political Protests’ (2018) 72 (2) *International Organization* 485; Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003); Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston MA 1973).

While there are many prominent examples of protests against private, corporate or other non-state actors, the main aim of this thesis is to examine protest (and violent protest) as a response to liberal democracies' claims to obedience: as such this Chapter, and subsequent Chapters, will limit their focus to protests against state laws, organs and actions. Further research may demonstrate similar moral claim dynamics in protest against non-state actors, but for now, the referent objects of examination are solely state actions and protest responses to them. The focus will, again, fall principally on non-revolutionary protest, for reasons discussed in the previous Chapters regarding accepted moral axioms and total claims to legitimate authority.

Protest can be understood as a response to failed state legitimacy claims, and a political and social extra-institutional means of redress in response to such failures.<sup>344</sup> As such, protest can (though may not always) be used as a claim and appeal to failed moral grounds.<sup>345</sup> Protest, understood as moral dialogue, can be used to question the legitimacy claims of the state.<sup>346</sup> If morality grounds the state, its law, and its legitimacy, then it is possible to question the legitimacy of a law, policy or state action when the claim's syllogism is broken. Evidence can be shown later in this Chapter that protest movements can and do consider claims to legitimacy, which we can interpret using these moral logical dynamics. Further, protest can itself make legitimacy counterclaims in defence of its own legitimacy or moral acceptability within the constitutional morality of the state.<sup>347</sup> That is to say, it can present both a) a critique of the state's argument *and* b) an argument founded in rational normativity, that the protest itself is legitimate and justified on the grounds of constitutional morality.

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<sup>344</sup> Della Porta, D. 'Political Economy and Social Movement Studies: The Class Basis of Anti-Austerity Protests' (2017) 17 (4) *Anthropological Theory* 453; Scheuerman, W.E. 'Recent Theories of Civil Disobedience: an Anti-legalistic Turn?' (2015) 23 (4) *The Journal of Political Philosophy* 427

<sup>345</sup> Brownlee, K. *Conscience and conviction: the case for civil disobedience* (Oxford University Press, Oxford 2012); Daase, C. and Deitelhoff, N. 'Opposition and Dissidence: Two Modes of Resistance Against International Rule' (2019) 15 (1) *International Political Theory* Special Issue 11

<sup>346</sup> Ganesh, S and Zoller, H.M. 'Dialogue, Activism and Democratic Social Change' (2012) 22 (1) *Communication Theory* 66; Brownlee, K. 'The Communicative Aspects of Civil Disobedience and Lawful Punishment' (2006) 1 (2) *Criminal Law and Philosophy* 179

<sup>347</sup> Klein, G.R. and Regan, P.M. 'Dynamics of Political Protests' (2018) 72 (2) *International Organization* 485

Examples will be presented illustratively where protesters make reference to constitutional moral principles cited by the state, and will include Black Lives Matter protests, Occupy movements, Hong Kong pro-democracy protests, and so forth.<sup>348</sup> The Chapter thereby demonstrates that protest can be a moral critique of state legitimacy claims. This will, in turn, inform the next Chapter on violent protest, which can also be understood as a response to failed legitimacy claims, and a form of counterclaim as to its own legitimacy as a device for redress.

### Protest: a brief theoretical overview

Protest is often considered a controversial but essential phenomenon within a liberal democracy.<sup>349</sup> Within liberal democratic theory, for hundreds of years, reference has been made to its importance in the free market of ideas, tied to notions of freedom of speech and assembly.<sup>350</sup> William Connolly wrote of its importance within an “agonistic” model of a twentieth century, modern democracy, as part of the mechanism of exchanging different political stances, especially for underrepresented groups.<sup>351</sup> Under a more contemporary gaze, writers like Volk have described its role and purpose within radical democratic theory, indeed within postmodern democracy, as not only a platform for the advocacy of rights or political opinions, but as a method of questioning the nature of democracy itself.<sup>352</sup> Various sociological and psycho-

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<sup>348</sup> Zinn, H. *Disobedience and Democracy: Nine Fallacies on Law and Order* (2<sup>nd</sup> edn South End Press, Cambridge MA 2002); Russell, R. ‘Black Lives Matter: Toward a Modern Practice of Mass Struggle’ (2016) 25 (1) *New Labour Forum* 34

<sup>349</sup> See generally: Rucht, D. ‘The Changing Role of Political Protest Movements’ (2010) 26 (4) *Western European Politics* 153; Beesley, C. ‘Euromaidan and the Role of Protest in Democracy’ (2016) 49 (2) *Political Science and Politics* 244; Chambers, S.A. and Carver, T. (eds) Connolly, W. *Democracy, Pluralism and Political Theory* (Routledge, Abingdon 2008)

<sup>350</sup> Mill, J.S. *On Liberty* (Oxford University Press, Oxford 1859)

<sup>351</sup> Chambers, S.A. and Carver, T. (eds) Connolly, W. *Democracy, Pluralism and Political Theory* (Routledge, Abingdon 2008), 234-239

<sup>352</sup> Volk, C. ‘On a radical democratic theory of political protest: potentials and shortcomings’ (2018) 21 *Critical Review of International Social and Political Philosophy* 1; Volk, C. ‘Enacting a parallel world: Political protest against the transnational constellation’ (2020) 51(1) *Journal of International Political Theory* 100-118. Celikates has further argued that protest – and in particular, civil disobedience – allows for the resurgence of a latent constituent power, creating a transformative environment which challenges existing political institutions and spaces, and allowing matters excluded from public life to emerge and reshape it. As described in Chapter 2, arguments relating to constituent power provoke further questions about the nature and existence of that power, but the power for civil disobedience – and protest more generally – to challenge prevailing social and political structures is very clear. Celikates,

sociological studies have also framed protester motivations and ideologies in terms of being responses to perceived grievances.<sup>353</sup>

Perhaps unsurprisingly, writers on liberal democratic theory broadly agree that protest performs a number of functions vital to the operations of a robust democracy. It serves as an additional tool for ensuring accountability of government organs, particularly in the face of perceived corruption.<sup>354</sup> It is an important mechanism for demanding transparency, should such accountability be withheld or insufficient through institutional means.<sup>355</sup> It serves as part of the interlocution of democratic dialogue, especially between marginalised groups and those within positions of political power and wider society, where the press, institutional means of addressing grievances, or judicial review, are for whatever reason unavailable or considered insufficient.<sup>356</sup> On a more fundamental level, perhaps, the right to protest is itself an important component of civil and political rights of expression and association, in pursuance of the safeguarding of other rights and socio-political interests. Within liberal democratic theory, for the moral autonomy and liberty of subjects to be preserved, some means of expressing competing moral views and effecting dissent must be available.<sup>357</sup>

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R. ‘Constituent power beyond exceptionalism: Irregular migration, disobedience, and (re-)constitution’ (2019) 15 (1) *Journal of International Political Theory* 67

<sup>353</sup> For example: Jost, J.T., Becker, J., Osborne, D. and Badaan, V. ‘Missing in (Collective) Action: Ideology, System Justification, and the Motivational Antecedents of Two Types of Protest Behavior’ (2017) 26 (2) *Current Directions in Psychological Science* 99; Zlobina, A. and Gonzalez Vazquez, A. ‘What is the Right Way to Protest? On the Process of Justification of Protest, and its Relationship to the Propensity to Participate in Different Types of Protest’ (2018) 17 (2) *Social Movement Studies* 234

<sup>354</sup> Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179, 179; Beesley, C. ‘Euromaidan and the Role of Protest in Democracy’ (2016) 49 (2) *Political Science and Politics* 244, 244; Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 130-134

<sup>355</sup> Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 42; Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179

<sup>356</sup> Zinn, H. *Disobedience and Democracy: Nine Fallacies on Law and Order* (2<sup>nd</sup> edn South End Press, Cambridge MA 2002); Klein, G.R. and Regan, P.M. ‘Dynamics of Political Protests’ (2018) 72 (2) *International Organization* 485; Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179; Ganesh, S and Zoller, H.M. ‘Dialogue, Activism and Democratic Social Change’ (2012) 22 (1) *Communication Theory* 66; Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017)

<sup>357</sup> Harris, D.J., O’Boyle, M., Bates, E.P. and Buckley, C.M. *Law of the European Convention on Human Rights* (2<sup>nd</sup> edn Oxford University Press, Oxford and New York 2009), 443; Moore, Barrington Jr. *Injustice: The Social Bases of Obedience and Revolt* (1<sup>st</sup> edn Macmillan,

Protest itself can take many forms and, as it were, manifestations. Sociological writers have attempted countless different taxonomies and typologies for defining these various types of protest and dissent behaviours. With regard to nonviolent action alone, Gene Sharp lists 198 different methods of nonviolent resistance under headings including boycotts, marches, strikes, sit-ins, guerrilla theatre, and hunger strikes.<sup>358</sup> Across his writings, James C. Scott includes under the (perhaps conceptually wider) title of “resistance” innumerable actions including tax evasion, “foot-dragging” when obeying orders, sabotage, theft, countercultural art and subversive theatre, and numerous other examples of dissent and resistance.<sup>359</sup>

More narrowly, certain forms of lawbreaking might be considered acts of protest *per se* given their conscientious, public and communicative nature. There are numerous examples where direct action, beyond merely vocalising dissent, demonstrates a clear disapproval of government action whilst also attempting to rectify “urgent and immediate harm:” recent cases include the aggravated trespassing of the Stansted 15, to prevent the flight of a plane returning refugees to dangerous countries.<sup>360</sup> Activists cut through fencing at Stansted Airport using bolt cutters. This damage to property was instrumental to them subsequently using piping and expanding foam to adhere themselves together to block an airplane. The plane had been chartered by the Home Office, set to deport foreign nationals to countries where, according to the activists, the deportees would be subject to human rights abuses.<sup>361</sup> Many of those being deported would only be entitled to a right to appeal *after* being removed from the UK.

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London 1978); Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985); Ganesh, S and Zoller, H.M. ‘Dialogue, Activism and Democratic Social Change’ (2012) 22 (1) *Communication Theory* 66

<sup>358</sup> Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston M.A. 1973)

<sup>359</sup> Scott, James C. *Domination and the Art of Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1990); Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985)

<sup>360</sup> Cammiss, S., Hayes, G. and Doherty, B. ‘Treating the Stansted 15 as Terrorists is Part of a Worrying Trend’ *Political Quarterly* (10/01/2019) <<https://politicalquarterly.blog/2019/01/10/treating-the-stansted-15-as-terrorists-is-part-of-a-worrying-wider-trend/>> accessed 27/07/2019

<sup>361</sup> Cammiss, S., Hayes, G. and Doherty, B. ‘Deportation and direct action in Britain: the ‘terrorist trial’ of the Stansted 15’ *Open Democracy* (16/03/2018) <<https://www.opendemocracy.net/en/deportation-and-direct-action-in-britain-terrorist-trial-o/>> accessed 27/07/2019

Direct action as a form of protest can also be seen in examples of Black Lives Matter activists intervening in unlawful arrests, or in unilateral citizen attempts to subvert government attempts to forcibly remove refugees through offering sanctuary or medical care contrary to domestic law.<sup>362</sup>

Other writers include within their understandings of protest, *inter alia*, civil disobedience, lawful and unlawful protest, violent protest, and even riots.<sup>363</sup> Within these diverse forms and definitions of protest actions, one can find a baffling array of requirements to satisfy certain definitional tests. For many theorists, notably including John Rawls, some actions require publicity, or open and visible expression, to count as “civil disobedience.”<sup>364</sup> Other writers like Brownlee say this publicity is unnecessary for civil disobedience.<sup>365</sup> Contrarily, sabotage, leaking compromising documentation, or abetting refugees against state law, might be done covertly and still be understood as (depending on one’s chosen textbook) dissent, direct action, civil disobedience, uncivil disobedience, principled disobedience, or protest: indeed, a number of writers use such terms practically and interchangeably.<sup>366</sup>

The definitions of these terms of art are, however, not core to this thesis, and no contest is made of these definitions. Indeed, rather than selecting arbitrarily from myriad, reasonable but differing taxonomies of protest forms, and potentially excluding salient cases, this thesis intends to cut through such classifications and instead to focus on the normative consequences of any reaction to perceived state injustices, regardless of

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<sup>362</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 31-34; Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 233-236

<sup>363</sup> Klein, G.R. and Regan, P.M. ‘Dynamics of Political Protests’ (2018) 72 (2) *International Organization* 485; Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003); Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston MA 1973).

<sup>364</sup> Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 1971), 363-368; Sabl, A. ‘Looking Forward to Justice: Rawlsian Civil Disobedience and its Non-Rawlsian Lessons’ (2001) 9 (3) *Journal of Political Philosophy* 331

<sup>365</sup> Brownlee, K. ‘Features of a Paradigm case of Civil Disobedience’ (2004) 10 (4) *Res Publica* 337

<sup>366</sup> Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985); Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 21-46

their precise form. The aim is to look paradigmatically at what protest entails.<sup>367</sup> A “protest” therefore, for our purposes, may include (without needing or wanting to be prescriptive) any of the following qualities. It could be action responding to something deemed negative; a manifestation of one or more persons with a view to expressing dissent; an action which seeks to subvert a law, policy, or organisation which the actor finds objectionable. As with the paradigmatic approach to violence in the Introduction, some instances of protest may be closer to the paradigm than others – defacing the statue of a politician, for example, may be more approximate to the paradigm than merely writing to one’s Member of Parliament.

This definition-averse approach might seem to risk being too broad, and possibly capable of including cases which do not seem to meet a common standard of what “protest” entails. This inclusivity is a strength, though, rather than a weakness. Writing a letter to one’s Member of Parliament might well be called a form of protest, just as much as riot might be. The closer to the paradigm the act is, the more salient it will be for the purposes of this analysis: and just how closely any given example does meet the paradigm can itself be up for interpretive analysis. Most importantly, these different actions have very different normative consequences, including intention, legality, and harms incurred. The importance of these different normative consequences will come into play in greater detail in Chapters 5 and 6, particularly when considering the acute normative consequences which may result from acts of violence.

### Protest, constitutional morality, and legitimacy claims

Many of the foregoing observations regarding protest have not required extensive analysis or critique. They are largely uncontroversial comments, widely discussed on the topic of protest, and are in any event not crucial to the current thesis. What is more important is to understand that protest also performs two other crucial counterclaim functions, namely, a) being a mechanism for responding to state legitimacy claims

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<sup>367</sup> On “paradigm cases” see Audi, R. (ed) *The Cambridge Dictionary of Philosophy* (Cambridge University Press, New York 1995), 558

when they are perceived to be failing, and b) creating counterclaims about the legitimacy of the protesters and their particular forms of protest.

Protest can be a political and social extra-institutional means of communicating when the citizen believes that the state's moral grounds have been breached.<sup>368</sup> As such, protest can be used as a claim and appeal to that moral ground.<sup>369</sup> For example, a citizen believing that a state's discriminatory law is contrary to its legitimating constitutional principles of equality might feel entitled to participate in protest, thereby communicating their outrage at the hypocrisy and injustice of that law. This is a recurring theme, for example, across Black Lives Matter protests and discourses, as writers like Lebron have noted.<sup>370</sup> As part of the democratic-dialogic function of protest, it encompasses the possibility of being a platform for moral dialogue. By "moral dialogue," one refers to the process whereby multiple participants (here, protesters and the government) exchange and learn from different moral interpretations and arguments.<sup>371</sup>

Protest can be construed as moral dialogue used to question the legitimacy claims of the state regarding specific laws, actions and policies.<sup>372</sup> As Ganesh and Zoller discuss in detail, activism presents opportunities for dialogues to emerge and circulate.<sup>373</sup> If morality grounds the state, its law, and its legitimacy, then it is possible to question the law's legitimacy when the claim's syllogism is broken without adequate moral justification. This dialogue is not simply unidirectional: being a dialogue, it

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<sup>368</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018); Della Porta, D. 'Political Economy and Social Movement Studies: The Class Basis of Anti-Austerity Protests' (2017) 17 (4) *Anthropological Theory* 453; Scheurman, W.E. 'Recent theories of civil disobedience: an anti-legalistic turn?' (2015) 23 (4) *The Journal of Political Philosophy* 427

<sup>369</sup> Brownlee, K. *Conscience and conviction: the case for civil disobedience* (Oxford University Press, Oxford 2012); Daase, C. and Deitelhoff, N. 'Opposition and Dissidence: Tow Modes of Resistance Against International Rule' (2019) 15 (1) *International Political Theory* Special Issue 11

<sup>370</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017)

<sup>371</sup> Etzioni A. 'Moral Dialogues' in: Library of Public Policy and Public Administration *Happiness is the Wrong Metric, vol 11* (Springer, Cham 2018)

<sup>372</sup> Ganesh, S and Zoller, H.M. 'Dialogue, Activism and Democratic Social Change' (2012) 22 (1) *Communication Theory* 66; Brownlee, K. 'The Communicative Aspects of Civil Disobedience and Lawful Punishment' (2006) 1 (2) *Criminal Law and Philosophy* 179

<sup>373</sup> Ganesh, S and Zoller, H.M. 'Dialogue, Activism and Democratic Social Change' (2012) 22 (1) *Communication Theory* 66



encourages responses from the state and its organs as interlocutors; indeed protest demands response. Brownlee has discussed this communicative aspect with relation to civil disobedience, but the interpretation could apply to any communicative form of protest.<sup>374</sup> This includes responses from police, civil servants, politicians and indeed the judiciary to the form of protest in question.<sup>375</sup> “Dialogue” in this sense means not merely that protesters communicate a critique of the government’s laws unilaterally, but rather that they anticipate and expect responses from the government, and from wider society.

Not all moral claims made by protesters against state legitimacy claims are palatable. Democracies are often confronted by nationalist marches, for example, which appeal to moral principles of national identity, or even racial identity, which might concern onlookers.<sup>376</sup> Although this research presumes a number of liberal democratic principles are held in common, within a given society, moral principles will inevitably vary between morally autonomous subjects, and be interpreted in numerous competing ways.

The moral principles of the subject may not be the same as those of the state: in which case, the parties are talking at cross-purposes axiomatically.<sup>377</sup> In these circumstances the legitimacy claim is being criticised for its starting principles, and indeed a total claim is being made against the state’s constitutional morality rather than a partial claim made with regard to a specific law: this leaves us with the difficulty alluded to in the second Chapter.<sup>378</sup>

Legitimacy counterclaims offer another crucial function of protests within this dynamic. Protesters can make legitimacy counterclaims regarding their own

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<sup>374</sup> Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179

<sup>375</sup> Soares, M., Barbosa, M., Matos, R. and Mendes, S.M. ‘Public Protest and Police Violence: Moral Disengagement and Its Role in Police Repression of Public Demonstrations in Portugal’ (2018) 24 (1) *Peace and Conflict: Journal of Peace Psychology* 27; Terwindt, C. *When Protest Becomes Crime* (Pluto Press, London 2020)

<sup>376</sup> See for example Rydgren, J. *The Populist Challenge: Political Protest and Ethno-nationalist Mobilization in France* (Berghahn, New York and Oxford 2004)

<sup>377</sup> Harris, J.W. *Legal Philosophies* (2<sup>nd</sup> edn Butterworths, London 1997), 13

<sup>378</sup> Where that axiomatic conflict is irreconcilable, see: Walzer, M. ‘The Obligation to Disobey’ (1967) 77 (3) *Ethics* 163

activism's defensibility: that is to say, protest can present both a critique of the State's argument *and* an argument, founded in rational normativity, that the protest itself is legitimate and justified on the grounds of constitutional morality.<sup>379</sup> Scott Varda has made an analogous observation regarding sit-ins as a particular form of protest, which can be "understood as arguments themselves". On the one hand, they make "specific claims" about the law or policy being protested, while simultaneously making "general claims" that the form of protest itself represents a powerful symbolic use of the protesters' bodies as a collective argument against an unacceptable status quo.<sup>380</sup> Beyond sit-ins specifically, other forms of public protest provide the means not only for interrogating the immorality of the matter being protested. They also allow the protester to show that they have considered the practical and moral factors in choosing these particular forms of protest.<sup>381</sup>

Examples of types of protest which make strong legitimacy counterclaims regarding the *protesters'* legitimacy include the Civil Rights movement protests. As well as questioning the legitimacy claims of a segregationist, discriminatory state, the protesters frequently presented moral arguments for why their own stance and methods were justifiable, including peaceful protests and marches.<sup>382</sup> The peaceful tactics of Martin Luther King Jr. are often contrasted with the more controversial advocacy of violence seen in the writings and speeches of Malcolm X. relating to the

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<sup>379</sup> Klein, G.R. and Regan, P.M. 'Dynamics of Political Protests' (2018) 72 (2) *International Organization* 485; Della Porta, D. 'Research on Social Movements and Political Violence' (2008) 31 (3) *Qualitative Sociology* 221; Russell, R. 'Black Lives Matter: Toward a Modern Practice of Mass Struggle' (2016) 25 (1) *New Labour Forum* 34. In revolution this will often involve questioning the constitution itself, or its constitutional moral grounds, while positing an alternative settlement. However, that revolutionary aspect is beyond the remit of this thesis. Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017)

<sup>380</sup> Varda, S.J. 'Sit-in as argument and the perils of misuse' [2019] *Argumentation and Advocacy* <<https://doi.org/10.1080/10511431.2018.1528122>> accessed 24/03/2022, 1

<sup>381</sup> See for example the Ploughshares' all-female "Seeds of Hope" group and their use of hammers to sabotage military equipment, consciously subverting patriarchal norms and using the tools of ordinary working folk symbolically: Sommier, I, Hayes, G. and Ollitrault, S. *Breaking laws: violence and civil disobedience in protest* (Amsterdam University Press, Amsterdam 2019), 227-232

<sup>382</sup> Washington, J.M. (ed) King, M.L. Jr. *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* (Harper Collins, New York 2003); Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017) 100-122

same injustices.<sup>383</sup> This is an important part of acting as a responsible and morally autonomous agent: presenting reasons for one's response not only shows sincerity in one's moral principles, but it demonstrates a consistency that helps to prevent accusations of hypocrisy which can undermine protester legitimacy claims.<sup>384</sup>

### Caveats

It should be noted that when looking at protests by multiple individuals, members of protest movements may not all share identical moral axioms or logics as one another. Often there are demonstrable shared causes and grievances by those marching under the same banner, and indeed many social movements garner support precisely on the basis of commonly-held moral principles and beliefs. As discussed below, leading members of groups like Extinction Rebellion tend to present guiding principles that are used to attract supporters who have similar political and moral leanings, and provide a general, collective statement of the movement's moral stance.<sup>385</sup> It would however be false to presume an aggregate moral argument from multiple individuals. With relation to anti-urbanisation protests in Hong Kong during the 1990s, for example, Lejano et al have demonstrated that although "every person interviewed shared the belief in democratic values and in justice for the marginalized," there was also a "plurivocity" in narratives as to why protesters joined and how they conceptualised these moral arguments.<sup>386</sup> Diversity of moral arguments may be extreme or even self-contradictory among participants. It would be erroneous, for example, to equate the moral argumentation of peaceful protest among core *gilets jaunes* activists, who addressed perceived legitimacy claim failures in the French

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<sup>383</sup> X, M. *Malcolm X: the Ballot or the Bullet* (Pacifica Foundation, North Hollywood 1965)

<sup>384</sup> Brownlee, K. 'The Communicative Aspects of Civil Disobedience and Lawful Punishment' (2006) 1 (2) *Criminal Law and Philosophy* 179, 180

<sup>385</sup> Extinction Rebellion 'Welcome to the Rebellion' (2018)

<[https://www.risingup.org.uk/sites/default/files/files/XR-Handbook\\_V2.pdf](https://www.risingup.org.uk/sites/default/files/files/XR-Handbook_V2.pdf)> accessed 27/01/2020

<sup>386</sup> Lejano, R., Chui, E., Lam, T. and Wong, J. 'Collective Action as Narrativity and Praxis: Theory and Application of Hong Kong's Urban Protest Movements' (2018) 33 (3) *Public Policy and Administration* 260, 269

government relating to economic inequalities, with the argumentations of fringe rioters whose moral claims (if any) were much more diverse.<sup>387</sup>

This moral-aggregation problem is however readily solvable. It is the moral autonomy of the individual protester that is central to a liberal democratic model.<sup>388</sup> As such, it is at the individual level that questions of moral argument should be sought. As Pasternak intimated with relation to the morality of individual rioters, whether any one protester has better moral arguments or reasons than another could be considered a matter of empirical investigation on a case-by-case basis. The criminal justice system certainly addresses motives and defences at the individual level, so it is well within the scope of this inquiry to presume a similar individualist approach.<sup>389</sup> Therefore, though as a shorthand one might refer to the moral arguments of protesters plural, or of a movement, in truth one must examine the moral argumentation of any individual for the purposes of maintaining a coherent rational-normative approach.<sup>390</sup>

Another objection which might arise against this Chapter's moral interpretation of protest is that not all protests present, or are intended by the participants to present, coherent moral arguments. Again with reference to sit-ins, Varda examined the use of this tactic by US Democratic congresspeople in 2016, who occupied the well of the House of Representatives, seeking to encourage fellow legislators to pass motions on stronger firearms regulations.<sup>391</sup> Although in general their aims were worthy, Varda

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<sup>387</sup> Willsher, K. 'One killed and hundreds injured in French anti-Macron protests' *The Guardian* (17/11/2018) <<https://www.theguardian.com/world/2018/nov/17/french-protester-killed-accident-anti-fuel-tax-blockade>> accessed 02.03/2019

<sup>388</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979)

<sup>389</sup> Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4) *Philosophy and Public Affairs* 384, 417

<sup>390</sup> This is not to say that it is *impossible* that a crowd of aggregated individuals can create a moral argument which is in some way distinct from, and greater than, the sum of its parts. Writers such as Rya Wall have discussed the ways in which crowds generate atmospheres, or affects, which cannot readily be explained away by individuation. It allows crowds to represent in some way a populace, a voice of the people, which is beyond the capacity of any one individual protester as moral interlocutor. It may be possible to interpret the moral meanings of these crowds in a similar manner to how this is done when interpreting the moral meanings of individual protesters. However, the practical and empirical question of how this can be done is not necessarily clear, and raises questions which fall outside the scope of the current thesis. Rya Wall, I. *Law and Disorder* (Abingdon, Routledge 2021)

<sup>391</sup> Varda, S.J. 'Sit-in as argument and the perils of misuse' [2019] *Argumentation and Advocacy* <<https://doi.org/10.1080/10511431.2018.1528122>> accessed 24/03/2022

argues, their “specific” claims regarding the proposed amendments “lacked meaningful substantiation,” as those amendment would only provide piecemeal and ineffective means of addressing broader problems of firearms circulation and the risk of violence.<sup>392</sup> Further, the means of protest chosen were incoherent. Sit-ins imply arguments firstly that the protesters lack the power to seek redress through other (institutional) means, and secondly, “sit-ins traditionally critique the exclusions of the current deliberative regime:” that is, they imply an argument that the institutional means of redress exclude the protester, are inadequate, and fail the requirements of justice.<sup>393</sup> Here, the legitimacy claims of the congresspeople were unpersuasive both because of the unclear substantive moral claims regarding their aims, and because their method of counterclaim was undermined by their own involvement and political power within the legislature. This does not mean, however, that the protest was *not* a moral argument: it merely presents a cautionary tale of the need to choose carefully the substantive moral claims being made, and the means through which those claims are presented through protest.

Some actions that might broadly be described as protest – riots, perhaps – seem to lack clear moral narratives and impetus, and so present even less coherent moral arguments.<sup>394</sup> An example might be the 2011 London riots, which have been notoriously difficult to interpret due to their sporadic manifestations and lack of discernible narrative. Widespread looting and a lack of protest discourse suggested an apolitical form of public disorder, rather than a political protest as it is generally understood.<sup>395</sup> This would in turn render such protests unintelligible as moral dialogue under the relatively narrow confines of the legitimacy claims heuristic. One simple response to this objection might be that indeed, to the extent that some protesters articulate their moral claims (if any) unintelligibly, they constitute poor moral claims and deserve little normative consideration as such: this would not pose a significant

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<sup>392</sup> *Ibid*, 8

<sup>393</sup> *Ibid*

<sup>394</sup> Hulme, T.E. (tr) Sorel, G. *Reflections on Violence* (Peter Smith, New York 1941), 100-125; Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 22-25. This also poses strategic disadvantages: Chenoweth, E. and Stephan, M.J. ‘Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict’ (2008) 33 (1) *International Security* 7

<sup>395</sup> The Independent, ‘The lessons to be drawn from mindless violence’ (09/08/2011) <<https://www.independent.co.uk/voices/editorials/leading-article-the-lessons-to-be-drawn-from-mindless-violence-2333987.html>> accessed 15/10/2019

objection to those protests which do indeed make identifiable moral claims persuasively.<sup>396</sup> Some moral arguments are, simply put, more considered than others.

However, a perhaps more nuanced approach would be to recognise that even confused or unpalatable protest may nonetheless be grounded in certain moral claims, however poorly articulated. Gilman-Opalsky theorises that revolts and rebellions in themselves, even absent concomitant manifestos, are a physical manifestation of “philosophy from below.”<sup>397</sup> Likewise, Charles Tilly refers to collective violence as a “kind of conversation,” dependent upon the socio-political milieu in which those actions take place.<sup>398</sup> Contra the view that violence represents a lack of communication, widespread or even seemingly random protest action at the very least suggests, and conveys, the existence of some perceived underlying social or moral grievance sufficient to justify the cost-heavy behaviours involved in these protest actions.<sup>399</sup>

With reference again to the seemingly-apolitical 2011 London riots, as an example of this, Lewis et al’s interviews with participants arrested during the events suggest a number of overlapping political and moral grievances, founded in inequality, which motivated engagement. These included economic deprivation, socio-political racialisation, and distrust of the police and wider criminal justice system.<sup>400</sup> In certain cases protest action may voice moral outrage inarticulately, requiring greater work to decipher a coherent meaning, but this does not therefore entail that such action necessarily occurs without meaning: it could be likened to a sincerely-felt but poorly-delivered moral argument. This example is also illustrative of the fact that some protests may not clearly or consciously target specific laws as flawed legitimacy claims at the time: they may only seem to kick against a latent perception of

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<sup>396</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 417

<sup>397</sup> Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 26

<sup>398</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 6

<sup>399</sup> Gurr, T.R. *Why Men Rebel* (40<sup>th</sup> anniversary paperback edn Routledge, Abingdon 2016)

<sup>400</sup> Lewis, P., Newburn, T., Taylor, M., McGillivray, C., Greenhill, A., Frayman, H. and Proctor, R. ‘Reading the riots: investigating England’s summer of disorder’ *Reading the riots. The London School of Economics and Political Science and The Guardian, London, UK* (2011) <<http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots%28published%29.pdf>> accessed 27/01/2020; Kawalerowicz, J. and Biggs, M. ‘Anarchy in the UK: Economic Deprivation, Social Disorganization, and Political Grievances in the London Riot of 2011’ (2015) 94 (2) *Social Forces* 673. See Chapter 2 for a further discussion on the London Riots and legitimacy claims.

illegitimacy, the nature of which takes more time and consideration to analyse in retrospect.

We can see from empirical research on protest policing the importance of treating protesters as participants in dialogue, and of the police actively engaging as interlocutors in that dialogue.<sup>401</sup> Gorringe, Stott and Rosie have observed how the more violent tactics of police during the 2011 London Riots failed to reflect the guidance provided in the Association of Chief Police Officers' (ACPO) guidance manual, *'Keeping the Peace.'*<sup>402</sup> This undermines many of the practical (and perhaps moral) benefits of policing through consent and dialogue. Recent research of Police Liaison Teams' use of dialogic public order policing in the Metropolitan Police Service by Kilgallon demonstrates that protest policing tactics that focus on dialogue and communication with protesters can help to improve capacity for public order management, facilitate self-regulation of the protest crowd, and de-escalate both protester and police use of violence.<sup>403</sup> In short, by treating protesters as participants in fair and open democratic dialogue, the state and its agents can actively mitigate the risk of violence which is exacerbated through distrust of the police and the state's own escalation of violence.

A related but separate objection might be that some participants (particularly in cases of riot) lack the "good faith" one expects from moral discourse. One response to such a comment might be that the state itself does not need to act in good faith for its laws to make claim to legitimacy: it merely needs to make coherent claims.<sup>404</sup> Why therefore should we demand "good faith" in the moral debates of protesters? A more nuanced response would be to say that "bad faith" protests can still produce effective

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<sup>401</sup> For a recent discussion of dialogic public order policing, including an ethnography of Police Liaison Teams in the Metropolitan Police Service in London, see: Kilgallon, A. *Performance and Dialogue - An Ethnographic Study into Police Liaison Teams* (PhD thesis, University of Leeds 2019)

<sup>402</sup> ACPO, *Manual of guidance on keeping the peace.* (NPIA, London 2010)

<sup>403</sup> Kilgallon, A. *Performance and Dialogue - An Ethnographic Study into Police Liaison Teams* (PhD thesis, University of Leeds 2019); Gorringe, H., Stott, C. and Rosie, M. 'Dialogue Police, Decision Making, and the Management of Public Order During Protest Crowd Events' (2012) 9 (2) *Journal of investigative psychology and offender profiling* 111

<sup>404</sup> Green, L. 'Review, Philip Soper: The Ethics of Deference: Learning from Law's Morals [2002] *Notre Dame Philosophical Reviews* <<https://ndpr.nd.edu/news/the-ethics-of-deference-learning-from-law-s-morals/>> accessed 15/10/2019



critiques of a law's illegitimacy: they just fail to show that the form of protest itself is morally justified. Again, we can distinguish the two separate functions of protest under the legitimacy claim heuristic: the first is to critique the state's claims for obedience, and the second is to demonstrate that the form of protest itself is justifiable. If a protest is in some way delivered in "bad faith," it is the latter component which is in question, but not necessarily the first. A critique of the state (however incoherent or difficult to interpret) can still have weight as a moral argument if there is an identifiable grievance to be stated.

Presumably what chiefly matters for protest dialogue to be in "good faith," and therefore justifiable, is for it to meet certain ethical or moral criteria. It is certainly possible that protest can constitute "communicative action," in the sense Habermas discusses, being an emancipatory communicative act capable of providing reasonable argument.<sup>405</sup> Whether any given protester's actions (especially violent actions) are coherent with the moral principles to which they too make appeal, and are in keeping with the discourse ethics necessary for reasonable discussions on normative rationality, are matters for discussion in Chapters 5 and 6.<sup>406</sup>

### Illustrative cases of legitimacy claims in protest

What follows are some illustrative examples which demonstrate how protesters refer to constitutional moral principles, cited by the state, through their activism – including in instances of lawful protest, and civil disobedience. Although of course protesters may not explicitly state their arguments as being "legitimacy counterclaims," it is evident that they can be understood through this device, and that it may be the most suitable means of interpreting competing claims to moral legitimacy in such cases.

Firstly, the Black Lives Matter protests, predominantly in the US but also across other democratic states, are a modern and vibrant example of this legitimacy claim reasoning being discernible in social activism. Lebron discusses the rise of the movement from its historical foundations and formative ideologies, dating back to the nineteenth

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<sup>405</sup> Habermas, J. *Theory of Communicative Action* (Polity Press, Cambridge 1989)

<sup>406</sup> Lenhardt, D. and Nicholsen, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990)



century. Frederick Douglass, when denouncing slavery in nineteenth century America, was explicit in juxtaposing the moral claims of the US Constitution from the reality of slavery. Douglass did not take at issue the supposed founding axioms of the American constitutional morality, such as equality among men.<sup>407</sup> Rather, his highlighting the “moral cowardice” of white citizens in northern states prior to the Civil War was part of an attempt to get “America to act more in accord the moral principles on which it was founded”.<sup>408</sup> This is a direct appeal not to his own moral axioms per se, but those explicitly enshrined by the constitutional morality of the state in question. A century later, during the Civil Rights Movement, the same observations were made of the legitimacy claims made by US states, and the federal government, with regard to the inconsistency between segregation and Jim Crow laws, and the foundations of equality and liberty to which those governments made appeal.<sup>409</sup>

This historical groundwork informs the moral argumentation of the protests of today’s Black Lives Matter movement. Appeals are made directly to the state’s claim to moral principles of liberty and equality, in juxtaposition to the failure to meet those principles, leading to protest as a critique of this perceived legitimacy deficit. Lebron states that it is one of the aims of BLM activists to highlight this hypocrisy – the state glorifying equality and liberty under the rule of law, whilst preserving the reality of systematic discrimination and the impunity of racist violence. It is this hypocrisy, Lebron explains, that gives the movement ammunition for its moral counterclaims against the state:

American democracy cannot claim for itself the title of a liberal, well-ordered democracy so long as blacks are so often killed with impunity by private citizens and state agents, or so long as they can earn lower incomes simply because of

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<sup>407</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 12

<sup>408</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 7-13

<sup>409</sup> Russell, R. ‘Black Lives Matter: Toward a Modern Practice of Mass Struggle’ (2016) 25 (1) *New Labour Forum* 34; Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 100-122

their skin color, or so long as their children receive substandard education because of their ancestors.<sup>410</sup>

This is neither simply an appeal to rights, nor an attempt to advance a unilateral political agenda on behalf of a specific minority group.<sup>411</sup> Rather, a core part of the argument is to accept the axioms of equality, justice and democracy, “while soundly and roundly rejecting the distortions and corruptions” of those principles in the everyday structural injustices of American society.<sup>412</sup> The state’s constitutional moral axioms are accepted, but the actions (and failures) of the US government are deemed to be in contradiction to those legitimating principles: it is this moral incoherence that means the US “cannot claim for itself the title of a liberal, well-ordered democracy” capable of making coherent claims for obedience. In this way, protest action acts as moral dialogue, highlighting this legitimacy claim failure on the state’s part, and attempting to shame policy makers and the public at large in light of this hypocrisy.

Contemporary examples in other jurisdictions also demonstrate that the heuristic device of legitimacy claims helps us to understand the way in which moral dialogue is framed through protest. Extinction Rebellion, for example, is a non-hierarchical, network-based social movement predicated on environmental injustice.<sup>413</sup> Their aim is to highlight government hypocrisy and lack of accountability regarding their failures to implement the changes necessary to safeguard the freedoms and liberties of future generations, and the systemic inequalities which climate destruction wreaks upon the globe.<sup>414</sup> Their nonviolent protests and acts of civil disobedience are employed specifically to draw attention to the injustices and hypocrisy of nation states that make claims to principles such as fairness, equality, security and justice, whilst perpetuating climate injustice. In their *Handbook*, their ‘Declaration of Rebellion’ makes a number

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<sup>410</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 143

<sup>411</sup> Volk, C. ‘On a radical democratic theory of political protest: potentials and shortcomings’ (2018) 21 *Critical Review of International Social and Political Philosophy* 1

<sup>412</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), xxi

<sup>413</sup> Extinction Rebellion ‘About Us’ *Extinction Rebellion* (2019) <<https://rebellion.earth/the-truth/about-us/>> accessed 27/08/2019

<sup>414</sup> Extinction Rebellion ‘FAQs’ *Extinction Rebellion* (2019) <<https://rebellion.earth/the-truth/faqs/>> accessed 27/08/2019

of explicit moral arguments which are made in a manner analogous to, and capable of interpretation through, the legitimacy claim dynamic. They state “democracy” as one of the “values” to which appeals are made, alongside “truth,” and the continued existence of life on our planet. They then proceed to argue that “when government and the law fail” these legitimating moral axioms, it is “the right of citizens to seek redress,” in order to “restore dutiful democracy” and “prevent crisis.” As with legitimacy claims, moral coherence is a crucial refrain in their rhetoric: mass extinction “can no longer be ignored, denied or go unanswered by any beings of sound rational mind, ethical conscience, moral concerns or spiritual belief.”<sup>415</sup> Without referring explicitly to “legitimacy claims” per se, the concept is raised with reference to moral claims to obedience and, on failure to meet those claims, an equal and opposite moral claim to disobedience.

The Occupy movements show that not only the claims made by protesters, but also the very methods they employ, are based upon certain claims about the constitutional morality, and what it means to be a liberal democracy.<sup>416</sup> Occupy movements protest against a perceived legitimacy deficit in the growing neoliberal governance of (particularly Western) states, running contrary to received understandings of accountability, transparency, and equal regard concomitant with liberal democratic theory.<sup>417</sup> But as Prentoulis and Thomassen argue, the methods employed, such as reclaiming public spaces, using a horizontal, non-hierarchical structure, and participatory egalitarianism within the organisation, are reflective of their liberal-democratic ethos just as much as their claims against the injustices caused by neoliberal governance.<sup>418</sup> The aspiration of representing the “99%” has required a flexible but proactive approach to ensuring participant inclusivity and equality, which is necessary for a movement which wishes to be taken seriously as espousing those

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<sup>415</sup> Extinction Rebellion, *This Is Not A Drill: an Extinction Rebellion Handbook* (Penguin, London 2019), 1-2

<sup>416</sup> Calhoun, C. ‘Occupy Wall Street in perspective’ (2013) 64 (1) *The British Journal of Sociology* 26

<sup>417</sup> Zlobina, A. and Gonzalez Vazquez, A. ‘What is the Right Way to Protest? On the Process of Justification of Protest, and its Relationship to the Propensity to Participate in Different Types of Protest’ (2018) 17 (2) *Social Movement Studies* 234, 234

<sup>418</sup> Prentoulis, M. and Thomassen, L. ‘Political theory in the square: Protest, representation and subjectification’ (2013) 12 (3) *Contemporary Political Theory* 166

same moral principles of inclusivity and equality.<sup>419</sup> This again demonstrates that these protesters are not simply concerned about critiquing the legitimacy claims of governments, but are also eager to comport themselves in a manner intentionally consistent with the democratic, moral principles to which they make appeal – deliberation, consent, equal concern and horizontal power-sharing – that is, to make coherent legitimacy counterclaims as democratic protesters.<sup>420</sup>

In Hong Kong, pro-democracy protesters in 2019 were vocal about their concerns that the government was unwilling to uphold the moral constitutional principles of liberty and the rule of law to which it made claim, with regard to the extradition laws it threatened to implement.<sup>421</sup> Interestingly, previous protests in Hong Kong over urban development showed a similar interest, on behalf of participants, to defend moral principles believed to be crucial to the constitutional morality of Hong Kong, as ethnographic studies and interviews from Lejano et al demonstrate. Despite being a loose and highly heterogeneous network of protesters, with different narratives as to why they participated, as previously stated, all participants in the study claimed that principles of justice and democracy were foundational moral reasons for their participation.<sup>422</sup> The more contemporary pro-democracy protests take this even further. Given the uncomfortable dichotomies within the “one country, two systems” approach the executive of Hong Kong takes – claiming democratic legitimacy at the regional level, but under the wider auspices of the People’s Republic of China, a non-liberal democratic state – overtly questioning the government’s adherence to principles of democracy, freedom, accountability, and the rule of law, has been a crucial motivational factor for protest activity and is a core concern of the protesters.<sup>423</sup> The protests very clearly show public distrust in the incoherence of the constitutional

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<sup>419</sup> Maharawal, M.M. ‘Occupy Wall Street and A Radical Politics of Inclusion’ (2013) 54 (2) *The Sociological Quarterly* 177

<sup>420</sup> Delmas, C. ‘Disobedience, Civil and Otherwise’ 2017) 11 (1) *Criminal Law and Philosophy* 195, 202

<sup>421</sup> Dapiran, A. ‘China is looking for a quick economic fix in Hong Kong. It’s missing the point’ *The Guardian* (30/07/2019) <<https://www.theguardian.com/commentisfree/2019/jul/30/china-economic-hong-kong-carrie-lam>> accessed 20/8/2019

<sup>422</sup> Lejano, R., Chui, E., Lam, T. and Wong, J. ‘Collective Action as Narrativity and Praxis: Theory and Application of Hong Kong’s Urban Protest Movements’ (2018) 33 (3) *Public Policy and Administration* 260, 269

<sup>423</sup> BBC, ‘The Hong Kong protests explained in 100 and 500 words’ (27/08/2019) <<https://www.bbc.co.uk/news/world-asia-china-49317695>> accessed 27/08/2019

moral claims made by the executive: on the one hand making democratic claims to legitimacy, and on the other hand, authoritarian claims for obedience.<sup>424</sup> Although modern protest networks do not necessarily demonstrate one unified message or approach to making legitimacy claims, comprised as they are of multiple heterogeneous individuals and groups, a decipherable pattern of claims, made by individual protesters, to constitutional moral principles and criticisms of perceived legitimacy deficits, can be found across the movement.<sup>425</sup>

The foregoing examples serve to show that non-revolutionary democratic protests, both historical and contemporary, have appealed to moral principles to fight against perceived unacceptable deviations from the constitutional morality of the state. Though not explicitly describing their arguments as “legitimacy claims,” in those exact terms of art, popular, successful protest movements are persuasive when appealing to commonly held and widely respected moral principles, and demonstrating literacy of the constitutional settlements in which they are situated when arguing that there is inconsistency, hypocrisy, and injustice on behalf of the administration.

### Chapter 3 Conclusion

Protest is widely acknowledged to serve its oft-cited constitutional or political functions, of accountability, transparency, democratic dialogue, and the preservation of certain political and civil rights. But crucially for the purposes of this research, protest also serves firstly to critique the legitimacy claims of the state, and secondly to posit its own legitimacy claims on behalf of the protest movements and activists in question. In non-revolutionary protest, it is a legitimacy claim to what must be done to correct the broken moral reasoning for obedience posited by the state. As Lebron discussed with relation to the ascendancy of Black Lives Matter protests:

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<sup>424</sup> The Guardian ‘China says Hong Kong violence “totally intolerable” (02/07/2019) <<https://www.theguardian.com/world/2019/jul/02/chinese-media-calls-for-zero-tolerance-after-violent-hong-kong-protest>> accessed 02/07/2019

<sup>425</sup> Greenwood-Reeves, J. ‘The Democracy Dichotomy: Framing the Hong Kong 2019 Street Protests as Legitimacy Counterclaims against an Incoherent Constitutional Morality’ (2020) 21 (1) *Asia-Pacific Journal on Human Rights and the Law* 35

...our standards of equal liberty and protection under the law to which we, as a nation, claim to be committed, tend to falter and collapse when blacks depend on those standards and commitments.<sup>426</sup>

Non-revolutionary political protest against the state is intelligible, according to rational normative understandings of practical reasoning, if it is in pursuit of those moral principles to which the state and the protesters ultimately aspire: even under Raz's more conservative service conception of legitimacy, the law's legitimacy depends upon its ability for subjects to act within "reason" as moral agents.<sup>427</sup> When the law fails to allow moral agents to live within moral reason, due to systematic moral logical failures between moral axioms and the state's actions, protest – in its various manifestations – is rationally justifiable and can be a means of addressing this breach of legitimacy.

The question here is: can violent protest, given its evident risks to moral principles such as liberty, security, and justice, *also* make such legitimacy claims and counterclaims? This question leads us to the discussion on violent protest, in the next Chapter, before in the subsequent Chapters an analysis can be given of the coherence, if any, that violence can maintain within an understanding of protest as moral constitutional dialogue.

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<sup>426</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 2

<sup>427</sup> Raz, J. 'Authority and Consent' (1981) 67 (1) *Virginia Law Review* 103, 105;

## Chapter 4: Violent protest as a legitimacy counterclaim in democratic constitutions

### Overview

This Chapter firstly reflects on “violence” and its conflicted use in political and legal theory; and secondly, it places violent protest within the same legitimacy claim framework as peaceful protest, as per the preceding Chapter. It begins with a critical examination of existing definitions of violence, specifically within a moral or political context, as being framed around either a) actions and motivations, or b) targets and victims. It can be demonstrated that a non-definitional, paradigmatic approach to political violence is preferred for the purposes of this research, so as to prevent arbitrary definition criteria from excluding potentially salient cases of violence, and to ensure the focus is kept on normative consequences of violent protests.<sup>428</sup> There will subsequently be an overview of the roles and purposes of violence in political protest, including symbolic, instrumental and opportunistic protest violence.<sup>429</sup> Violent protest will then be framed using the same legitimacy claims heuristic as the previous Chapter: it is demonstrated that violent protest can also be a means of expressing disdain for a perceived deficit in legitimacy on the part of the state. This framing of violent protest as a legitimacy counterclaim will be evidenced in a selection of illustrative case studies of violent protests which demonstrate the same logics being applied in practices and discourses of violent dissenters.

This framing of violent protest provides an important theoretical backdrop for later critical engagement with the moral coherence of using violence, instrumentally or demonstratively, under the constitutional moralities of democratic states: in short, whether the use of violence can ever be justified in pursuit of the moral aims to which legitimacy claims appeal. Chapters 5 and 6 explore whether violent protest can be justified according to the logics of constitutional morality. As such this Chapter does

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<sup>428</sup> For the use of a “paradigmatic” approach see Audi, R. (ed) *The Cambridge Dictionary of Philosophy* (Cambridge University Press, New York 1995), 558

<sup>429</sup> Feierabend, I.K., Feierabend, R.L. and Gurr, T.R. (eds) *Anger, Violence and Politics: Theories and Research* (Prince Hall, Englewood Cliff NJ 1972); Gurr, T.R. *Why Men Rebel* (40<sup>th</sup> anniversary paperback edn Routledge, Abingdon 2016)

not seek to justify the use of violent protest in any given example: it simply frames violence as a method of communication in protest, and specifically in the legitimacy counterclaims of protesters.

### Definitions of violence

This section details how various scholars have attempted to define violence for the purposes of researching violent protest. It will demonstrate that writers often focus either on actions and intentions, or on victims; and that in neither case can such restrictive definitional approaches cover the wider conceptualisations of violence needed to ensure that all relevant cases can be included in analysis.

Different typologies and definitions of “violence” can be found across legal, sociological, and political literature. Raymond Williams noted that its use varies in social and historical context: whether one takes violence to mean “violation,” “unruliness” or “unlawfulness,” or mere infringement of the rights of others, violence can only be understood in terms of the context of the society in which it belongs.<sup>430</sup> Williams noted that society itself is subject to continuous contention, and that violence (from individuals or collective actors, especially the state) is a fundamental underlying presence even at times of ostensible peace.<sup>431</sup> Violence, then, need not be considered something extrinsic or alien to social life. As Charles Tilly wrote with relation to collective political violence, we are often trying not to identify violence in the abstract, but socially unacceptable violence: “in choosing political regimes, to some extent we also choose among varieties of violence.”<sup>432</sup> The question then becomes one of identifying instances of violence that are acceptable or unacceptable, and normal or abnormal.

Given this research’s state-centric models of constitutional morality and legitimacy claims, one tempting starting point would be to adopt the view that the state’s

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<sup>430</sup> Williams, R. *Keywords: a Vocabulary of Culture and Society* (3<sup>rd</sup> edn Fontana, London 1988)

<sup>431</sup> Lawrence, B.B. and Karim, A. (eds) *On Violence: A Reader* (Duke University Press, Durham and London 2007), 106; Malcolm, N, (ed) Hobbes, T. *Leviathan* (Oxford University Press, Oxford 2012)

<sup>432</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 9



monopoly of legitimate force, and violence mandated by the state in accordance with law, is socially normal and generally acceptable.<sup>433</sup> Under this conception of the state, violence belies the state; and indeed in a Weberian sense it defines the very existence of the state.<sup>434</sup> Weber's oft-cited claim that a state is not defined by its functions, but its monopoly on using *legitimate physical force* within a given territory, rather begs the question: are theorists of political violence trying to define violence writ large, or simply *illegitimate violence*?<sup>435</sup>

Any distinction between legitimate or illegitimate violence predicated on whether it is used normally and exclusively by the state within its territory fails, however, to account for a number of limitations to the Weberian model – and indeed most state-centric models of legitimacy or violence.<sup>436</sup> For example, the Weberian model struggles to explain or hold to account transnational violence, and transnational actors.<sup>437</sup> It struggles with the transnationality of new forms of violence, such as violence to data, the inter-jurisdictional nature of which is not so neatly contained within the boundaries that the Weberian model requires.<sup>438</sup> It also presents a reductionist and tautological conception of legitimacy and legitimate violence: that the state is defined by its monopoly of the legitimate use of violence, and that its violence is legitimate.<sup>439</sup> Tilly further argues that distinguishing “lawful force” from “unlawful violence” is politically arbitrary and conceptually imprecise, given the propensity for state actors to rewrite laws on the use of force, and to employ force which is at times either morally and legally difficult to justify.<sup>440</sup> Other scholars have explored these

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<sup>433</sup> See for example Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 8

<sup>434</sup> Owen, D.S. and Strong, T.B. (eds) *Weber, M. The Vocation Lectures: "Science as a Vocation", "Politics as a Vocation"* (Hackett Publishers, Indianapolis 2004)

<sup>435</sup> *Ibid*, 33

<sup>436</sup> Hunt, A. *The Sociological Movement in Law* (Macmillan, London 1978), 130-133. With regard to its limitations in international law see Schachter, O. ‘The Decline of the Nation-State and its Implications for International Law’ (1997) 1 (36) *The Columbia Journal of Transnational Law* 7

<sup>437</sup> Albanese, J.S. (ed.) *Transnational Crime* (de Sitter Publications, Whitby, ON 2005)

<sup>438</sup> Perloff-Giles, A. ‘Transnational Cyber Offenses: Overcoming Jurisdictional Challenges’ (2018) 43 (1) *The Yale Journal of International Law* 191

<sup>439</sup> Mercier, T.C. ‘Resisting legitimacy: Weber, Derrida, and the fallibility of sovereign power’ (2016) 6 (3) *Global Discourse: Legitimacy* 374, 376-377; Derrida, J.; Anidjar, G. (ed) *Acts of Religion* (Routledge, London 2002), 272–277

<sup>440</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 27

defects in much greater detail than can be afforded here. For our current purposes, we can conclude that defining “violence” based on its legitimacy, legality, acceptability, or normalcy under a Weberian, state-centric model, leaves open too many conceptual and practical questions to be helpful to the present analysis.

Legal definitions of “violence” similarly often prove unilluminating, as they attempt to categorise certain actions solely for the purposes of specific, codified crimes or torts. In English law, for example, violence has no authoritative source of its definition. Instead, where violence is a component of a particular criminal offence, it is given its legislative definition (if one exists) for that specific offence only. For the purposes of the Public Order Act 1986 for example, “violence,” for the offences of riot, violent disorder and affray (ss.1-3 respectively), has a brief definition at s.8 which does little to set the boundaries for the concept:

“violence” means any violent conduct, so that—

- (a) except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons, and
- (b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).<sup>441</sup>

Defining violence with reference to “any violent conduct,” is both problematically broad and philosophically tautological. The statute refers immediately back to “violent conduct towards property as well as violent conduct towards persons.” Apart from telling us that violence to property is also included (except in cases of affray), this

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<sup>441</sup> Public Order Act 1986. Elsewhere, 2000 s1. of the Terrorism Act defines terrorism as comprising a qualifying act which seeks to influence government or intimidate the public, in advance of a religious, political or ideological cause. Those qualifying acts under s.1 include: serious violence against a person, serious damage to property, endangerment of a person’s life, creating a serious risk to the health or safety of the public or a section of the public, or seriously interfering with or seriously to disrupt an electronic system. “Violence” and “damage” remain undefined, even under the interpretive provisions of s.121 of the Act. This is a pattern which recurs across many criminal law statutes seeking to criminalise purportedly violent acts: Mead, D. *The new law of peaceful protest: rights and regulation in the Human Rights Act era* (Hart, Oxford 2010), 243-244

defines violence in a very circular fashion. That it can include conduct where the defendant is neither “causing or intending to cause injury,” but “any other violent conduct,” leaves an enormously open-ended conception of violence that gives us little in terms of defining what that “violent conduct” could, and could not, entail. Perhaps purposefully, the legislation was drafted specifically to be broad, in order to apply to as many salient cases as possible. Mead notes that it is left to the magistrate or jury to make out “violence” as a question of fact, not law, in any given case.<sup>442</sup>

The law on breach of the peace does little to help us determine a clear definition of violence. In the landmark case, *Howell*, Lord Justice Watkins laid down the rule that a breach of the peace could be established, empowering police constables to effect arrests and other measures necessary for its prevention,

whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.<sup>443</sup>

Here, “harm” (or fear of such harm, whether to persons, or to property in front of its owner) is the focus of analysis, rather than “violence.” Subsequent case law suggests to us what seems intuitively correct: “violence” is often used by judges as a shorthand or substitute for “harm,” in the context of breach of the peace, and this perhaps reflects our received understandings that this is what violence paradigmatically entails.<sup>444</sup> But there is no effort made to explicitly state that the terms are interchangeable

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<sup>442</sup> Mead, D. *The new law of peaceful protest: rights and regulation in the Human Rights Act era* (Hart, Oxford 2010), 244. In *R v Brodie* [2000] Crim LR 777, the Court of Appeal suggested that context is paramount in determining a finding of violence as a question of fact. In that case, walking behind a victim at night with a baseball bat created an “aura of menace” sufficient to determine a threat of violence for the purposes of the s.2 Public Order Act 1986 offence of violent disorder. Once again, the language of an “aura of menace” seems if anything to take us even further away from a scientific, or at least conceptually clear, conception of violence itself.

<sup>443</sup> *R v Howell* [1982] QB 416 [427] (Watkins LJ)

<sup>444</sup> This includes cases where the defendants act in a disorderly fashion without threatening to cause harm, but might in doing so naturally provoke others to cause such harm. “This line of authority shows that so long as the Queen's peace is put at risk by the disorderly activities of the person against whom the justices are invited to exercise their bindover powers, then it is not necessary to show that that person put anyone in bodily fear if his disorderly conduct would have the natural consequence of provoking others to *violence*.” *R v Morpeth Ward Justices ex p Ward* (1992) 95 Cr. App. R. 215 [219] – [220] (Brooke J) (emphasis added).

conceptually. Other than identifying targets (persons and their property), this line of case law leaves more questions unanswered. Seldom is it asked what level of “harm” amounts to “violence,” whether they are synonymous, or whether it is specifically the unlawfulness of the harm anticipated that renders it “violent” – or whether in fact we should stop using the term “violence,” given that *Howell* relies explicitly on harm.<sup>445</sup> We are again expected to know what violence is when we see it.

Outside of this public order framework – from which our legal understanding of protest violence chiefly derives, in England and Wales – English criminal law statutes barely refer to violence as a term of art, per se. Violent crimes under the Offences Against the Person Act 1861, such as s.47 on assaults occasioning actual bodily harm, and s.18 on grievous bodily harm, make no mention of violence itself. Instead they refer to the outcomes of these offences – that is, bodily harm of some level of severity. Violence itself is not mentioned, or conceptualised, at all. It can be inferred perhaps, from the infliction of damage to another person, but it is not conceived as “violence” within the internal, definitive conceptualisation of the offence.

The case law regarding assault makes some attempt to touch upon “violence,” in that the legal definition requires the victim to apprehend immediate unlawful force against their person. But again, this definition only requires a concept of force, and of persons: violence itself is not a component of the offence. The judicial discussions in landmark assault cases, such as *Burstow and Ireland*, do raise violence and the fear of violence as a shorthand for use and fear of unlawful force: but little is done to explore whether the latter constitute a necessary or sufficient definition of violence as its own concept.<sup>446</sup> In their judgements, neither Lord Craig, nor Lord Steyn, make any attempt

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<sup>445</sup> In the separate case of *Dino Services*, which related to the terms “forcible and violent” for the purposes of theft which were written into an insurance policy, Kerr LJ intimated that violence is an ordinary English word that must entail more than merely the use of force, and not simply the unlawfulness of that force. There must be some quality that renders the force “violent,” as it is commonly understood. However, what that entails is left ambiguous, and as David Mead notes is “itself circular” in its rationale: Mead, D. *The new law of peaceful protest: rights and regulation in the Human Rights Act era* (Hart, Oxford 2010), 243. Further, this case relates to the use of the term “violent” apropos of the specific contract in question, and would therefore in any event be ungeneralisable to criminal or public law conceptions of the term: *Nash (t/a Dino Services Ltd) v Prudential Assurance Co Ltd* [1989] 1 All E.R. 422

<sup>446</sup> *R v Ireland, R v Burstow* [1998] AC 147

to define “violence” except by intuitive reference to use of force against the person. In *Smith v Superintendent of Woking Police*, violence was explicitly used as a shorthand in this way by Lord Justice Kerr, but the discussion around the nature of violence provides little clarity to the concept itself.<sup>447</sup> It was decided that the exact nature of the type of “violence” feared by the victim need not fully be known or comprehended: fear on the part of the victim of some unnamed, unknowable violence is sufficient to constitute as assault. Although rhetorically the judges in these cases are citing “violence” as a shorthand for an assault, they take little time (if any at all) telling us what violence means. If anything, the discussion in these cases takes us further away from a definition of violence for the purpose. While it is assumed by these judges (not unreasonably perhaps) that causing injury, or fear of injury to a person, and thereby committing assault, is a form of violence, this assumption does little to give us a meaningful concept of violence beyond what the judges state as a matter of intuition, and even then, only for the purposes of *these particular offences* in question.

As such, relying on legal definitions proves unhelpful in two important ways. Firstly, it only provides an indication of what “violence” means for the purpose of a specific law, usually a criminal offence, and tells us little else about the nature of violence – and certainly protest violence – more broadly. Secondly, even these partial definitions are often missing, circular, or incomplete in the legislation itself, or in the common law. We need to look beyond these narrow, tautological legal definitions if we are to understand violence as a moral concept, rather than a purely legal one.

That said, many of the greatest philosophers who have discussed violence in more abstract terms – Benjamin, Arendt, Butler, Sorel – have avoided spending any great deal of time trying to pin down precisely what it entails. Whereas (as discussed below) sociological writers such as Chenoweth and Stephan try to be precise, to operationalise variables for quantitative analysis for specific studies rather than general theory, the

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<sup>447</sup> *Smith v Superintendent of Woking Police* (1983) 76 Cr. App. R. 234. At times the vagueness of the description of violence borders on the gothic: “As it seems to me, there is no need for a finding that what she was frightened of, which she probably could not analyse at that moment, was some innominate terror of some potential violence. It was clearly a situation where the basis of the fear which was instilled in her was that she did not know what the defendant was going to do next, but that, whatever he might be going to do next, and sufficiently immediately for the purposes of the offence, was something of a violent nature...” [238] (Kerr LJ)

more philosophical writers perhaps offer themselves more room for manoeuvre.<sup>448</sup> In his *Critique of Violence*, Benjamin makes no attempt to define violence itself.<sup>449</sup> He analyses the dichotomies inherent in the concept of political violence: being just or unjust, a means or an end, legitimate or illegitimate in its historical origin, and so on. What violence actually means, however, is left unsaid. It is implicit throughout the text that Benjamin considers force to be a necessary component of violence; yet he also problematises strike action as being a form of violence, without explicitly detailing what precisely is violent in the nature of withdrawing labour. Benjamin seems to rely on an intuitive understanding of violence, rather than explaining what the term specifically entails.

In a similar vein, Sorel's *Reflections on Violence*, one of the most influential texts on class struggle and revolution, and a cornerstone of twentieth century thinking regarding political violence, similarly speaks much of the violence of the strike, and specifically the general strike.<sup>450</sup> He does not, however, spend much time telling us what violence means, in this way. He describes both the use of physical force and the withdrawal of labour as being "violent," although he does not explicitly do so to provide a definition. He explains how "force" is called "violence," rhetorically but also perhaps conceptually, when that force is used contrary to or against the existing social and political order.<sup>451</sup> To that extent we can interpret in Sorel's writings that violence is to be conceived as unlawful force, or perhaps (so as to accommodate withdrawal of labour within this definition), unlawful coercion. It has been argued by Finlay that one interpretation of Sorel is to understand his glorification of violence as being purely instrumental to the preservation of the *nonviolence* of the general strike, and to the overthrow of the existing, violent capitalist system.<sup>452</sup> We are however still left with an uncertain concept of what "violence" actually entails, in precise terms.

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<sup>448</sup> Chenoweth, E. and Stephan, M.J. 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2008) 33 (1) *International Security* 7

<sup>449</sup> Benjamin, W.; Demetz, P. (ed) Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995) 236-252

<sup>450</sup> Hulme, T.E. (tr) Sorel, G. *Reflections on Violence* (Peter Smith, New York 1941)

<sup>451</sup> Hulme, T.E. (tr) Sorel, G. *Reflections on Violence* (Peter Smith, New York 1941), 195

<sup>452</sup> Finlay, C.J. 'Hannah Arendt's Critique of Violence' (2009) 97 (1) *Thesis Eleven* 26

Arendt similarly makes no attempt to define violence in her central text on the issue, *On Violence*.<sup>453</sup> She gives examples that demonstrate that she is chiefly considering actions that cause harm to human beings, including pain, damage and death; and acts which significantly damage or destroy the property of persons.<sup>454</sup> Above all, her conception of violence is based not on its definitive properties, but on its capacity. Namely, Arendt argues that violence cannot generate power, but can only destroy persons, whose collective actions are necessary for the generation and exercise of power: and therefore that violence destroys, rather than generates, power. In this way, Arendt seems to presume (without explicitly stipulating as such) that violence must be defined as causing pain, damage and death to humans, and harm or destruction to personal property, and that it is innately destructive in nature. This seems intuitively correct, of course, and covers the majority of instances of violence which ordinarily spring to mind when one thinks of examples of violence in real life. Yet the absence of a “definition” allows for blurring at the boundaries of the concept. We are left uncertain as to whether this conceptualisation of violence can extend to harms caused by omissions, rather than actions. We are also left uncertain as to whether it could apply to destruction of non-tangible data.

The best attempts to conceptualise violence acknowledge that definition can be the enemy of that conceptualisation, rather than its ally. Butler, in *The Force of Nonviolence*, begins with a candid discussion of how both violence and nonviolence, being essentially contested concepts that are frequently used politically to discredit or commend, respectively, the actions of other political actors, create an intersubjectivity of meaning that evades strict definitions.<sup>455</sup> We must, she says, “accept the difficulty of finding and securing the definition of violence when it is subject to instrumental definitions that serve political interests and sometimes state violence itself.”<sup>456</sup> Violence, she argues, evades definition in part because our usage of the concept is never neutral, but rather, it is always politically charged. Some specific types of violence seem to us to be more obvious, and more important, than others, of course. Any definition of violence that did not identify the “blow” – the “physical violence”

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<sup>453</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970)

<sup>454</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 46-51

<sup>455</sup> Butler, J.P. *The Force of Non-Violence* (Verso, London 2020), 1-7

<sup>456</sup> Butler, J.P. *The Force of Non-Violence* (Verso, London 2020), 7

against persons, of the “one striking and the one struck” – would seem intuitively to fail our understandings of the concept, Butler argues, and would fail to address the violence that we wish to prevent in the world, including domestic violence. Yet we must also accept that there are forms of structural and systemic violence which do not reflect this unilateral, physical dynamic so clearly.<sup>457</sup> Butler makes no further attempt to define violence, beyond this. Instead she turns her focus onto the moral valence of violence, and of nonviolence: their meanings are left as a matter of interpretation.

As such, creating a coherent definition of violence that might be applied universally, or even across only liberal democratic states, has been called “a highly unenviable task”.<sup>458</sup> This frank confession, from Johan Galtung, prefaced his own work on understanding both violence and peace (as its presumed antonym or antithesis). He theorised that violence might be conceptualised beyond such criteria as the actor, their actions, their intentions, and their victims. Instead he sought to consider indirect and structural violence as similarly relevant categories: that any “avoidable insult to basic human needs” could be considered a violence.<sup>459</sup> Theories of systemic violence have of course also developed in numerous other fields of social research, including *inter alia* feminist and Critical Race legal theories.<sup>460</sup>

Writers who specifically focus on political violence and protest violence tend not to incorporate these broader notions of systemic violence within their own typologies, as their subject focus is much narrower. Instead, many writers focus on creating particular typologies of protest or political violence based on categorising actions and intentions: this is particularly the case for social scientists who need to operationalise dependent and independent variables. Tilly, by way of example, categorises acts of “collective violence” on genotypes based on their mechanics, processes and explanations: depending upon how these factors combine, they then create identifiable

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<sup>457</sup> Butler, J.P. *The Force of Non-Violence* (Verso, London 2020), 2

<sup>458</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 168

<sup>459</sup> Though this might preclude categories of violence to, for example, wildlife. Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 171

<sup>460</sup> Mackinnon, C. *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge MA 1987); Crenshaw, K. *Critical Race Theory: the key writings that formed the movement* (New Press, New York 1995)



phenotypes, or specific varieties of political violence, including what he terms as violent rituals, coordinated destruction, or mere opportunistic violence.<sup>461</sup>

Alternatively, one can conceptualise violence not by its instantiation but its targets. Typically, it is accepted that this will include violence to the person.<sup>462</sup> For many, it can include violence to property, which is almost always subject to criminal penalty in liberal democracies.<sup>463</sup> Many writers make this presumption in their own analyses of the meaning of violence, without stopping to explain why. To take but one example, in *The Voice of Violence*, Rhodes defines violence as “wilfully injuring people or damaging property” without further elaboration.<sup>464</sup> It is nevertheless possible to suggest why property is also latently understood to be included as a potential target for “violence,” within liberal democratic thought. Within certain schools of liberal theory, violence to property is conceptualised as an extension of violence to the person. A classical Lockean conception of property being an extension of the natural rights over one’s own person still holds sway in certain quarters.<sup>465</sup> Nozick certainly falls into this justification of property rights in his theory of just holdings.<sup>466</sup> For such theorists, interference with property is tantamount to interference with the person, in its capacity to limit the freedoms of the owner to pursue their own free life.

Under a more nuanced, contemporary conception of property rights, Penner eschews such a purely individualistic notion of property which conceives of property solely as an extension of the inalienable rights of the individual. Instead, he takes an instrumentalist view of property rights: that, although exclusive property rights do

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<sup>461</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003)

<sup>462</sup> Violence to the person is often implied by the mere word “violence.” See for example Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), who makes little attempt to define violence; Dudouet, V., Cunningham, K.G. and Chenoweth, E. ‘Dynamics and Factors of Transition from Armed Struggle to Nonviolent Resistance’ (2013) 50 (3) *Journal of Peace Research* 401, who equate “armed conflict” with “violence” synonymously for the purposes of sociological research. Both texts infer violence to the person without explicitly justifying why, or justifying why they might exclude other forms of violence.

<sup>463</sup> For a general discussion on the definitions of violence as comprising violence to persons and to property, see Sommier, I, Hayes, G. and Ollitrault, S. *Breaking laws: violence and civil disobedience in protest* (Amsterdam University Press, Amsterdam 2019), 216-240

<sup>464</sup> Rhodes, J.P. *The Voice of Violence: Performative Violence as Protest in the Vietnam Era* (Praeger, Westport 2001), 4

<sup>465</sup> Macpherson, C.B. (ed) Locke, J. *Second Treatise on Government* (Hackett, Indianapolis 1980)

<sup>466</sup> Nozick, R. *Anarchy, State and Utopia* (1<sup>st</sup> edn Blackwell, Oxford 1974)

indeed provide the means for securing “our basic individual agency,” our justifications of property rights are also dependent on wider economic, social and political considerations.<sup>467</sup> Legal rights to the exclusive enjoyment of property are morally founded not only on the basic argument for liberty. They are also founded on the wider social and economic benefits which emerge from having a secure system of property rights. As such, aside from the earlier, classical conceptions of property rights, and how violence to property therefore can be conceptualised as a violation of personal right, infringing on the enjoyment of others’ property might be considered a violence that risks preventing society at large from enjoying the collective benefits made possible through systems of property ownership. Given the centrality placed on property rights for the purposes of economic development in capitalist societies, democracies have placed a premium on their protection.<sup>468</sup>

Defining violence by its violation of other peoples’ rights does however overlook the fact that the self may also be a target of violence, and of political violence.<sup>469</sup> A notable example would be the self-immolation of Mohamed Bouazizi, which was widely understood to have been a catalyst for demonstrations which were precursors to the Arab Spring.<sup>470</sup> In the UK and France, public and dramatic acts of self-immolation outside job centres by those denied work or benefits have also been reported.<sup>471</sup> In particular, fatal violence to the self can act as a powerful form of protest: for example, hunger strikes by political prisoners, as was evidenced during the Troubles in Northern

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<sup>467</sup> Penner, J.E. *Property Rights: a Re-examination* (Oxford University Press, Oxford 2020), 199

<sup>468</sup> Leblang, D.A. ‘Property rights, democracy and economic growth’ (1996) 49 (1) *Political Research Quarterly* 5. On whether corporate and state ownership follow the same logics of personal ownership and deserve the same protections as personal property under liberal democratic theory, see generally Millon, D. ‘Theories of the Corporation’ (1990) 1 (2) *Duke Law Journal* 201; Gregory, P.R.; Stuart, R.C. *Comparing economic systems in the twenty-first century* (7<sup>th</sup> edn Houghton Mifflin, Boston 2004)

<sup>469</sup> Grojean, O. ‘Violence Against Oneself,’ in Snow, D.A.; della Porta, D.; Klandermans, B.; and McAdam, D. (eds.) *The Blackwell Encyclopedia of Social and Political Movements* (Blackwell, Oxford 2012); Grojean, O. ‘Self-immolations by Kurdish Activists in Turkey and Europe’ (2012) 25 *Revue d’Etudes Tibétaines* 159

<sup>470</sup> Pugliese, J. ‘Permanent Revolution: Mohamed Bouazizi’s Incendiary Ethics of Revolt’ (2014) 10 (3) *Law, Culture and the Humanities* 408

<sup>471</sup> The Telegraph, ‘Unemployed man sets himself alight outside Birmingham Jobcentre’ (29/06/2012) <<https://www.telegraph.co.uk/finance/jobs/9365087/Unemployed-man-sets-himself-alight-outside-Birmingham-Jobcentre.html>> accessed 04/10/2019; BBC, ‘France Nantes: Man burns himself to death at job centre’ (13/02/2013) <<https://www.bbc.co.uk/news/world-europe-21442879>> accessed 04/10/2019

Ireland in the latter half of the last century.<sup>472</sup> Where protest violence to the self is fatal, it can gather significant international attention and serve a number of important symbolic purposes – especially on themes of martyrdom, shaming, autonomy, and moral authority. Chris Yuill has explored the ways that by reclaiming the “body-as-weapon,” prisoners such as Bobby Sands were able to effect a form of resistance that provided the opportunity to reclaim their bodies as a living, embodied narrative. The hunger strikers were able to overwrite narratives of criminality imposed on their bodies by British military forces, and indeed British political leaders, and instead take authorship of a competing moral narrative.<sup>473</sup> Sands’ hunger strike succeeded in drawing national and international attention to the cause: he would even be elected as an MP, as member of the Anti-H-Block/Armagh Political Prisoner Party, a month before he died.<sup>474</sup> As such, classic victim-oriented definitions of violence – which decry the infringement of the victim’s rights through violence of another, namely the protester – often overlook acts of political violence that can be inflicted consensually upon oneself to great symbolic and instrumental effect, especially from under-resourced minority groups.<sup>475</sup>

There are other potential targets to consider which force us to question whether standard victim-oriented typologies are fit for purpose. For example, in some jurisdictions there is a growing discourse on whether violence to data is a viable concept, depending upon notions of the tangibility of the harm caused.<sup>476</sup> Some commentators such as Thomas Rid have suggested that cyber-attacks in truth facilitate

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<sup>472</sup> Hennessey, T. *Hunger Strike: Margaret Thatcher's Battle with the IRA: 1980-1981* (Irish Academic Press, Newbridge 2013)

<sup>473</sup> Yuill, C. ‘The Body as Weapon: Bobby Sands and the Republican Hunger Strikes’ (2007) 12 (2) *Sociological Research Online* 1 <<https://journals.sagepub.com/doi/pdf/10.5153/sro.1348>> accessed 06/04/2020; Feldman, A. *Formations of Violence: the Narrative of the Body and Political Terror in Northern Ireland* (University of Chicago, Chicago 1991)

<sup>474</sup> CAIN Web Service, ‘Westminster By-election (NI) - Thursday 9 April 1981’ (2022) <<https://cain.ulster.ac.uk/issues/politics/election/rwby1981a.htm>> accessed 30/01/2022

<sup>475</sup> See also the PKK hunger strikes in Turkey: Amnesty International ‘Hunger Strikes in Turkey: A Quiet Crisis’ <<https://www.amnestyusa.org/hunger-strikes-in-turkey-a-quiet-crisis-2/>> accessed 07/04/2020

<sup>476</sup> Rivard, C. ‘Is Computer Data "Tangible Property" or Subject to "Physical Loss or Damage"?—Part 1’ *IRMI* (08/2001) < <https://www.irmi.com/articles/expert-commentary/is-computer-data-tangible-property-or-subject-to-physical-loss-or-damage-part-1>> accessed 04/10/2019

a *reduction* of political violence, as they can only directly damage “technical systems” and not “human operators and managers”<sup>477</sup> Examples such as cyber-attacks which overwhelm government or bank servers are used by Rid to show a *lack* of “violence:” though the term is not clearly defined in the research in question, it is presumed that violence must be perpetrated against physical matter including persons directly, not to (or via) immaterial code. Rid suggests that any violence that could result from hacking – such as the US/Israeli Stuxnet operations, which encoded bugs into Iran’s nuclear enrichment programming, causing many centrifuges to be damaged from 2005-2010 – could only cause harm to persons or property indirectly.<sup>478</sup>

There are two chief criticisms to be levelled against this analysis, elaborated upon by Aaron F. Brantly in his analysis of hacking as both conceptually and realistically violent. Firstly, it depends on a conception of violence “confined to pre-digital static definitions,” which fails to accept how social and historical contexts change the meaning of social concepts such as violence.<sup>479</sup> Once again, as Raymond Williams observed, violence can only be understood in the social context of the society in question.<sup>480</sup> Definitions based exclusively on physicality (of the act or the target) predate social facts that are now relevant to conceptualising violence. This seems short-sighted, as damage to even immaterial code can be irreparable, destructive, and freedom-inhibiting to its original owner – qualities which fit within traditional explanations for the normative significance of violence, but would never have been considered within older, historical definitions.<sup>481</sup>

Secondly, practically and realistically, even if violence to data is only to be considered ancillary to violence to property or persons, the losses and damage that can be caused by attacks on digital information are potentially enormous. Hacking is violent not only

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<sup>477</sup> Rid, T. ‘Cyberwar and Peace: Hacking Can Reduce Real-World Violence’ (2013) 92 (6) *Foreign Affairs* 77, 77

<sup>478</sup> Rid, T. ‘Cyberwar and Peace: Hacking Can Reduce Real-World Violence’ (2013) 92 (6) *Foreign Affairs* 77

<sup>479</sup> Brantly, A.F. ‘The Violence of Hacking: State Violence and Cyberspace’ (2017) 2 (1) *The Cyber Defense Review* 73, 73

<sup>480</sup> Williams, R. *Keywords: a Vocabulary of Culture and Society* (3<sup>rd</sup> edn Fontana, London 1988)

<sup>481</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 168-172

in its “first, second and third order effects, but also in its ability to violently alter the reality of the world” in which we live.<sup>482</sup> Examples include Advanced Persistent Threats (APTs) to military and logistical infrastructure, such as the USTRANSCOM system, and hacking into the coding that operates even ordinary cars owned by members of the public, even when driving. “Violence in the form of a bomb,” Brantly reminds us, “can pale in comparison to the potential for violence achievable by code.”<sup>483</sup> A growing discourse on hacktivism and digital protest movements, such as Anonymous, demonstrates that traditional physical conceptualisations of political violence also need continuously to adapt and grow along with social and technological change.<sup>484</sup>

The difficulty, then, may be in finding a theoretical framework which makes coherent and justified definitions of violence across countless social and historical contexts. As Martin, McCarthy and McPhail suggest in the opening comments of their research into targets of collective violence, conceptual coherence is lacking among sociological scholars when categorising and evaluating instances of violence, and seldom are there direct references to legal definitions in such research.<sup>485</sup> This is inevitable where the research aims and methodologies between different studies are so disparate, focusing on specific forms of violence or causes of violence, and across multiple different jurisdictions.

These competing definitions and conceptualisations of violence, though of great importance in their own fields of research and illustrative of the types of phenomena that might be called violence, may hinder rather than help the course of this particular study. None of these approaches frames their conceptualisations around the “moral

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<sup>482</sup> Brantly, A.F. ‘The Violence of Hacking: State Violence and Cyberspace’ (2017) 2 (1) *The Cyber Defense Review* 73, 75

<sup>483</sup> Brantly, A.F. ‘The Violence of Hacking: State Violence and Cyberspace’ (2017) 2 (1) *The Cyber Defense Review* 73, 87

<sup>484</sup> Coleman, G, *Coding Freedom: The Ethics and Aesthetics of Hacking* (Princeton University Press, Princeton 2013); Coleman, G. *Hacker Hoaxer, Whistleblower, Spy: The Many Faces of Anonymous* (Verso Press, London and New York 2014); Coleman, G. ‘From Internet Farming to Weapons of the Geek’ (2017) 58 (15) *Current Anthropology* 91

<sup>485</sup> Martin, A.W., McCarthy, C. and McPhail, J.D. ‘Why Targets Matter: Towards a More Inclusive Model of Collective Violence’ (2009) 74 (5) *American Sociological Review* 821, 821-823

harm” caused by acts of purported violence.<sup>486</sup> Definition-based approaches can cause difficulty when looking from a rational-normative framework as they can lead to misunderstanding or blurring the quite different normative consequences of violent actions.<sup>487</sup> For example, categorising harms differently based purely on victims may lead to morally dubious conclusions: though violence to the person is often considered more egregious than violence to property, this might not be so if we compare for example the “milkshaking” of a politician to the sabotage of ambulance machinery.<sup>488</sup> Alternatively, a focus on defining violence by actions or intentions can overlook harms committed through omission, or carelessness.<sup>489</sup> What these definitions of violence all have in common is a focus on physical acts, rather than normative consequences: yet it is precisely these normative consequences which give “violence” its distinct quality, over the more mechanical matters of causes, targets, and harms.<sup>490</sup> It appears that focusing on these criteria for the definition of violence would draw attention away from the more pertinent question of the moral significance of violence.

Given that the legitimacy claim heuristic is founded upon consistency with moral principles, this research must eschew arbitrary definitional approaches and seek instead to interrogate whether any purported instance of violence runs contrary to moral principles enshrined in liberal democratic constitutional morality. Here, a paradigmatic approach is preferred, which takes a non-criterial, definition-averse notion of violence, allowing the reader to consider critically whether any instance is close to, or far from, a paradigmatic conception of violence.<sup>491</sup> As stated in the Introduction, for current purposes one could frame a paradigm around certain qualities (without using them as strict criteria). Such features can include, but need not

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<sup>486</sup> Wiinikka-Lydon, J. ‘Mapping Moral Injury: Comparing Discourses of Moral Harm’ (2019) 44 (2) *The Journal of Medicine and Philosophy* 175

<sup>487</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 168-172

<sup>488</sup> Chakraborty, A ‘This Milkshake Spring isn’t political violence – it’s political theatre’ *The Guardian* (21/05/2019) <<https://www.theguardian.com/commentisfree/2019/may/21/far-right-milkshake-nigel-farage-tommy-robinson>> accessed 27/01/2020

<sup>489</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167; Benjamin, W.; Demetz, P. (ed), Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995), 282

<sup>490</sup> Benjamin, W.; Demetz, P. (ed), Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995), 277

<sup>491</sup> Audi, R. (ed) *The Cambridge Dictionary of Philosophy* (Cambridge University Press, New York 1995), 558

necessarily comprise, the threat or use of physical force, or coercion; causing others to apprehend the use of physical force; or causing physical injury to persons, or damage to or loss of property. Some instances of violence may fit the paradigm more closely – throwing a brick at a police van, for example. Others might not be so evidently close to the paradigm, yet still be sufficiently proximate for coherent moral argument with relation to violence and its harms: for example, the ways in which hacktivism can damage data.

This does not create exclusionary criteria but instead examines the extent to which purported acts of violence cause normative harms: that is, whether they frustrate any of the constitutional moral principles in question. Principles of autonomy, dignity, respect, and liberty, the violations of which are fundamental to a normative understanding of violence, are all themselves relatable to grounds of constitutional morality. That is to say, they represent moral grounds to which the state appeals when enforcing its laws.<sup>492</sup> It will make analysis of the constitutional morality of violence more coherent if we allow analysis of normative consequences, rather than arbitrary criteria. For example, unlawful and wilful criminal damage to heavily-insured corporate property might have few onerous normative consequences, while a peaceful strike by ambulance workers might have terrible ones.<sup>493</sup> As such, given that this research aims to analyse the coherence of moral claims when violence can adversely affect moral principles, any instances of violence will be evaluated not on their definitional components but instead their normative consequences, and whether those normative consequences run contrary to principles of constitutional morality. It is the subject of Chapters 5 and 6 to provide this analysis of the normative consequences of violent protest.

## Overview of the roles of political violence

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<sup>492</sup> Martin, A.W., McCarthy, C. and McPhail, J.D. ‘Why targets matter: towards a more inclusive model of collective violence’ (2009) 74 (5) *American Sociological Review* 821; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 400-420

<sup>493</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267; Benjamin, W.; Demetz, P. (ed), Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995), 292

The roles of political violence and violent protest are, to say the least, varied and complex.<sup>494</sup> What follows is an overview of their roles, curated for the purposes of demonstrating their functions, purposes and effects. Broadly one could describe these roles as being demonstrative, instrumental, or incidental with regard to the protester's own political morality.

Political violence perhaps most crucially for current purposes may have demonstrative and expressive roles. This (very broadly and non-prescriptively) means that the purpose, function, or effect of the violent action is communicative. This has already been discussed with relation to nonviolent protest in the preceding Chapter: Brownlee has described civil disobedience, for example, as moral dialogue within democratic states.<sup>495</sup> Violent protests, if public or suitably communicated, can be similarly expressive or convey similar political meanings. Before embarking on his categorisation of acts of collective violence, Tilly describes collective violence as a "kind of conversation," dependent upon the socio-political milieu in which those actions take place.<sup>496</sup> Some acts of violence are symbolic, conveying specific meanings and significances.<sup>497</sup>

Violence to property can be a highly symbolic and expressive form of resistance. Graffiti is perhaps the most obvious example of a form of violence (property damage) used to convey, or even create, some symbolic capital.<sup>498</sup> Alison Young discusses how street art is seldom a mindless and inarticulate mode of action, but is instead an expression of dissatisfaction, creativity, and the pursuit of identity within urban

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<sup>494</sup> See generally: Grant, D.S. and Wallace, M. 'Why Do Strikes Turn Violent?' (1991) 96 (5) *American Journal of Sociology* 1117; Lawrence, B.B. and Karim, A. (eds) *On Violence: A Reader* (Duke University Press, Durham and London 2007)

<sup>495</sup> Brownlee, K. 'The Communicative Aspects of Civil Disobedience and Lawful Punishment' (2006) 1 (2) *Criminal Law and Philosophy* 179

<sup>496</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 6

<sup>497</sup> "Symbolic violence" here, meaning acts of violence which communicate symbols, should not be confused with Habermas' or Bourdieu's (related but distinct) "symbolic violence" which is the use of language and symbols in the domination of others as a form of violence in itself: Poupeau, F. 'Reasons for Domination, Bourdieu versus Habermas' (2001) 49 *The Sociological Review* (supplement 1) 69; Habermas, J. *Sociologie et Theorie du Langage*, (P.U.F., Paris 1995); Bourdieu, P. and Wacquant, L. *Invitation to a Reflexive Sociology* (Polity, Cambridge 1992). Further evaluation of Habermas' theory of communicative action will be elaborated in the subsequent Chapters.

<sup>498</sup> Jacobson, M. 'Marketing with graffiti: Crime as symbolic capital' (2017) 3 (2) *Street Art and Urban Creativity* 102



landscapes – that artists far more obscure than Banksy can also express a critique of their socio-political milieu through their work.<sup>499</sup> When done as an act of political protest, property damage can convey political meanings: whether as publicised or secretive sabotage, a message of resistance is made.<sup>500</sup>

Demonstrative, symbolic acts of political violence can on occasion also include political rioting. Avia Pasternak has suggested that, rather than considering all rioters morally comparable to common criminals, instead we should consider “political rioting” a particular manifestation of dissent which presents with symbolic and demonstrative acts of public violence, or a “communicative episode” that is “expressed through the open confrontational engagement of destructive acts.”<sup>501</sup> She argues that this can be contrasted from apolitical rioting, which does not present the same legitimacy counterclaims and has less effect as democratic dialogue, and from opportunistic rioting during large protests, more of which is discussed shortly. The violence caused during political rioting may arguably be incompatible with or disproportionate to the moral counterclaims made by the protesters, particularly if it entails fatalities or causes excessive suffering: the question of this justificatory aspect of violence is however discussed in Chapters 5 and 6.<sup>502</sup>

Demonstrative acts of political violence can, of course, include violence against persons, and acts of terrorism. Indeed a great deal of scholarship has been dedicated to conceptualising the latter within symbolic communication theory, with violence being both performative and communicative.<sup>503</sup> Such actions, in suicide terrorism, can

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<sup>499</sup> Young, A. ‘Criminal Images: The Affective Judgement of Graffiti and Street Art’ (2012) 8 (3) *Crime Media Culture* 297; Young, A., Halsey, M. “‘Our Desires Are Ungovernable’”: Writing Graffiti in Urban Space’ (2006) 10 (3) *Theoretical Criminology* 275

<sup>500</sup> Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985), 31, 265-292; Alexandrakis, O. ‘Indirect Activism: Graffiti and Political Possibility in Athens, Greece’ (2016) 31 (2) *Cultural Anthropology* 272

<sup>501</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 391

<sup>502</sup> That being said, note that even seemingly selfish, apolitical and morally arbitrary rioting can nonetheless be examined and interpreted as having underlying moral reasons. The 2011 London riots may be a good example of this: Kawalerowicz, J. and Biggs, M. ‘Anarchy in the UK: Economic Deprivation, Social Disorganization, and Political Grievances in the London Riot of 2011’ (2015) 94 (2) *Social Forces* 673

<sup>503</sup> Weimann, G. ‘The Psychology of Mass-Mediated Terrorism’ (2008) 52 (1) *American Behavioral Scientist* 69; Chermak, S. and Gruenewald, J. ‘The Media's Coverage of Domestic Terrorism’ (2006) 23 (4) *Justice Quarterly* 428

include violence against not only other persons but to the self and to property – as such the target itself need not be of instrumental consequence, or even of particular symbolic value, but the act of destruction is demonstrative *per se*.<sup>504</sup> This seems to confirm previous findings about the inappropriateness of victim-focused typologies, when instead a broader normative approach best understands the nature and role of violence, here. Drawing from Jabri, Debord, and other twentieth century writers, Spens has restated for a contemporary readership, in *Shooting Hipsters*, that the “propaganda of the deed” rests in its performativity, being staged and being spectacular.<sup>505</sup> Violence as communication is not a monologue: it relies upon the “readiness of people to engage with such a ‘dialogue,’” and is less concerned with the nature of the violence or the victim as it is engagement with a wider audience.<sup>506</sup> Indeed, usually the more extravagantly violent the act of protest is, the greater media interest and therefore “oxygen of publicity” with which to engage with audiences, and to inspire responses from the media and public as interlocutors in kind.<sup>507</sup>

Not only can violent protest act as dialogue, or as a basis for communicative action, through its very practice. Violent protest also facilitates dialogue between participant activists, demonstrating their motivations, ideologies, and claims to legitimacy.<sup>508</sup> The chants of rioters, the graffiti they leave on government buildings, even the tactical choice of state-owned properties, can all explicitly communicate the moral claims of activist groups: such examples were particularly evident with the 2019-20 protest violence in Hong Kong, where government buildings were strategically targeted and

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<sup>504</sup> Pape, R. ‘The Strategic Logic of Suicide Terrorism’ (2003) 97 (3) *The American Political Science Review* 343

<sup>505</sup> Spens, C. *Shooting Hipsters: Rethinking Dissent in the Age of Public Relations* (Repeater, London 2016), 101-103; Jabri, V. *Discourses on Violence: Conflict Analysis Reconsidered* (Manchester University Press, Manchester 1996); Nicholson-Smith, D. (tr) Debord, G. *The Society of the Spectacle* (Zone Books, New York 1995)

<sup>506</sup> Spens, C. *Shooting Hipsters: Rethinking Dissent in the Age of Public Relations* (Repeater, London 2016), 62

<sup>507</sup> Bloom, M.M. ‘Palestinian Suicide Bombing: Public Support, Market Share, and Outbidding’ (2004) 119 (1) *Political Science Quarterly* 61; Chermak, S. M. and Gruenewald, J. ‘The Media’s Coverage of Domestic Terrorism’ (2006) 23 (4) *Justice Quarterly* 428

<sup>508</sup> With regard to Habermas’ conceptualisation of “communicative action,” whether protest violence is ever acceptable or justifiable will of course be examined in subsequent Chapters. Habermas, J. *Theory of Communicative Action* (Polity Press, Cambridge 1989)

tagged with pro-democracy slogans.<sup>509</sup> Activists may even explicitly publish pamphlets or literature distributed at such events, or online, flourishing off of the publicity that their protest action attracts.<sup>510</sup> The aim of communication of course is not only to express oneself unilaterally, but also to instigate a response from one's audience. This might be in order to obtain concessions from the state, or to gain popular support.<sup>511</sup>

The expressive, but multilateral communicativeness of political violence is particularly clear in acts of protest violence that seek communication beyond the realms of the nation state, reaching to the wider international community. With relation to the 2019-2020 Hong Kong protests again, many activists were seeking responses not only from the government of the Hong Kong Special Administrative Region, and from Beijing, but also the wider international community, hoping for assistance and validation from London and Washington, D.C.<sup>512</sup> In this way protest can act as expression in dialogue, and indeed it provides a platform to engage in dialogue at both a national and international level.

Tactical or instrumental acts of violence, as another potential category – again, loosely and not prescriptively-defined – seem oriented at achieving a particular tangible goal of preventing a perceived injustice as a result of the violence committed, rather than necessarily a goal of widening engagement and communication.<sup>513</sup> Instrumental violence might be used to sabotage, delay, or frustrate authorities or perceived opponents directly. James C. Scott for example observed various instances of “direct action” in late-1970s rural Malaysia, where oppressed groups would sabotage, steal from, and at times destroy property of more affluent oppressor landowners not only as

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<sup>509</sup> The Guardian ‘China says Hong Kong violence “totally intolerable” (02/07/2019) <<https://www.theguardian.com/world/2019/jul/02/chinese-media-calls-for-zero-tolerance-after-violent-hong-kong-protest>> accessed 02/07/2019

<sup>510</sup> For a contemporary example, see Extinction Rebellion ‘Welcome to the Rebellion’ (2018) <[https://www.risingup.org.uk/sites/default/files/files/XR-Handbook\\_V2.pdf](https://www.risingup.org.uk/sites/default/files/files/XR-Handbook_V2.pdf)> accessed 27/01/2020

<sup>511</sup> Tosini, D. ‘Calculated, Passionate, Pious Extremism: Beyond a Rational Choice Theory of Suicide Terrorism’ (2010) 38 *Asian Journal of Social Science* 394

<sup>512</sup> BBC, ‘Hong Kong Protesters Appeal to Trump for Help’ (08/09/2019) <<https://www.bbc.co.uk/news/world-asia-china-49625233>> accessed 28/10/2019

<sup>513</sup> For insight into the tactical use of violence in protest see Wang, D.J. and Piazza, A. ‘The Use of Disruptive Tactics in Protest as a Trade-Off: the Role of Social Movement Claims’ (1994) 94 (4) *Social Forces* 1675

a form of resistance, but as “self-help”.<sup>514</sup> More recently, Delmas has incorporated instrumental violence and acts of self-help and self-defence within her broader conception of principled resistance, theorising that there may be occasions where a limited and principled use of violence, for example, may be a form of justifiable violent resistance, particularly if in self-defence or the defence of others.<sup>515</sup>

Some acts of instrumental violence may be clandestine and so not communicative *prima facie*. Examples include sabotage of oppressor landlord equipment, mentioned previously.<sup>516</sup> As a very different example, we see a similar dynamic with those activists who anonymously hack into databases and leak confidential government documentation, where non-publicity in the first instance may be of great tactical importance.<sup>517</sup> But whether such covert acts of resistance are without communicative potential is not so clear. The act of resistance is itself expressive of dissent against authority; and non-publicity, in the sense of avoiding detection at first instance, does not mean non-communicativeness with regard to output.<sup>518</sup> Covert protest has the ability to convey messages once subsequently detected or advertised. Even secretive groups – leakers, hackers and renegades who engage in “clandestine dissent” – can ultimately foster “a public image defined by secrecy:” the hacking group Anonymous is famous precisely for hiding, literally, behind a mask.<sup>519</sup> Covert commission does not preclude subsequent publicity of such acts of protest.<sup>520</sup>

With regard to clandestine communicativeness and protest, it is interesting to examine the example of Edward Snowden. Snowden breached the US Espionage Act by

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<sup>514</sup> Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985)

<sup>515</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 48

<sup>516</sup> Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985)

<sup>517</sup> Brownlee, K. ‘The Civil Disobedience of Edward Snowden: A Reply to William Scheuerman’ (2016) 42 (10) *Philosophy and Social Criticism* 965

<sup>518</sup> Brownlee, K. ‘The Civil Disobedience of Edward Snowden: A Reply to William Scheuerman’ (2016) 42 (10) *Philosophy and Social Criticism* 965, 966

<sup>519</sup> Spens, C. *Shooting Hipsters: Rethinking Dissent in the Age of Public Relations* (Repeater, London 2016) 109

<sup>520</sup> On the balance between publicity and secrecy of hacking organisations, see generally Coleman, G. *Hacker, Hoaxer, Whistleblower, Spy: The Many Faces of Anonymous* (Verso Press, London and New York 2014)

unlawfully gathering, copying, and leaking information regarding the National Security Agency's unlawful mass surveillance and data gathering of US citizens. He then fled the USA to avoid arrest, and spoke with journalists to ensure his whistleblowing engaged with public discourse.<sup>521</sup> Firstly, the example is interesting because it once again makes us question whether the targets of violence can be limited to persons or property, or whether the concept can also apply to the violation and unauthorised access and copying of data.<sup>522</sup> If we can conceive of such access as a violence to data, it makes us question our normative presumptions of the role of violence in civil, or uncivil, disobedience. Secondly and independently of this critique of violence, this case is of interest because it challenges Rawls's narrow conception of civil disobedience, which requires publicity, forewarning and a willingness to face arrest. For Scheuerman and Brownlee, Snowden's case shows how definitions of civil disobedience from half a century ago fail to account for the types of disobedience and activism available with technology today.<sup>523</sup> Rawls' onerous requirements could preclude effective activism, and place too great a burden on the disobedient, without due consideration for the open debate and public dialogue Snowden initiated wilfully after his flight. And again, should we consider violence to data an acceptable instance of political violence, it can also make us question the role that violence plays in civil, rather than merely uncivil, disobedience.<sup>524</sup>

A final and more problematic category of violent protest includes what might be called ancillary or incidental, or "opportunistic," violence.<sup>525</sup> This miscellaneous category

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<sup>521</sup> Greenwald, G., MacAskill, E. and Poitras, L. 'Edward Snowden: the Whistleblower behind the NSA Surveillance Revelations' *The Guardian* (09/06/2013) <<https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>> accessed 28/01/2020

<sup>522</sup> Rivard, C. 'Is Computer Data "Tangible Property" or Subject to "Physical Loss or Damage"?—Part 1' *IRMI* (08/2001) < <https://www.irmi.com/articles/expert-commentary/is-computer-data-tangible-property-or-subject-to-physical-loss-or-damage-part-1>> accessed 04/10/2019

<sup>523</sup> Scheuerman, W.E. 'Whistleblowing as civil disobedience: The case of Edward Snowden' (2014) 40 (7) *Philosophy & Social Criticism* 609; Brownlee, K. 'The Civil Disobedience of Edward Snowden: A Reply to William Scheuerman' (2016) 42 (10) *Philosophy and Social Criticism* 965

<sup>524</sup> See Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 36, regarding whether Snowden's actions might be conceived as "civil"

<sup>525</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 130-150

seems to include violence that is not intended explicitly to have symbolic value, nor instrumentally to affect some immediate interest against a perceived injustice, as described above. Examples which generally seem to fit into this category include looting or vigilantism, or – as was also observed with relation for example to the London riots in 2011, described in Chapter 2 – carnivalesque lawlessness.<sup>526</sup> Often these forms of protest violence are to be found at the fringe of larger protest movements: this appears to have been the case with regard to more extreme acts of violence surrounding the *gilets jaunes* protests, for example.<sup>527</sup>

Being less directly connected to a stated political purpose, opportunistic protest violence is widely considered to be illegitimate and counterproductive to meaningful democratic dialogue.<sup>528</sup> Its aims and methods are considered amoral, seemingly apolitical, in such a manner that seems out of keeping with “moral dialogue”.<sup>529</sup> If the latter is understood as a meaningful communication, it is presumed that violence undertaken opportunistically fails to have the considered motivation and justification that is signified by conscientious protest.<sup>530</sup> That being so, these forms of protest might seem to face difficulty if we tried to interpret them through the legitimacy claim framework.

However, not all opportunistic protest violence is incapable of communicating signification based on moral claims. One can still try to identify motivations founded in moral outrage in some cases where spontaneous violence breaks out, often founded in perceived socio-economic injustices: this may be the case where union strikes overspill into fringe violence, for example.<sup>531</sup> The London riots of 2011, to return to

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<sup>526</sup> Spalek, B., Isakjee, A. and Davies, T. ‘Panic on the streets of Birmingham? Struggles over space and belonging in the Revanchist City’ (2012) 87 *Criminal Justice Matters* 14

<sup>527</sup> Willsher, K. ‘One killed and hundreds injured in French anti-Macron protests’ *The Guardian* (17/11/2018) <<https://www.theguardian.com/world/2018/nov/17/french-protester-killed-accident-anti-fuel-tax-blockade>> accessed 02.03/2019

<sup>528</sup> See for example Delmas with relation to principled disobedience, as against unprincipled disobedience – that is to say, general criminality – Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 21-22

<sup>529</sup> Etzioni A. ‘Moral Dialogues’ in: Library of Public Policy and Public Administration *Happiness is the Wrong Metric, vol 11* (Springer, Cham 2018)

<sup>530</sup> Brownlee, K. *Conscience and Conviction: the Case for Civil Disobedience* (Oxford University Press, Oxford 2012)

<sup>531</sup> See for example Grant, D.S. and Wallace, M. ‘Why Do Strikes Turn Violent?’ (1991) 96 (5) *American Journal of Sociology* 1117

this example, have been researched via interviews with participants arrested during the disruptions. There were found to be strong correlations among participants in the reasons why they engaged in the violence, grounded in perceived inequalities and disenfranchisement, loss of education maintenance allowance and youth facilities, perceived racism in the police, and so forth.<sup>532</sup> A lot of these grievances have been raised retrospectively by opportunistic rioters, demonstrating a latent sense of injustice which materialised in unplanned acts of (perhaps unknowingly political) violence. Even these seemingly incidental acts of violence, then, can constructively be interpreted to read an expression of frustration grounded in an underlying sense of injustice.<sup>533</sup>

Even in cases of looting, care must be taken to distinguish between protesters who loot, and those not engaged in protest who do opportunistically exploit the state of public disorder in order to loot.<sup>534</sup> Andrea S. Boyles interviewed a number of those accused of looting during the Ferguson unrest, and found that many of the protesters who did choose to loot identified as targets large corporations that did not belong to or serve the local community.<sup>535</sup> These targets were insured, would suffer no significant losses, and had taken money out of the community in profits, where other locally-run businesses would see a reinvestment in those profits within the community itself. Some spontaneous acts of protest violence, and even theft, can therefore be decided based on a moral justification of sorts.<sup>536</sup>

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<sup>532</sup> Kawalerowicz, J. and Biggs, M. 'Anarchy in the UK: Economic Deprivation, Social Disorganization, and Political Grievances in the London Riot of 2011' (2015) 94 (2) *Social Forces* 673; Lewis, P., Newburn, T., Taylor, M., McGillivray, C., Greenhill, A., Frayman, H. and Proctor, R. 'Reading the riots: investigating England's summer of disorder' *Reading the riots. The London School of Economics and Political Science and The Guardian, London, UK* (2011) <<http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots%28published%29.pdf>> accessed 27/01/2020

<sup>533</sup> *Ibid.*

<sup>534</sup> Khazan, O. 'Why people riot' *The Atlantic* (02/06/2020) <<https://www.theatlantic.com/health/archive/2020/06/why-people-loot/612577/>> accessed 15/02/2022

<sup>535</sup> Boyles, A.S. *You Can't Stop the Revolution: Community Disorder and Social Ties in Post-Ferguson America* (University of California Press, Berkeley 2019)

<sup>536</sup> Khazan, O. 'Why people riot' *The Atlantic* (02/06/2020) <<https://www.theatlantic.com/health/archive/2020/06/why-people-loot/612577/>> accessed 15/02/2022

One should also be suspicious of accusations that any given act of violence or looting is “merely” opportunistic, as well. Firstly, state authorities often claim that symbolic or instrumental acts of violent protest instead fall into this “merely opportunistic” category, so as to discredit the legitimacy counterclaim of the protesters, by making their actions seem morally incoherent and aberrant. This was certainly the case with the Metropolitan Police’s response to the London Riots, which focused much more on the frightening lawlessness of the protesters rather than their motivations or justifications.<sup>537</sup> Such a rhetorical device is used *instrumentally* by states precisely to rebut legitimacy counterclaims of protesters. Secondly, and reflexively, another concern is that truly opportunistic acts of violence – looting from “fringe” rioters, and so on – are used to question the legitimacy counterclaims of other “core” protesters who are protesting for symbolic or instrumental purposes. This may have been the case within Hong Kong in 2019 when the actions of fringe baseball bat-wielding “thugs,” *inter alia*, were equated with the tactical criminal damage and graffiti of public buildings as synonymously violent and unacceptable.<sup>538</sup> Conflating opportunistic violence with instrumental or demonstrative violence is an effective means of delegitimising the counterclaims of protesters precisely because it conflates their very different normative significances, and tars discriminately- and indiscriminately-violent protesters with the same brush. For a regime that wishes to discredit the counterclaims of protesters using instrumental or symbolic violence, equating them with opportunistic thugs can be an effective tactical move by the state.<sup>539</sup>

Socio-political studies in political violence often demonstrate that these roles of violence overlap considerably. Not only can one role encompass others (for example,

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<sup>537</sup> For an example of a contemporary journalistic attempt at balancing different frames of explanation, relating to the London 2011 riots, see for instance: The Independent, ‘The lessons to be drawn from mindless violence’ (09/08/2011) <<https://www.independent.co.uk/voices/editorials/leading-article-the-lessons-to-be-drawn-from-mindless-violence-2333987.html>> accessed 15/10/2019

<sup>538</sup> The Guardian ‘China says Hong Kong violence “totally intolerable” (02/07/2019) <<https://www.theguardian.com/world/2019/jul/02/chinese-media-calls-for-zero-tolerance-after-violent-hong-kong-protest>> accessed 02/07/2019

<sup>539</sup> Again with relation to the London 2011 riots, former Prime Minister David Cameron’s full statement emphasises opportunism of looters over other salient factors and motivations of other violent protesters: BBC, ‘Riots: David Cameron’s Commons Statement In Full’ (11/8/2020 <<https://www.bbc.co.uk/news/uk-politics-14492789>> accessed 06/04/2020



instrumentally sabotaging police equipment can also convey symbolic meanings) – as Grant and Wallace explain, at times, symbolic or instrumental acts can escalate to create, or encourage in others, opportunistic violence.<sup>540</sup> There is no need to explore socio-political reasons how these roles interconnect in great detail, during this thesis: other socio-legal and socio-political texts have investigated these interplays in greater detail, and with greater scope for empirical analysis.<sup>541</sup> The foregoing sections have aimed simply to show that violence can occur across a number of *typologies* of protest, defying any coherent attempt at definition, and can play many overlapping *roles* within a protest movement.

### Violent protests as legitimacy counterclaims: the language of violence

With reference to the legitimacy claims theory developed in the preceding Chapters, one can now see how violent protesters may still make legitimacy counterclaims much like peaceful protesters, but with violence – whether against persons, property, oneself, or data – as instrumental, symbolic, or incidental to the communication of their legitimacy counterclaims. Now the expressive and communicative properties of protest violence shall be explored, particularly as part of a legitimacy counterclaim.

When symbolic or instrumental in nature, violent protest may overtly form part of this moral dialogue or legitimacy claim. Some acts of property violence specify symbols as targets. In the case of flag-burning for example, the protesters identify an object of cultural and historical significance, one Welch and Bryan describe as being particularly consecrated in the “civil religion” of the United States: its deliberate conflagration not only demonstrates hostility to its symbology, and its significations of patriotism and nationhood, but also knowingly seeks out dialogic responses from

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<sup>540</sup> For example Grant, D.S. and Wallace, M. ‘Why Do Strikes Turn Violent?’ (1991) 96 (5) *American Journal of Sociology* 1117

<sup>541</sup> Generally with regard to the multivariate roles of violence in protest see: Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003); Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970); Scott, James C. *Domination and the Art of Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1990); Hulme, T.E. (tr) Sorel, G. *Reflections on Violence* (Peter Smith, New York 1941); X, M. *Malcolm X: the ballot or the bullet* (Pacifica Foundation, North Hollywood 1965)

law enforcement, courts, and civil society at large.<sup>542</sup> Interestingly many of these American flag-burning cases involve violence against the defendants' own property, that is, flags purchased for the defendants' personal use. This suggests that the violence litigated against and institutionally condemned is not against the item of property, which the defendants would otherwise be legally entitled to destroy as they saw fit, but the violence against the very symbol itself.<sup>543</sup> The violence is a deliberate and deliberative counterclaim against the norms and symbology of wider society, and the illegitimacy of any laws limiting freedom of expression, forbidding its performance.

Alternatively, the property damaged may not itself contain symbolic meanings, but the damage can be inflicted in a manner which is itself communicative. Graffiti which questions political authorities and the status quo can have this effect. Alexandrakis has discussed how in Athens, young artists responded to disaffection from post-crash economic austerity and perceived neoliberal governance with provocative street art.<sup>544</sup> It expresses a counterclaim regarding the purported legitimacy of these policies, and the governance under the state more widely. Indeed, in a Foucauldian sense, the very act of defacement can operate as critique, with the artist's defiance of dominant forms of governance – including norms of property ownership and exclusive possession – creating a contrary subjectivity on the part of the dissenter.<sup>545</sup> The target itself might be purely incidental. As Alison Young explains, the “blank space” of urban architecture is a canvas on which to demonstrate expression and in doing so make not only a posited affirmation of identity, but an implied critique of urban existence. As such, violence against property can convey specific meanings based on the symbology of the target, but more broadly it can convey defiance against a purportedly illegitimate governmentality.<sup>546</sup> Wilful violation of social norms is *per se* an act of defiance of social norms.

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<sup>542</sup> Welch, M.; Bryan, J. 'Flag Desecration in American Culture: Offenses against Civil Religion and a Consecrated Symbol of Nationalism' (1996) 26 (1) *Crime, Law and Social Change* 77

<sup>543</sup> See for example *United States v. Eichman*, 496 U.S. 310 (1990).

<sup>544</sup> Alexandrakis, O. 'Indirect Activism: Graffiti and Political Possibility in Athens, Greece' (2016) 31 (2) *Cultural Anthropology* 272

<sup>545</sup> Foucault, M. 'What is Critique?' in: Lotringer, S. (ed) *The Politics of Truth* (Semiotext, Los Angeles 1997); Butler, J.; Athanasiou, A. *Dispossession: The Performative in the Political* (Polity, Cambridge 2013)

<sup>546</sup> Young, A. 'Criminal Images: The Affective Judgement of Graffiti and Street Art' (2012) 8 (3) *Crime Media Culture* 297

At a more extreme level, violence against persons can also have powerful symbolic potential as a legitimacy counterclaim. Whether the choice of victim is discriminate or indiscriminate, violence against human beings carries such emotional meaning and gravity that, even though we may despise it and wish to frustrate its intentions, we nonetheless seek meaning in its execution.<sup>547</sup> Ruggiero's analysis of late-twentieth century Italian leftist violence, for instance, reviews theories of "symbolic interactionism" – that is, the ways in which terrorist violence presents counterexamples to more widely socialised norms, attitudes and beliefs, including beliefs about civilian innocence, the sanctity of human life, and the moral censure of unlawful killing.<sup>548</sup> He argues that, as violence must itself be construed under prevailing societal norms contextually, in both moral and social-normative terms, those committing political violence against persons – and indeed terrorists more generally – are epistemologically framed by these norms, and are found to be dissenting as such.<sup>549</sup> In short, violent protest against the person breaks norms about civil behaviour and therefore in itself is a symbolic act. Such violence can also break norms on governance and social life. Antonio Negri was a founding member of the Workers' Power movement, one of the leftist organisations operative in Italy at the time, and was involved in the Red Brigades extremist leftist organisation. He has written extensive Marxist critiques of capitalist state governmentality. For him, the violence of activists personified the struggle against the inherent violence of capitalist exploitation, and he spoke of the "fundamental valence" of violence in the workers' struggle: "We consider violence to be a function legitimated by the escalation of the relation of force within the crisis and by the richness of the contents of proletarian self-valorization".<sup>550</sup> In this way, violence is itself dialogic: responding to, and anticipating, state violence. Even violence against victims who are not themselves agents of the state, who might otherwise be assassinated to the protester's instrumental or symbolic advantage, could be a counterclaim against prevailing (and for the

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<sup>547</sup> Arendt, H. *On Violence* (1st edn Penguin, London 1970)

<sup>548</sup> See for example Akers, R. L.; Silverman, A. L. 'Toward a Social Learning Model of Violence and Terrorism' in: Zahn, M.; Brownstein, H.; and Jackson, S. (eds) *Violence: From Theory to Research* (Anderson Publishing, Cincinnati 2004)

<sup>549</sup> Ruggiero, V. 'Armed Struggle in Italy: The Limits to Criminology in the Analysis of Political Violence' (2010) 50 (4) *The British Journal of Criminology* 708

<sup>550</sup> Negri, A. *Books for burning: between civil war and democracy in 1970s Italy* (Verso, London 2005), 281

protester, unacceptable) social and moral claims by the state – a counterclaim against a perceived legitimacy deficit.<sup>551</sup>

Although by no means the sole example of political violence against persons, and subject as it is to a whole other interdisciplinary debate as to its definitions and scope, terrorism presents perhaps the most vivid example of this symbolic violence *per* legitimacy counterclaim.<sup>552</sup> Acts of terrorism which harm or kill civilians, including but not limited to political assassination, are not solely instrumental but also demonstrative or expressive. Indeed part of the instrumentality of terrorism is precisely to be politically communicative and expressive to wider society.<sup>553</sup> Whether one looks to mid-twentieth century European groups such as the Red Army Faction, or more contemporary Middle Eastern activities from Al Qaeda or ISIS, terrorist groups have historically used violence to protest against perceived legitimacy deficits: the violence is demonstrative of sincerity, it evinces the “propaganda of the deed,” and creates a synthesis between moral reasoning and political instrumentality.<sup>554</sup> It is also worth reiterating that more spectacular violence – in the sense of being a spectacle, carnivalesque and exciting – draws significant media attention and therefore generates dialogue. It not only communicates to, but it intentionally seeks responses from, a wider, indeed international, public.<sup>555</sup>

Violence to the self can evince a powerful counterclaim to perceived legitimacy deficits. The aforementioned hunger strikes undertaken by Northern Irish prisoners during the Troubles, particularly regarding their conditions and their treatment by

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<sup>551</sup> Whether such violence is ever acceptable or justifiable will of course be examined in subsequent Chapters.

<sup>552</sup> The term “terrorism” itself is a highly politicised and controversial concept, the precise nature of which is beyond the scope of this thesis. More generally on definitions and debates regarding the concept of terrorism, see *inter alia*: Wight, C. ‘Theorising Terrorism: The State, Structure and History’ (2009) 23 (1) *International Relations* 99

<sup>553</sup> For example see Weimann, G. ‘The Psychology of Mass-Mediated Terrorism’ (2008) 52 (1) *American Behavioral Scientist* 69

<sup>554</sup> Moghadam, A. ‘Failure and Disengagement in the Red Army Faction’ (2012) 35 (2) *Studies in Conflict & Terrorism* 156; Duyvestyn, I. ‘How New Is The New Terrorism?’ (2004) 27 (2) *Studies in Conflict and Terrorism* 439

<sup>555</sup> For example, ritualised beheadings convey multiple overlapping symbolic meanings while presenting a morbidly vivid image: Impara, E. ‘A social semiotics analysis of Islamic State’s use of beheadings: Images of power, masculinity, spectacle and propaganda’ (2018) (53) *International Journal of Law, Crime and Justice* 25

British military authorities as criminal rather than political prisoners, are potent examples.<sup>556</sup> In light of determined rhetoric from the British state to the effect that the strikers were merely (and ignobly) criminal, the self-abnegation of their particular self-inflicted violence instead allowed discourses to circulate regarding symbolism of martyrdom – framed, with debatable historical accuracy, within pre-existing Catholic and Gaelic symbology of sacrifice and starvation.<sup>557</sup> When analysed as a legitimacy counterclaim against unjust and illiberal treatment, acts of self-sacrifice which do not also impose violence on others can have powerful symbolic value. Baumann argues that the hunger strikes, in contrast to the overt intrapersonal violence of Bloody Sunday, symbolised for many a form of *nonviolent* protest which would, ultimately, engender sympathy and popular support.<sup>558</sup> It is interesting to consider that in context, this violence, by virtue of its self-abnegation and consenting target (oneself), communicated sincerity and unselfishness, and thus seemed to have presented stronger moral arguments per legitimacy counterclaim than violence to others.

Regardless of the consideration of targets, violence might itself be more broadly considered as the symbolic expression of grievance. Much has been written (most notably by Fanon) on the psychological effect (and affect) of political violence, or how its roots in perceived legitimacy deficits eventually germinate into expressed collective emotive responses.<sup>559</sup> Importantly for the purposes of rational normativity though, this catharsis is not merely emotive: it is can also be an expression of considered and significant moral opposition to the status quo. Pasternak discusses how far from being unprincipled and irrational violence, even riots can be understood as “communicative episodes”, in which perceived injustices are “expressed through the

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<sup>556</sup> Hennessey, T. *Hunger Strike: Margaret Thatcher's Battle with the IRA: 1980-1981* (Irish Academic Press, Newbridge 2013)

<sup>557</sup> Although these interpretations are persuasive, they have been questioned on the premise that the hunger strikers themselves did not consciously consider such imagery at the time of their actions. Yuill, C. ‘The Body as Weapon: Bobby Sands and the Republican Hunger Strikes’ (2007) 12 (2) *Sociological Research Online* 1 <<https://journals.sagepub.com/doi/pdf/10.5153/sro.1348>> accessed 06/04/2020

<sup>558</sup> Baumann, M.M. ‘Transforming conflict toward and away from violence: Bloody Sunday and the hunger strikes in Northern Ireland’ (2009) 2 (3) *Dynamics of Asymmetric Conflict* 172

<sup>559</sup> Most notably: Farrington, C. (tr) Fanon, F. *The Wretched of the Earth* (Modern Classics edn Penguin, London 2001). See also: Gurr, T.R. ‘Psychological Factors in Civil Violence’ in Feierabend, I.K., Feierabend, R.L. and Gurr, T.R. (eds) *Anger, Violence and Politics: Theories and Research* (Prince Hall, Englewood Cliff NJ 1972)

open confrontational engagement in destructive acts”.<sup>560</sup> One can even see evidence of this in the UK poll tax riots.<sup>561</sup> Initially, the organisation of peaceful and lawful protest was arranged specifically to address concerns of the social injustice and inequality engendered through the new per-capita taxation. Subsequent heavy-handed arrests and use of mounted police caused greater distrust and resentment on the part of protesters, who responded to escalated policing tactics by throwing missiles and attacking armoured police vans.<sup>562</sup> The violence demonstrated not only a rejection of the legitimacy of the poll tax, but also of the state’s policing methods used to control and circumscribe the protesters’ legitimacy counterclaims. When framed as a legitimacy counterclaim, we can see how even dramatic and seemingly chaotic rioting can in fact operate as a means of communicating grievances and denouncing state legitimacy claims.<sup>563</sup>

This communicativeness comes notwithstanding even a lack of written discourse from protesters: protest as an action *per se* is performative and dramaturgical, and therefore communicative.<sup>564</sup> Protest, as an act of defiance, is expressive and communicative.<sup>565</sup> Indeed, protesters often strategise their activism so as to have the widest potential for communicativeness, with specific symbols, imagery and soundbites operating as

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<sup>560</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 391

<sup>561</sup> For a review of the way in which participants in the poll tax riots categorised and self-identified as a group, see Stott, C. and Drury, J. ‘Crowds, context and identity: Dynamic categorization processes in the ‘poll tax riot’ (2000) 53 (2) *Human Relations* 247

<sup>562</sup> Burns, D. *Poll Tax Rebellion* (AK Press and Attack International, London 1992). Conversely, research suggests that policing through consent, and protest policing tactics that focus on dialogue and communication with protesters, can help to improve capacity for public order management, facilitate self-regulation of the protest crowd, and de-escalate both protester and police use of violence: Gorringer, H., Stott, C. and Rosie, M. ‘Dialogue Police, Decision Making, and the Management of Public Order During Protest Crowd Events’ (2012) 9 (2) *Journal of Investigative Psychology and Offender Profiling* 111

<sup>563</sup> For Pasternak the particular problem of rioting, that it involves plural actors with plural motivations, and so therefore can be difficult to decipher as a coherent expression of moral outrage, is an empirical one. Individual actors’ motivations diverge and must be considered singularly, not in a falsely-aggregated plural consciousness. Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 417

<sup>564</sup> Duffly, C.M.T. ‘Conscientious Abjection: Performative Protest and the Revolting Body’ 65 *Theatre Annual* 1-iv; Rhodes, J.P. *The Voice of Violence: Performative Violence as Protest in the Vietnam Era* (Praeger, Westport 2001)

<sup>565</sup> Butler, J. and Athanasiou, A. *Dispossession: The Performative in the Political* (Polity, Cambridge 2013)

coded forms of communication.<sup>566</sup> With relation specifically to violent protest, then, one can frame such activism as a form of performative violence.<sup>567</sup> The sophistication with which performative violence can be coded is at times alarming. With relation to school shootings internationally, studies in communication theory indicate that perpetrators anticipate the “mediatization” of violence in a sharable, digitalised format, with political messages and buzzwords directed towards targeted audiences, ranging from broad social media attention to specific subcultures on obscure online fora.<sup>568</sup> The possibility for performative political violence to be digitalised, sharable, and “hashtagable,” provides it with even greater scope for communicativeness.

It is important when framing violent protest under the legitimacy claim heuristic to interpret the expression made by protesters as a particular moral argument pursuant to a legitimacy counterclaim. It might not do so explicitly: nor might protest violence do so as coherently as an academic moral philosopher might.<sup>569</sup> Some forms of protest violence may not articulate grievances and moral argumentation about perceived legitimacy deficits fluently, but they can nevertheless be interpreted as moral claims. Gilman-Opalsky has recently re-conceptualised a Marxist interpretation of rebellion as “philosophy from below,” one which requires interpretation and evaluation just as any posited moral theory or argument.<sup>570</sup> Even beyond this Marxist framing of political violence, the injustices at the root of protest may be various, overlapping, difficult to extricate and rationalise, and this does not make articulation, or interpretation, of legitimacy counterclaims easy: but they *can be* identified. As Pasternak reminds us, one first needs to examine the motivations of individual actors, not a false aggregate moral conscience of a crowd.<sup>571</sup> As for the acts of violent protest

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<sup>566</sup> Barash, R.E. ‘Systematic and communicative theory of the protest movement: Protest as «an alternative without an alternative»’ (2018) 145 *Monitoring Obshchestvennogo Mneniya: Ekonomicheskie i Sotsial'nye Peremeny* (3) 123-138

<sup>567</sup> See for example Weimann, G. ‘The Psychology of Mass-Mediated Terrorism’ (2008) 52 (1) *American Behavioral Scientist* 69; Chermak, S.; Gruenewald, J. ‘The Media's Coverage of Domestic Terrorism’ (2006) 23 (4) *Justice Quarterly* 428

<sup>568</sup> Paton, N. and Figeac, J. ‘Expressive violence: the performative effects of subversive participatory media uses’ (2015) 8 (1) *ESSACHESS- Journal for Communication Studies* 231

<sup>569</sup> The irony is not lost on the author that indeed, many moral and legal philosophers may lack precision in making their own normative claims, and might be less succinct than a violent mob. The latter is often much more direct, at least.

<sup>570</sup> Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 26-27

<sup>571</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384

against such myriad injustices, these can also be framed as various, overlapping performative acts of rebellion *per* counterargument.<sup>572</sup> Barrington Moore Jr., who theorised that injustice lay at the root of all protest and revolt, considered that certain social and moral imperatives within social groups could, if violated, breach an “implicit” or “explicit” social contract, legitimising disobedience.<sup>573</sup> These implicit moral imperatives – the moral grounds for action, our principles of morality expected from our political settlement – are analogous if not identical to the grounds of constitutional morality within the particular political system in question. That these grievances might erupt in actions that are performative, physical and nonverbal does not mean that these actions are not also communicative and pertinent to constitutional moral claims.<sup>574</sup>

Therefore on the one hand, political violence identifies latent flawed legitimacy claims; on the other hand, it presents a latent legitimacy counterclaim by protesters. For Fanon, in *The Wretched of the Earth*, violence is both a realisation of dignity and a language of expression.<sup>575</sup> As the “bridge between theory and praxis,” violence nonverbally articulates critique. It speaks to the flaws in the claimed legitimacy of the state, and it speaks to affirm the existence and dignity of the protester.<sup>576</sup> It is dialogic, and therefore is a communicative action that presents moral counterarguments, per legitimacy counterclaim.

To take a further example, one can look to the Harlem Riots in 1935. At a time of economic turmoil, with overt discrimination and deep suspicion of the all-white police force, the suspected murder of a young Black man led to mass mobilisation of local citizens who, on receiving no reassurances from the police as to the man’s

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<sup>572</sup> *Ibid*

<sup>573</sup> Moore, B. Jr. *Injustice: The Social Bases of Obedience and Revolt* (1<sup>st</sup> edn Macmillan, London 1978), 7-13

<sup>574</sup> Foucault, M. ‘What is Critique?’ in: Lotringer, S. (ed) *The Politics of Truth* (Semiotext, Los Angeles 1997); Butler, J. and Athanasiou, A. *Dispossession: The Performative in the Political* (Polity, Cambridge 2013)

<sup>575</sup> Farrington, C. (tr) Fanon, F. *The Wretched of the Earth* (Modern Classics edn Penguin, London 2001)

<sup>576</sup> Lawrence, B.B. and Karim, A. (eds) *On Violence: A Reader* (Duke University Press, Durham and London 2007), 78



whereabouts, began to riot.<sup>577</sup> The Mayor subsequently commissioned criminologists and sociologists to compile a report, to retrospectively evaluate the reasons for the rioting. They found damning evidence of discriminatory policing, social exclusion, underinvestment in local infrastructure including schools and local amenities, and appalling living conditions. So shameful were the report's findings that, after conceding piecemeal investments in local community centres, the Mayor had the report suppressed so that the findings could not be publicised.<sup>578</sup> Here we see rioting as a response to very real injustices, and dialogic failure, *on the part of the state*. The problem was never that the rioters were inarticulate: it was that the establishment had simply refused to listen.<sup>579</sup> Marxist theorists of political violence have often observed that the standard centrist view, that violence represents a *lack* of articulate communication, is the privilege of political classes who indeed must frame (non-state) political violence with "condescension."<sup>580</sup> It is in fact entirely possible to find the meanings and moral arguments behind acts of violent protest, as the separate reports of the London 2011 and Harlem 1935 riots show very clearly: one need simply ask the rioters.

The same interpretive approach applies to framing and analysing instrumental acts of violence as communicative legitimacy counterclaims. Acts of violence which are predominantly tactical or strategic might not seem to communicate a great deal *prima facie*, especially if they are covert, but they are expressive at least in the sense previously described. One can in context interpret from those violent acts certain meanings and, therefore, moral counterclaims. From James C. Scott, we see in the sabotage of military equipment, or of landowner equipment, not just a bid for tactical advantage but a coded message of opprobrium.<sup>581</sup> Sometimes the violence is less

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<sup>577</sup> Mayor's Commission on Conditions in Harlem, 'Harlem riot, study of conditions which precipitated Harlem riot and The Negro in Harlem, A Report' (1935) <<https://congressional.proquest.com/histvault?q=001608-024-0522&accountid=14664>> accessed 29/01/2020

<sup>578</sup> Lowery, W. *They Can't Kill Us All: The Story of Black Lives Matter* (Penguin London 2017)

<sup>579</sup> It is a cycle of institutional deafness, and blaming the speaker for being inarticulate, that continues to this day: see for example Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), especially 155-161

<sup>580</sup> Hulme, T.E. (tr) Sorel, G. *Reflections on Violence* (Peter Smith, New York 1941), 100-111; Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 217

<sup>581</sup> Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985)

directly expressive. In the more contemporary case of the “Stansted 15,” activists cut through fencing at Stansted Airport using bolt cutters. This aggravated trespass, involving damage to the airport’s property, was instrumental to them accessing the runway, before using piping and expanding foam to adhere themselves together, “locking on” to prevent an airplane from taking off. The plane had been chartered by the Home Office to deport foreign nationals to countries where the passengers would face human rights abuses.<sup>582</sup> Those on board would only be legally entitled to a right to appeal after having being deported from the UK. In this case the limited property violence was strategic, at first glance purely instrumental: but as part of their wider tactics, it also draws attention to and communicates a moral message as part of a wider counterclaim against the injustices being caused by the state in this case.<sup>583</sup> One sees how analogous use of limited, instrumental damage to property can contribute to a larger communicative effect with Extinction Rebellion activists gluing themselves to public property. By disrupting traffic in this way, their activism draws public attention, impedes arrest, *and* demonstrates that one is (quite literally) an adherent to the cause.<sup>584</sup>

Incidental violence, or opportunistic violence that seems neither instrumental to nor demonstrative of moral claims central to a protest movement, might be considered morally arbitrary and so fall outside of moral justification on these terms.<sup>585</sup> Indeed opportunistic violence unconnected to a specific moral or political stance appears straightforwardly amoral and apolitical, and thus out of keeping with the spirit of

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<sup>582</sup> Cammiss, S., Hayes, G. and Doherty , B. ‘Deportation and direct action in Britain: the ‘terrorist trial’ of the Stansted 15’ *Open Democracy* (16/032018) <<https://www.opendemocracy.net/en/deportation-and-direct-action-in-britain-terrorist-trial-o/>> accessed 27/07/2019

<sup>583</sup> Cammiss, S., Hayes, G. and Doherty , B. ‘Treating the Stansted 15 as Terrorists is Part of a Worrying Trend’ *Political Quarterly* (10/01/2019) <<https://politicalquarterly.blog/2019/01/10/treating-the-stansted-15-as-terrorists-is-part-of-a-worrying-wider-trend/>> accessed 27/07/2019

<sup>584</sup> Extinction Rebellion, *This Is Not A Drill: an Extinction Rebellion Handbook* (Penguin, London 2019)

<sup>585</sup> This “conventional wisdom” is usually applied to rioting and particularly fringe activity: see Lewis, P., Newburn, T., Taylor, M., McGillivray, C., Greenhill, A., Frayman, H. and Proctor, R. ‘Reading the riots: investigating England’s summer of disorder’ *Reading the riots. The London School of Economics and Political Science and The Guardian, London, UK* (2011) <<http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots%28published%29.pdf>> accessed 27/01/2020, 24

democratic dialogue.<sup>586</sup> For Charles Tilly's typology of political violence, opportunistic violence is problematic because its "salience" (or potential for serious harm) is great, but its motivations can be difficult to decipher or identify.<sup>587</sup> Note that this is a different empirical problem to plural actors, for example in a riot, having multiple different or overlapping rationales: for Pasternak, again, this is resolved by focusing on each individual, rather than trying to decipher a falsely-aggregated collective moral consciousness.<sup>588</sup> The question here is instead whether, even for the individual, opportunistic violence can convey meaning. Extempore violence *might* convey motivations rooted in perceived injustices, such as socio-economic inequality of political disenfranchisement, but as a form of expression it is seldom as coherent a moral argument as violence enacted expressively or even instrumentally.<sup>589</sup> Many acts of random fringe violence in movements, such as that surrounding the *gilets jaunes* in France – particularly that which is carried out seemingly for hedonistic purposes – might seem like "ordinary criminality" and so fall outside of what Pasternak could describe as political rioting; perhaps outside of communicative or dialogic protest altogether.<sup>590</sup> But even poorly-communicated, extemporised expressions of violence, if founded upon socio-political grievances, *can* convey an opinion that a moral expectation has been failed: it would simply be a more difficult task to discern a coherent moral argument from such violence.<sup>591</sup>

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<sup>586</sup> Brownlee, K. *Conscience and Conviction: the Case for Civil Disobedience* (Oxford University Press, Oxford 2012)

<sup>587</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 130-149

<sup>588</sup> Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4)*Philosophy and Public Affairs* 384, 417

<sup>589</sup> See generally Kirkpatrick, J. *Uncivil Disobedience: Studies in Violence and Democratic Politics* (Princeton University Press, Princeton NJ 2008)

<sup>590</sup> See for example Willsher, K. 'One killed and hundreds injured in French anti-Macron protests' *The Guardian* (17/11/2018)

<<https://www.theguardian.com/world/2018/nov/17/french-protester-killed-accident-anti-fuel-tax-blockade>> accessed 02.03/2019

<sup>591</sup> It is also important to be discerning in what is labelled as "opportunistic" or random violence, when there may be moral or political motivations underlying the acts in question. See Lewis, P., Newburn, T., Taylor, M., McGillivray, C., Greenhill, A., Frayman, H. and Proctor, R. 'Reading the riots: investigating England's summer of disorder' *Reading the riots. The London School of Economics and Political Science and The Guardian, London, UK* (2011) <<http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots%28published%29.pdf>> accessed 27/01/2020

It is also worth briefly addressing whether violence itself is “communicative action” in the more specific sense Habermas considers: that is, as an emancipatory communicative act capable of providing reasonable argument.<sup>592</sup> For Habermas, a theory of communicative action allows for protest to be a form of moral dialogue, but in order to be acceptable under his conception of discourse ethics, any form of discourse must meet certain criteria.<sup>593</sup> Whether violence in any form can satisfy these criteria will determine whether violence can ever logically be coherent as a form of moral dialogue. This is addressed in Chapter 6, which focuses on justifications for violence in the wider context of liberal democratic theory.

### State violence

A lot of the foregoing discussion has focused on protest violence, in such a way that might uncharitably frame protesters as being aberrant and unusual in their employment of political violence. As a final consideration to put this aberrant violence in context, one should compare it to the very usual and normal role of political violence employed by the state. Violence is normal and indeed constitutive of society.<sup>594</sup> Under a classical Weberian conception the state is the principal *legitimate* user of force. Indeed, as mentioned at the start of this Chapter, the monopoly on the legitimate use of force defines the state.<sup>595</sup> As Terwindt argues, the state even claims the exclusive right of defining and interpreting violence through its laws, and their enforcement and adjudication: an epistemological control of violence, beyond and encompassing its mere production and employment.<sup>596</sup> The presumption that the state has an exclusive right to define and execute violence until proven otherwise is a normative assumption which arbitrarily gives the benefit of the doubt to state actors using violence.<sup>597</sup> This presumption should not go without question. Again, to paraphrase Tilly in the preface

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<sup>592</sup> Habermas, J. *Theory of Communicative Action* (Polity Press, Cambridge 1989); Lenhardt, D. and Nicholsen, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990)

<sup>593</sup> *Ibid*

<sup>594</sup> Cover, R.M. ‘Violence and the Word’ (1986) 95 *Yale Law Journal* 1601

<sup>595</sup> Owen, D.S. and Strong, T.B. (eds) *Weber, M. The Vocation Lectures: "Science as a Vocation", "Politics as a Vocation"* (Hackett Publishers, Indianapolis 2004)

<sup>596</sup> Terwindt, C. *When Protest Becomes Crime* (Pluto Press, London 2020), 49

<sup>597</sup> Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 171; Terwindt, C. *When Protest Becomes Crime* (Pluto Press, London 2020), 49-59

to his discussion on political violence, in deciding our politics we decide what forms of violence we consider acceptable.<sup>598</sup> Even if one is to presume the prima facie state monopoly on violence, our understanding of the legitimacy of its use must be framed using legitimization claim heuristics.

It should be noted that states also engage in instrumental, communicative, and opportunistic violence during protests – even peaceful protests. Expressive or symbolic forms of violence include deploying mounted police, wearing riot gear, and the use of tear gas – these are not purely instrumental, but are “symbols of conflict” and control.<sup>599</sup> They dramatically demonstrate the authority, power and military superiority of the state, and are deliberately and ostentatiously deployed. Instrumental violence is perhaps more frequently observed: any power of arrest, and any force used in the course of making an arrest, would constitute an act of state violence, and is also communicative to the public of the state’s claim to authority and legitimacy.<sup>600</sup> Perhaps most controversial is the opportunistic violence carried out by police in the course of their duties, whether under the auspices of discretionary use of powers or acts *ultra vires*: stop and search powers, and even violent abuse of power, demonstrate the physical and political superiority of the state.<sup>601</sup> In all of these cases, again, we must be reminded that the state also communicates through violence, in messages that are either explicitly or implicitly coded to make claims to legitimacy and authority.

Interestingly this coded violence is itself dialogical: it not only expresses coded messages about legitimacy and power, but also invites responses from the public, intentionally or otherwise. One example in the UK was the death of Ian Tomlinson at the hands of police officers at the G20 protests in April 2009. Tomlinson, a newspaper

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<sup>598</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 9

<sup>599</sup> Momboisse, R. *Riots, Revolts and Insurrections* (Charles C Thomas Publisher, Springfield, IL 1967); Soares, M., Barbosa, M., Matos, R. and Mendes, S.M. ‘Public Protest and Police Violence: Moral Disengagement and Its Role in Police Repression of Public Demonstrations in Portugal’ (2018) 24 (1) *Peace and Conflict: Journal of Peace Psychology* 27; Giacomantonio, C., Bradford, B., Davies, M. and Martin, R. ‘Making and Breaking Barriers: Assessing the value of mounted police units in the UK: Summary report’ (2014) <[https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR800/RR830z1/RAND\\_R830z1.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR830z1/RAND_R830z1.pdf)> accessed 29/01/2020

<sup>600</sup> Gerber, M.M. and Jackson, J. ‘Justifying violence: legitimacy, ideology and public support for police use of force’ 23 (1) *Psychology, Crime & Law* 79

<sup>601</sup> *Ibid.* See also Langworthy, R.H. and Travis III, L.F. *Policing in America* (Macmillan Publishing Co, New York 1994)

vendor who was not a protester, was beaten by a police officer, suffering heart trauma that would later cause his death.<sup>602</sup> Excessive use of force by the police, and subsequent failures to prosecute the officer chiefly implicated, led to widespread comment as to the military nature of protest policing, the ineffectiveness of the Independent Police Complaints Commission, and indeed its legitimacy.<sup>603</sup> In some cases state violence *generates* violent protest as a dialogic response: a most notable example would be the Ferguson riots after the death of Michael Brown at the hands of the Ferguson police in August 2014, as discussed in the Introduction.<sup>604</sup> Protesters interpreted the police violence – first against Brown, and then through excessive use of force, including tear gas, against protesters – as a coded message of power, control, and institutional racism, delivered with fatal effect.<sup>605</sup> It has already been discussed that protest – and particularly violent protest, and protest by multiple actors, such as in riot – can be criticised *per* moral dialogue for the difficulty in interpreting a coherent argument coded in its performance. We see similar difficulties when it is the state who communicates incoherently with violence, too.

More recently in the UK, the vigil of Sarah Everard on 13 March 2021 provides another excellent example of a peaceful assembly turning disruptive and violent as a direct result of poor policing tactics and communications. The Clapham Common vigil for Everard, who had been raped and murdered by a Metropolitan Police officer, was peacefully attended by several hundred people. The Metropolitan Police officers on the scene asked attendees to disperse, to avoid breach of public order legislation and

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<sup>602</sup> Walker, P. and Lewis, P. 'Ian Tomlinson death: Simon Harwood cleared of manslaughter' *The Guardian* (19/07/2012) < <https://www.theguardian.com/uk/2012/jul/19/simon-harwood-not-guilty-ian-tomlinson>> accessed 09/04/2020

<sup>603</sup> Lyall, S. 'Critics Assail British Police for Harsh Tactics During the G-20 Summit Meeting' *The New York Times* (30/05/2009) < <https://www.nytimes.com/2009/05/31/world/europe/31police.html?pagewanted=all>> accessed 09/04/2020

<sup>604</sup> Kesling, B. 'Vigil for Missouri Teen Turns Violent' *The Wall Street Journal* (11/08/2014) < <https://www.wsj.com/articles/missouri-teenager-killed-by-police-after-fight-1407698036>> accessed 09/04/2020

<sup>605</sup> Terkel, A. 'Police Officer Caught On Video Calling Michael Brown Protesters 'F\*\*\*ing Animals'' *The Huffington Post* (07/07/2014) < [https://consent.yahoo.com/collectConsent?sessionId=3\\_cc-session\\_b7945179-f4f7-4f7a-b5e0-6e1998efb599&lang=en-us&inline=false;](https://consent.yahoo.com/collectConsent?sessionId=3_cc-session_b7945179-f4f7-4f7a-b5e0-6e1998efb599&lang=en-us&inline=false;)> accessed 09/04/2020; Follman, M. 'Michael Brown's Mom Laid Flowers Where He Was Shot—and Police Crushed Them' *Mother Jones* (27/08/2014) < <https://www.motherjones.com/politics/2014/08/ferguson-st-louis-police-tactics-dogs-michael-brown/>> accessed 09/04/2020



coronavirus regulations: though many did leave on request, officers began to arrest those who remained, including many people who questioned the legitimacy of the very police force making arrests. The optics were far from optimal: groups of predominantly male police officers, manhandling predominantly female attendees, at the vigil for a woman raped and killed by one of their officers.<sup>606</sup> A subsequent report by HM Inspectorate of Constabulary and Fire and Rescue Services, mostly supportive of the police and sympathetic to the dilemmas they faced on the ground, found that the police did try to engage in dialogue with protesters in advance of making arrests. Nevertheless, the report also acknowledged the police response as being “tone deaf,” and that “a more conciliatory” approach by the service would have been more effective at handling attendees at the vigil and, perhaps even more importantly in the long term, maintaining wider public trust in the service.<sup>607</sup> The messages the state was trying to make, including by the police, were confused: and this confusion led many to question the use of force by the police, and what they aimed to achieve by demonstrating this use of force in such a sensitive context. In light of the Tomlinson, Brown and Everard cases, it is important that greater thought also be given to the incoherent and indecipherable moral arguments presented by state agents when perpetrating violence on citizens – violence which is often far deadlier than the violence of the protesters in question.

Theorising state violence in this way, as a dialogic expression of a legitimacy claim, is of particular interest when one considers how protesters may incite state violence or its escalation, willingly or otherwise – and indeed how the state may also incite violence in otherwise peaceful protests. This is dialogue in its absolute form, in the sense of mutual interlocutors engaging in communicative expression and seeking out expression from the other party.<sup>608</sup> We see in several of the flag burning cases in the

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<sup>606</sup> Taub, A. ‘In Rage Over Sarah Everard Killing, ‘Women’s Bargain’ Is Put on Notice’ *The New York Times* (14/03/2021) <<https://www.nytimes.com/2021/03/14/world/europe/sarah-everard-women-protest.html>> accessed 15/2/2022

<sup>607</sup> Her Majesty’s Inspectorate of Constabulary and Fire and Rescue Services, ‘The Sarah Everard vigil – An inspection of the Metropolitan Police Service’s policing of a vigil held in commemoration of Sarah Everard on Clapham Common on Saturday 13 March 2021’ (30/03/2021) <<https://www.justiceinspectors.gov.uk/hmicfrs/publication-html/inspection-metropolitan-police-services-policing-of-vigil-commemorating-sarah-everard-clapham-common/#were-police-actions-at-the-event-proportionate>> accessed 15/02/2022

<sup>608</sup> On state responses to criminality and protest *per* dialogue, see generally Feinberg, J. ‘The expressive function of punishment’ in: Duff, A. & Garland, D. (eds) *A Reader on Punishment*

USA that the act was intentionally instigated to evoke a violent state response, that is to say, an arrest.<sup>609</sup> On a grander scale, one can see protest violence used to incite escalation of violent tactics by police. In the 2019 Hong Kong protests, for example, certain activists intentionally provoked police to use excessive force, in order to demonstrate the brutality of the institution. Conversely, there were allegations that police officers intentionally incited violence from crowds to legitimise the use of more forceful policing techniques.<sup>610</sup> Agents-provocateurs are an uncommon but not unheard-of method of policing protest, aimed not at limiting protest violence but precisely seeking to escalate it, so as to justify stronger crackdowns.<sup>611</sup> It tells us a great deal about the moral logics of the state when violence is thus employed. Much can be revealed about the nature of the state in which one lives, by examining the methods and modes of expression it uses through violence when addressing its political dissidents.

However, the purpose of the discussion in this Chapter subsection is not to explore the purpose and role of state violence in any great depth: rather, it is to remind the reader that certain forms of violence are deemed morally acceptable or legitimate *per se* if done under the auspices of the state, unless and until proven illegitimate. The inverse is so for protesters: their use of violence is traditionally deemed illegitimate until proven exceptional.<sup>612</sup> It also demonstrates that state violence is also a form of moral

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(Oxford University Press, Oxford 1994); Brownlee, K. 'The Communicative Aspects of Civil Disobedience and Lawful Punishment' (2006) 1 (2) *Criminal Law and Philosophy* 179, especially at 188

<sup>609</sup> Welch, M. and Bryan, J. 'Flag Desecration in American Culture: Offenses against Civil Religion and a Consecrated Symbol of Nationalism' (1996) 26 (1) *Crime, Law and Social Change* 77

<sup>610</sup> Cheng, A. 'Brutal Hong Kong police creating a cycle of violence in protest-torn city' (04/10/2019) <<https://www.scmp.com/comment/opinion/article/3031384/brutal-hong-kong-police-creating-cycle-violence-protest-torn-city>> accessed 10/10/2019

<sup>611</sup> Savage, M. 'Police under fire as trial collapses over 'agent provocateur' claims' *The Independent* (11/01/2011) < <https://www.independent.co.uk/news/uk/crime/police-under-fire-as-trial-collapses-over-agent-provocateur-claims-2181118.html>> accessed 29/01/2020

<sup>612</sup> For an interesting contemporary example in the UK: for a year and half, the discourse around the protesters who tore down the statue of Edward Colston in Bristol, during BLM protests in 2020, mostly focused on whether the unlawful violence was justified *morally*. Since the Colston 4 were acquitted in January 2022, and their actions found lawful by the jury at Bristol Crown Court, discourse has become much more muddled: were they *really* acting lawfully, or were the jury giving a perverse acquittal? If their actions were lawful, what implications could this have for security and protest, and the state's jealously-guarded monopoly on force, moving forward? Until the property damage was *proven by law* to be lawful, it was considered illegitimate; once it was proven lawful, its exceptionality has caused



dialogue, and that to treat the moral dialogue of protest violence differently to the dialogue of state violence is to misunderstand their interconnectedness.

From the forgoing sections, we can see how violent protest can be both a critique of a state's legitimacy claim, and its own legitimacy counterclaim by protesters. Instrumental and expressive acts of violence are able to communicate arguments as moral dialogue, just as nonviolent protest can. Even incidental or opportunistic violence *can* convey meanings, and though it is not perhaps the most coherent forum for legitimacy counterclaims in its rational-normative reasoning and communication, it still is capable of this essential function. This demonstrates that violence can be used as part of legitimacy claim by protesters – particularly when contrasted with the violence operationalised by the state.

#### Chapter 4 Conclusion

Violent protest is used instrumentally, symbolically and sometimes incidentally, in protest movements where legitimacy counterclaims are made with regard to the state, its government, and its laws and policies. The selection of targets of violence may have normative consequences which are relevant to evaluating its moral coherence as a legitimacy counterclaim, but the target alone is not the defining factor in determining the moral relevance of an act of violence. The focus must remain on the normative consequences of the action: that is, what constitutional moral principles are engaged and frustrated by its execution. The aim of the rest of the thesis is to test – given the nature of constitutional morality, legitimacy claims to its moral grounds, and counterclaims of the violent protesters – whether there can ever be a use of violence in protest that is justifiable in democratic constitutionality.

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political commentators to utterly fail to understand its legitimacy. Greenwood-Reeves, J. 'The Colston Four: Justifying Legitimate Violent Protest Within, and Without, the Law' *SLSA Blog* (08/01/2022) <<http://slsablog.co.uk/blog/blog-posts/thecolston-four-justifying-legitimate-violent-protest-within-and-without-the-law/>> accessed 15/02/2022

## Chapter 5: Nonspecific Limitations to Violent Protest

### Specific and nonspecific limitations to political violence

In the previous Chapters, the relevance of violent protest *per* legitimacy counterclaim has been demonstrated. The research thus far has been able to demonstrate that violence can be intelligible in protest with reference to its instrumental and symbolic value in dialogue, in liberal democracies. To assess fully its justifiability in the context of liberal democratic constitutionalism, however, it is now necessary to address the arguments which claim that violence is *not* justifiable, or which impose limitations on the nature and scope of violence which can be justified. The purpose of the next two Chapters is systematically to examine these arguments, and to evaluate the limitations they place on justifiable protest violence.

The literature which looks to the evils of political violence in society, and more specifically in democratic states, is extremely broad in scope.<sup>613</sup> By necessity the remainder of this thesis must focus forensically on those texts and arguments in moral-political theory that most closely address the coherence of violent protest in political discourse, and can help to impose limitations on its use. Does violent protest disregard the moral foundations of constitutional morality?<sup>614</sup> If the purpose of liberal democracy is to control and limit violence, in pursuit of maximum individual autonomy, how do we reconcile violent protest to this?<sup>615</sup> In short, if protesters' violence is not coherent under their own state's constitutional morality, is it incoherent and irrational, and therefore morally unjustifiable?<sup>616</sup> By examining arguments that present objections to violence, it will be possible to examine what limitations – if any – they can pose upon the justifiability of protest violence.

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<sup>613</sup> For general theory in opposition to political violence see *inter alia* Gandhi, M. *Young India* 1919-1922 (B.W. Huebsch, New York 1923); Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970); Singer, P. *Democracy and Disobedience* (Oxford university Press, New York 1977), 82

<sup>614</sup> Zlobina, A. and Gonzalez Vazquez, A. 'What is the Right Way to Protest? On the Process of Justification of Protest, and its Relationship to the Propensity to Participate in Different Types of Protest' (2018) 17 (2) *Social Movement Studies* 234

<sup>615</sup> Gurr, T.R. *Why Men Rebel* (40<sup>th</sup> anniversary paperback edn Routledge, Abingdon 2016); Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004)

<sup>616</sup> Buchanan, A. 'Political Legitimacy and Democracy' (2002) 112 (4) *Ethics* 689, 713-718

These arguments, which generally form objections to the justifiability of violence in making a legitimacy counterclaim, are complex and often overlapping moral and political arguments. In order to render this inquiry coherent and systematic, it would be expedient to separate these particular arguments into two general categories: specific and nonspecific limitations.

For current purposes, “specific limitations” relate directly to the heuristics of the present research. They are arguments that interrogate the role and effect of violence regarding constitutional morality and legitimacy claims specifically. These might include the objection that violence harms the moral principle of liberty, which is a constitutional moral principle, and so therefore that violence is inconsistent with constitutional morality.<sup>617</sup> These will therefore pose limitations to what kinds of political violence can be justified *in accordance with constitutional morality specifically*.

“Nonspecific limitations” are relevant to the justifiability of political violence in democratic states, but do not necessarily relate directly to the heuristics of constitutional morality and legitimacy claims. They are general arguments for limiting or prohibiting violence. They include the objection that violent methods of protest are counterproductive or off-putting to the public; that violence is innately wrong; or objections that protest violence risks social instability and could lead to chaos.<sup>618</sup> They do not directly require an examination of the theory of constitutional morality expounded in previous Chapters. These objections are still relevant to the inquiry, as they interrogate the role and purpose of protest violence in liberal democratic states, but they do not directly relate to the core heuristics of this thesis.

The decision to separate limitations to the justifiability of violence into these specific and nonspecific categories has three main motivations. Firstly, the sheer numerousness

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<sup>617</sup> Mill, J.S. *On Liberty* (Oxford University Press, Oxford 1859)

<sup>618</sup> See respectively: Chenoweth, E. and Stephan, M.J. ‘Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict’ (2008) 33 (1) *International Security* 7; Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970); Waldron, J. *The Dignity of Legislation* (Cambridge University Press, Cambridge 1999), 59-62

of critiques on political violence is such that there must be some division of subject matter to prevent administrative unworkability or incoherence in the present research. Secondly, the nonspecific objections do not require a re-examination of constitutional morality, and so can be analysed quickly from the start. By focusing on nonspecific objections first, or why political violence is *generally* wrong, it is possible to address broader criticisms of political violence systematically, before being able to examine forensically those criticisms that relate directly to the heuristics of the research. Thirdly, the distinction of specificity does not affect the rigour of the examination to which the various arguments will be applied. In this way the breakdown between nonspecific and specific limitations will provide methodical expediency without sacrificing analytic precision.

The remainder of this Chapter examines nonspecific limitations to political violence that feature prominently in liberal democratic theory. Some of these criticisms impose important limitations on what sorts of violence can be morally acceptable in protest. Care has been taken not to reproduce “straw men” for these arguments, but to present each one in full before honestly and rigorously evaluating its effect on justifications for protest violence.<sup>619</sup> This ensures that in the next Chapter, specific limitations can be examined with less risk of analytic blurring, and with greater focus on those objections and how they relate directly to the current thesis.

### Nonspecific limitations to violence in protest

The main nonspecific critiques of violence within protest in a liberal democracy are listed below. They largely all reduce down to claims that violence is morally wrong or harmful, particularly within a democracy. They comprise the following:

1. that political violence is illegal and therefore unjustifiable;
2. that violence is by definition immoral (either from deontological or consequentialist perspectives), and therefore unjustifiable;

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<sup>619</sup> Tindale, C. *Fallacies and Argument Appraisal* (Cambridge University Press, Cambridge 2007) pp. 19–28

3. that nonviolence is always preferable to violence, and so the latter is unjustifiable;
4. that violence is unnecessary and therefore unjustifiable;
5. that violence in protest is counterproductive and therefore unjustifiable;
6. that violence threatens social cohesion and can destabilise society, and therefore is unjustifiable.

It will be demonstrated that, although some of these arguments do present important limitations on the use of violence in democratic states, none of them demonstrate that violence can *never* be justified. Instead, they impose limitations on the types and magnitude of violence that can be justifiable in particular circumstances, and are useful checks against excessive and unjustifiable harm. It should be noted that any finding that an act of violent protest *might* be justifiable does not imply that all instances or any specific instance of protest violence will be justifiable. It merely demonstrates that violence is not per se unjustifiable.

### Illegality

Perhaps the most simplistic objection to protest violence is that it is usually illegal, and therefore not morally defensible on that basis alone. This seems to be an argument more commonly propounded by political leaders rather than political theorists.<sup>620</sup> As such it is difficult to find an author who writes a persuasive version of this argument capable of withstanding scrutiny.

The difficulty with this objection stems from two distinct but overlapping conceptual conflation that it makes. Firstly, equating all protest violence with illegality: for political theorists, it tends to be unhelpful to equate or elide the violent with the

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<sup>620</sup> For examples of government denunciation based upon the illegality of violent protests in question, see for example: <<https://www.telegraph.co.uk/news/uknews/crime/8691034/London-riots-Prime-Ministers-statement-in-full.html>> accessed 11/02/2020; Ejinsight, 'Carrie Lam condemns violent acts at Liaison Office, Yuen Long' (23/07/2019) <<http://www.ejinsight.com/20190723-carrie-lam-condemns-violent-acts-at-liaison-office-yuen-long/>> accessed 11/02/2020

illegal.<sup>621</sup> Secondly, this objection falsely equates illegality with immorality. These two matters can be addressed in turn.

Firstly, not all violence is illegal: the state has a monopoly on its legitimate use, but this simply means that violence may be used only in accordance with law.<sup>622</sup> Lawful violent protest is conceivable, and a few illustrative examples can show this straightforwardly. First, where that violence is sanctioned by law, violence may indeed be legal. A curious example is the June 2020 toppling of the statue of Edward Colston into Bristol harbour by the so-called Colston 4.<sup>623</sup> Four defendants were charged with s. 1 of the Criminal Damage Act 1971 for their involvement in tearing down the statue of the infamous slave trader, during a wave of BLM protests which spread across the UK. In January 2022, the trial of the Colston 4 was heard in Bristol Crown Court before a jury. All defendants pleaded not guilty, whilst conceding that they had indeed been involved in toppling the statue. Three main legal defences were put to the jury by all defendants: that the defendants' actions were necessary to prevent the criminal indecency of the statue's continued presence in a public place; that the protesters honestly believed that the owners of the statue, the people of Bristol, would consent to its toppling; and that it would be a disproportionate breach of their rights to freedom of expression and assembly to find them guilty of the offence.<sup>624</sup> The defendants were acquitted – that is to say, their actions were retrospectively found to be *lawful*. As it is a criminal offence to ask a jury for their reasons, we will never know which of these legal grounds, if any, the jury found convincing, but in any event the use of force during their protest was found to be lawful. Lawful violent protest is, therefore, both theoretically and practically possible.

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<sup>621</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 27

<sup>622</sup> Owen, D.S. and Strong, T.B. (eds) *Weber, M. The vocation lectures: "Science as a vocation", "Politics as a vocation"* (Hackett Publishers, Indianapolis 2004)

<sup>623</sup> Olusoga, D. 'The toppling of Edward Colston's statue is not an attack on history. It is history' *The Guardian* (08/06/2020) <<https://www.theguardian.com/commentisfree/2020/jun/08/edward-colston-statue-history-slave-trader-bristol-protest>> accessed 09/07/2020

<sup>624</sup> Greenwood-Reeves, J. 'The Colston Four: Justifying Legitimate Violent Protest Within, and Without, the Law' *SLSA Blog* (08/01/2022) <<http://slsablog.co.uk/blog/blog-posts/thecolston-four-justifying-legitimate-violent-protest-within-and-without-the-law/>> accessed 15/02/2022. Three of the defendants further argued that they were not guilty of criminal damage as their actions had increased, rather than decreased, the value of the statue.

A second example of lawful violent protest is the violence to one's own property, such as flag-burning cases in the USA in which defendants burnt their own flags, described in Chapter 4. In the *Eichman* case, the Supreme Court found Texan legislation criminalising acts destroying or defacing the national flag was unconstitutional, being an unjustifiable incursion on free speech under the First Amendment.<sup>625</sup> For current purposes however, the importance of the case lies simply in that it demonstrates that violent protest *can* be performed on one's own property without it necessarily being *unlawful*.

Violence to the self similarly is rarely unlawful in modern liberal democratic states. In the UK, s.1 of the Suicide Act 1961 decriminalised suicide and attempted suicide; there is no law against inflicting lethal or nonlethal self-harm for the purposes of protest.<sup>626</sup> There are many examples of violence being committed to the self in protest that do not breach any law: for example, tragic cases in which failed asylum seekers held in detention in Glasgow in 2004 stitched their own lips together to symbolise their being silenced.<sup>627</sup> These examples relate exclusively to violence committed against oneself, of course, and as such do not represent those cases in which violence committed against targets other than oneself might be (and usually is) illegal. Nevertheless, what all these examples do demonstrate is that the *unlawfulness* of violence itself is not the issue: it must be the harmful effect that the violence has (particularly on other persons), which is a matter that will be discussed in subsequent sections on deontological and consequentialist objections.

Regarding the second conceptual conflation, illegality does not always entail immorality.<sup>628</sup> The distinction between lawfulness and morality does not merely extend to legal positivist traditions of determining legal validity separate to

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<sup>625</sup> *United States v. Eichman*, 496 U.S. 310 (1990); Welch, M. and Bryan, J. 'Flag Desecration in American Culture: Offenses against Civil Religion and a Consecrated Symbol of Nationalism' (1996) 26 (1) *Crime, Law and Social Change* 77

<sup>626</sup> s.1 Suicide Act 1961

<sup>627</sup> BBC, 'Asylum seekers stitch up mouths' (22/02/2004) <<http://news.bbc.co.uk/1/hi/scotland/3511633.stm>> accessed 20/05/2020

<sup>628</sup> Zinn, H. *Disobedience and Democracy: Nine Fallacies on Law and Order* (2<sup>nd</sup> edn South End Press, Cambridge MA 2002); Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979)

morality.<sup>629</sup> Both the content of law, and obedience to law, can be morally ambivalent. Regarding the content of law, just as the content of that which is lawful may not be moral (a state can pass wicked laws), similarly, the content of that which is unlawful need not necessarily be immoral.<sup>630</sup> As such, an argument that that which is unlawful is immoral, and therefore that disobedience is immoral, is a false syllogism.<sup>631</sup>

The foregoing discussion might seem to betray a positivist stance, despite having in the Introduction disavowed any particular position in that very well-trodden debate. However, it is worth considering that even a non-positivist conception of the moral content of law does not itself entail that breaching a law is necessarily immoral. Whether breaching a law entails a breach of morality would, for the non-positivist, depend upon the moral content of that law: and whether the breach of that law therefore is justifiable would depend upon the moral factors for and against its breach. This being so it is *not* the illegality which is itself immoral, but *the breach of the moral content*. Illegality therefore does not remain an independent moral reason not to disobey that law.

Regarding the separate question whether there is a moral obligation to obey law, and therefore that disobedience is itself unjustifiable: this is a complex issue, and yet it is widely accepted that there can be times when the law can be broken pursuant to righteous causes through acts of *nonviolent* civil disobedience.<sup>632</sup> Most contemporary theorists agree that there is no *prima facie* obligation to obey law, and certainly that there is no indefeasible duty to obey in cases of gross injustice.<sup>633</sup> As such, if one can

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<sup>629</sup> Hart, H.L.A. *The Concept of Law* (2<sup>nd</sup> edn Oxford University Press, New York 1994); Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>630</sup> Delmas, C. 'On Michael Walzer's "The Obligation to Disobey"' (2015) 125 (4) *Ethics* 1145

<sup>631</sup> Lyons, D. 'Moral Judgment, Historical Reality, and Civil Disobedience' (1998) 27 (1) *Philosophical and Public Affairs* 31

<sup>632</sup> Lefkowitz, D. 'On a Moral Right to Civil Disobedience' (2007) 117 (2) *Ethics* 202; Brownlee, K. *Conscience and Conviction: the Case for Civil Disobedience* (Oxford University Press, Oxford 2012); Allan, T.R.S. 'Citizenship and Obligation: Civil Disobedience and Civil Dissent' (1996) 55 (1) *Cambridge Law Journal* 89

<sup>633</sup> Raz, J. 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 (4) *Minnesota Law Review* 1003; Dworkin, R. *Law's Empire* (1<sup>st</sup> edn Hart, Oxford 1998); Allan, T.R.S. 'Citizenship and Obligation: Civil Disobedience and Civil Dissent' (1996) 55 (1) *Cambridge Law Journal* 89; Lyons, D. 'Moral Judgment, Historical Reality, and Civil Disobedience' (1998) 27 (1) *Philosophical and Public Affairs* 31, 34-35; Lefkowitz, D. 'On a Moral Right to Civil Disobedience' (2007) 117 (2) *Ethics* 202, 205



produce instances in which civil disobedience can be both unlawful and morally justifiable, such as the case regarding the Civil Rights movement, it is not *illegality* which is at issue.<sup>634</sup>

Violence can indeed at times be both lawful and moral (such as self-defence); or lawful and immoral (for example, state-mandated human rights atrocities); unlawful and immoral (such as murder); or unlawful and moral (arguably, abortion in some states).<sup>635</sup> The same applies to protest violence. But it is also important to note that the power to determine what is lawful rests with the state: as such, judging the morality of protest according to what is lawful surrenders far too much moral autonomy to the state.<sup>636</sup> Normative standards of acceptable protest are based upon narratives of legitimacy, founded on a majoritarian status quo and the state's presumed monopoly on violence. Zlobina and Gonzalez Vazquez have observed that protest actions which are lawful but disruptive, such as strikes and sit-ins, often become criminalised this way.<sup>637</sup> In other words, morally justifiable protest often gets encroached upon and absorbed by the criminal justice system: as Terwindt argues, criminalising formerly-lawful protest helps present a narrative to delegitimise it morally.<sup>638</sup> Legality should therefore not be used as a yardstick for moral justifiability. If a particular instance of protest violence is immoral – for example, committing arson pursuant to one's political protest – it is not because it is illegal, but because it is itself immoral in context. As such, the “illegality” argument does not itself pose any strong moral limitations on the use of violence by protesters.

### Violence as innately immoral

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<sup>634</sup> Washington, J.M. (ed) King, M.L. Jr. *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* (Harper Collins, New York 2003); Brownlee, K. 'Features of a Paradigm case of Civil Disobedience' (2004) 10 (4) *Res Publica* 337

<sup>635</sup> Lawrence, B.B. and Karim, A. (eds) *On Violence: A Reader* (Duke University Press, Durham and London 2007), 7

<sup>636</sup> For analogous difficulties in allowing the state to define “terrorism” as a specific form of political violence see generally Frey, R. G. and Morris C. W. (eds) *Violence, Terrorism, and Justice* (Cambridge University Press, New York 1991)

<sup>637</sup> Zlobina, A. and Gonzalez Vazquez, A. 'What is the Right Way to Protest? On the Process of Justification of Protest, and its Relationship to the Propensity to Participate in Different Types of Protest' (2018) 17 (2) *Social Movement Studies* 234, 236

<sup>638</sup> Terwindt, C. *When Protest Becomes Crime* (Pluto Press, London 2020)

Perhaps the most foundational argument against political violence is that violence is innately immoral, and therefore unjustifiable. There are several ways in which this argument manifests, but in liberal democratic theory, they largely fall into either deontological or consequentialist arguments. Both types of argument impose important limitations on violence that might be justifiable for the purposes of protest, but neither produces an absolute moral prohibition on political violence. As is demonstrated below, the deontological limitation would principally require protesters to use violence that does not treat others merely as means to their own ends.<sup>639</sup> The consequentialist limitation would not prohibit violence absolutely, but requires that activists determine, to the best of their ability, whether the effects of their violence will prove successful in their aims, and cause an acceptable level of harm.<sup>640</sup>

### *Deontological Objections*

Most notable deontological analyses of political violence present arguments totally prohibiting its use. It will be argued here, however, that these arguments do not persuasively demonstrate that *no* political violence is ever justified. Instead, they chiefly require that activists should not treat other persons merely as means to an end when using their tactics, violent or otherwise.

Several writers have attempted to examine whether violence itself should be seen as unjustifiable, without reference to its consequences, based on Kantian deontological perspectives on the innate morality or rightness of actions.<sup>641</sup> The key principles underlying Kant's argument can be stated here briefly and concisely, demonstrating how they produce compelling limitations to justifiable political violence.

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<sup>639</sup> For a similar argument see Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 49-52

<sup>640</sup> An analogous argument can be found in Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4) *Philosophy and Public Affairs* 384

<sup>641</sup> "Immanuel Kant (1724-1804) is generally considered the greatest of modern philosophers. I cannot myself agree with this estimate, but it would be foolish not to recognize his great importance" – Russell, B. *History of Western Philosophy* (London, Routledge 2004), 677

Kant's *Metaphysics of Morals* and *Groundwork* posit two relevant formulae for the justifiability of all actions.<sup>642</sup> They are fundamentally based on the shared dignity of human persons, and the presumption that all persons are capable of moral reasoning. These presumptions are not uncontested by political theorists, but shall go uncontested here for the sake of brevity, and so that these arguments can be given a fair examination on their merits.<sup>643</sup> The first formula is the Universal Law formula: that one should only commit to an action or maxim which, if universally applicable to all, would be reasonable. One should be able to conceive, and will, that a maxim be universally applied. The second is the Humanity formula: that persons should never be treated merely as means to an end, but must also be ends in themselves.<sup>644</sup>

The cumulative effect of these can most easily be represented using the following steps. If political violence were to be framed in any universally applicable maxim, per the Universal Law formula, such that violent protest could be “reasonable” for anyone and everyone to do, it would allow too many people to commit violence. It could allow for uncontrollable, widespread violence based on arbitrary judgments of individual actors. Therefore it would be unreasonable for everyone to operate under any maxim whereby political violence would be permitted: we could conceive of such a violent world, but we would not *will* it to be.<sup>645</sup> As such, it is argued, it is unreasonable to allow any resort to political violence as a universal principle: and so political violence would breach the Universal Law formula. In conjunction with this, Kantian deontological perspectives generally see political violence as contrary to the Humanity formula. Violence, it is argued, treats persons merely as means to an end: that is to say, using or threatening force coerces others against their will, in pursuit of the user's

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<sup>642</sup> Gregor, M. (tr.) Kant, I. *The Metaphysics of Morals* (Cambridge University Press, Cambridge 1991), 55-65; Paton, H.J. (tr.) Kant, I. *Groundwork of the Metaphysic of Morals* (Harper & Row, New York 1964), 98-107

<sup>643</sup> For an influential general critique of Kant's work see Schopenhauer, A. *The World as Will and Representation* (Dover Press, New York 1966)

<sup>644</sup> Gregor, M. (tr.) Kant, I. *The Metaphysics of Morals* (Cambridge University Press, Cambridge 1991), 55-65; Paton, H.J. (tr.) Kant, I. *Groundwork of the Metaphysic of Morals* (Harper & Row, New York 1964), 98-107

<sup>645</sup> Kleingeld, P. 'A Contradiction of the Right Kind: Convenience Killing and Kant's Formula of Universal Law' (2019) 69 (274) *The Philosophical Quarterly* 64

own agenda.<sup>646</sup> As such, protest violence is unjustifiable in accordance with the two main principles of Kantian deontology.

Through these formulae, Kant argues that *no* political violence is justifiable. Such thinking inspired twentieth century writers, who evince a distrust of violence based upon similar reasoning. Most notably, Hannah Arendt's *On Violence* addresses a number of consequentialist objections to political violence, but at heart seems to base its critique of violence on deontological concerns. Arendt's view that violence "will never be legitimate," for example, stems from the very nature of violence to undermine the integrity and dignity of persons, and to silence rather than engage in moral dialogue with the victim, which runs contrary to the Humanity formula.<sup>647</sup> Arendt also argues that political violence might be seen as justifiable by egregious actors and for egregious ideologies, such as racist organisations. This suggests a similar concern as that under the Universal Law formula, in that it would be dangerous and unreasonable to generalise or universalise even a relatively qualified and conditional principle of violent protest, if it might also extend to justifying heinous organisations' use of political violence.<sup>648</sup>

The requirement that we should not treat other persons merely as a means to an end is certainly an important limitation to the use of political violence. Kant's theory does not, however, present a powerful argument for the case that *all* political violence is therefore unjustifiable. Kant's original formulae prove too stringent to be applicable to liberal democratic morality. Thomas E. Hill Jr. addresses some of the flaws in Kant's writings regarding political violence, and his work on this is very enlightening to the current discussion.<sup>649</sup> In particular, Hill addresses ways in which Kant's formulae either produce unworkable results, or else do, in fact, allow for the possibility of some limited, principled use of political violence.

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<sup>646</sup> Gregor, M. (tr.) Kant, I. *The Metaphysics of Morals* (Cambridge University Press, Cambridge 1991), 127-133

<sup>647</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 52

<sup>648</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 76-80

<sup>649</sup> Hill, Thomas E. (Jr.) 'A Kantian Perspective on Political Violence' (1997) 1 (2) *The Journal of Ethics* 105

Hill's critique of the Universal Law formula is straightforward. He begins by asking us to imagine the absolute worst conditions of tyranny possible – he refers to this as the “best case scenario for political violence” – in which an unelected, merciless, cruel, mass-murdering, irredeemable despot rules over us with absolute intention of continuing to massacre innocent people.<sup>650</sup> Were one to posit the maxim that violent protest must never be undertaken, as per the Universal Law formula, Hill suggests, it would be unreasonable for such a position to be universalised.<sup>651</sup> One could not reasonably will for such a maxim to have universal application. For Hill, the Universal Law formula presents far too stringent a threshold. This seems intuitively correct: few contemporary writers claim that there can *never* be conditions where violent protest can be justifiable.<sup>652</sup> Even Arendt suggests that though “illegitimate,” violence can be “justifiable,” which seems to suggest that a Kantian dichotomy between absolutely proscribed and absolutely prescribed maxims of political violence goes too far.<sup>653</sup>

Alternatively, Hill suggests, one would have to alter the phrasing of the posited maxim to include sufficient conditions and qualifications on the type of protest, so as to accommodate those occasions where it is necessary to overturn unambiguous tyranny. This would require some stipulation as to its methods, whether alternative methods of resolving the dispute have been engaged, the severity of state injustice required to render protest violence defensible, and so on. Yet in doing so, one would lose the *absolute* prohibitive nature of the Universal Law argument against political violence.<sup>654</sup> As such the Universal Law formula must either allow for the possibility of justifying unchecked tyranny, which we could not reasonably will into being; or else it must accommodate a qualified justification for certain types of violent protest. What these types of protest might entail, and what qualifications they would require in order to be justifiable, are, naturally, highly complicated and context-dependent

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<sup>650</sup> Hill, Thomas E. (Jr.) ‘A Kantian Perspective on Political Violence’ (1997) 1 (2) *The Journal of Ethics* 105, 109

<sup>651</sup> Hill, Thomas E. (Jr.) ‘A Kantian Perspective on Political Violence’ (1997) 1 (2) *The Journal of Ethics* 105, 122

<sup>652</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 47-51

<sup>653</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 52

<sup>654</sup> Hill, Thomas E. (Jr.) ‘A Kantian Perspective on Political Violence’ (1997) 1 (2) *The Journal of Ethics* 105, 123

questions. Crucially however, the *absolute* moral prohibition of violent protest cannot reasonably be supported under the formula.

There is an alternative means by which the Universal Law formula could allow for *some* use of violent protest, even if we did adopt a universal maxim of nonviolence. Kleingeld has discussed how for Kant, certain “wide” duties (for example, to beneficence and generosity) exist, where our duty to act on them is sincerely adopted but our capacity to act in accordance with those maxims is not always possible.<sup>655</sup> In Kant’s *Metaphysic of Morals*, he explains how for some wide or “imperfect” duties, it is permissible not to act upon those duties *as long as* one’s reasons for doing so are based upon some other maxim or duty.<sup>656</sup> For example, one’s duty to act according to the maxim of beneficence is not necessarily forsaken, if one does not give all of one’s time and resources to serve others, provided that one spend that time and those resources pursuing self-improvement and education. Kleingeld gives the example of a medical student, spending time away from providing disaster relief, so that she can focus on her exams: this is an acceptable limit on one’s duty to act generously.<sup>657</sup> Provided that one *has* adopted the virtuous maxim of beneficence, one can refrain from charity provided it is motivated by another virtuous maxim. Refraining from acting on the maxim of benevolence does not itself entail that one has adopted the converse maxim of non-beneficence (that is to say, selfishness).<sup>658</sup>

To draw the analogy to a maxim of nonviolence, then, the following argument could be made. It is virtuous and good to adopt a maxim of nonviolence, and let us presume that it is a maxim one could rationally will to apply universally.<sup>659</sup> However, in the context of a liberal democratic state, we *must accept* (as described in Chapter 4) that

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<sup>655</sup> Kleingeld, P. ‘A Contradiction of the Right Kind: Convenience Killing and Kant’s Formula of Universal Law’ (2019) 69 (274) *The Philosophical Quarterly* 64

<sup>656</sup> Paton, H.J. (tr.) Kant, I. *Groundwork of the Metaphysic of Morals* (Harper & Row, New York 1964), 98-107

<sup>657</sup> Kleingeld, P. ‘A Contradiction of the Right Kind: Convenience Killing and Kant’s Formula of Universal Law’ (2019) 69 (274) *The Philosophical Quarterly* 64, 74

<sup>658</sup> Kleingeld, P. ‘A Contradiction of the Right Kind: Convenience Killing and Kant’s Formula of Universal Law’ (2019) 69 (274) *The Philosophical Quarterly* 64, 77

<sup>659</sup> One could certainly rationally will for such a world to exist: whether this maxim meets the other condition under the Universal Law formula, that such a condition is conceivable (particularly in the milieu of liberal democratic theory and the state’s very foundation in violence), is a wider and more difficult question. For now we will presume, for the purposes of this argument, that such a maxim is both conceivable and rationally capable of being willed.

violence is necessary, *according to liberal democratic theory*, for the creation and maintenance of the state.<sup>660</sup> Nonviolence then, if it *can* be a maxim which can conceivably and rationally be willed into being in a liberal democratic state, *must* impose an imperfect duty. It has necessary limits imposed through the need for the state to arrest criminals, employ an army in defence of its sovereignty, and so forth.<sup>661</sup> The same maxim of nonviolence applies of course not just to states, but to individuals and their own actions. But again we cannot will, in liberal democratic theory, for the individual to have *absolutely no* leeway in determining when to use violence against, per Hill's example, an unambiguously monstrous regime.<sup>662</sup> The nonviolence maxim must be imperfect, for both the state and the individual.

As such, one can justifiably *not* act on the principle of nonviolence where there is another maxim which justifies that course of action. Just as self-improvement is a good maxim to justify the medical student studying for exams rather than devoting herself entirely to disaster relief, likewise it would be justifiable not to act on the imperfect duties arising from the maxim of nonviolence, provided one was acting in pursuit of some other maxim: for example, the pursuit of justice, the promotion of equality, or the protection of one's fellow citizens against oppression.<sup>663</sup> Refraining from acting on a maxim which imposes imperfect duties does not imply that one has adopted the inverse maxim: the medical student has not adopted a maxim of selfishness.<sup>664</sup> Similarly the protester who has adopted a maxim of nonviolence, but acts with measured violence in accordance with the duties imposed by a maxim of justice or

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<sup>660</sup> See chapter 4. Owen, D.S. and Strong, T.B. (eds) *Weber, M. The Vocation Lectures: "Science as a Vocation", "Politics as a Vocation"* (Hackett Publishers, Indianapolis 2004); Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001)

<sup>661</sup> Cover, R.M. 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601; Schwarzmantel, J. 'Democracy and Violence: A Theoretical Overview' (2010) 17 (2) *Democratization* (2) 217

<sup>662</sup> Hill, Thomas E. (Jr.) 'A Kantian Perspective on Political Violence' (1997) 1 (2) *The Journal of Ethics* 105

<sup>663</sup> These other maxims need not necessarily reflect the principles of constitutional morality. However, where they do – for example, a maxim to act in the pursuit of justice – the protester action would not only be reconcilable with the Universal Law formula, but will also align with the principles of constitutional morality.

<sup>664</sup> Kleingeld, P. 'A Contradiction of the Right Kind: Convenience Killing and Kant's Formula of Universal Law' (2019) 69 (274) *The Philosophical Quarterly* 64, 77

equality, for example, does not necessarily thereby renounce the maxim of nonviolence, nor do they necessarily adopt a maxim of violence.

Therefore, the Universal Law formula fails to provide a justification for the total moral prohibition of violent protest. Firstly, we could not will for an absolute maxim of nonviolence, because it would allow for unchecked and unjustifiable tyranny.<sup>665</sup> Secondly, such a maxim could only impose imperfect duties: therefore it would be justifiable to *not* act on the principle of nonviolence, provided one was acting in pursuit of other maxims, such as justice, equality, and liberty.

The next part of the deontological argument against violence to consider is Kant's Humanity formula argument. For Kant, the principle that one should treat others as ends, and not merely means to one's own ends, derives from the innate dignity of human persons and their capacity for moral reason.<sup>666</sup> The argument then follows that political violence renders other persons as merely means to an end, rather than ends in themselves. A key qualifying word here is to treat others "merely" as means rather than ends. People can and must be used as means also: or else there could be no legal order.<sup>667</sup> A convicted murderer may object to being imprisoned: but that does not mean that, by adopting a view of practical reason that treats him as a rational being capable of agency and dignity, a system which allows for his incarceration falls foul of the Humanity formula. What is crucial is that the action should be *capable* of being "in principle justifiable to all."<sup>668</sup> This entails that the person in question must be treated as also having dignity, and of having their own moral autonomy.

Hill addresses two countervailing objections to the use of the Humanity formula to preclude political violence, which, much like the criticisms of the Universal Law formula, result in the Kantian view either being redundant or requiring significant qualification. The first is that, taken at face value, the Humanity formula can be so

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<sup>665</sup> Hill, Thomas E. (Jr.) 'A Kantian Perspective on Political Violence' (1997) 1 *The Journal of Ethics* (2) 105-140, 120

<sup>666</sup> Paton, H.J. (tr.) Kant, I. *Groundwork of the Metaphysic of Morals* (Harper & Row, New York 1964), 98-107

<sup>667</sup> Paton, H.J. (tr.) Kant, I. *Groundwork of the Metaphysic of Morals* (Harper & Row, New York 1964), 98-107

<sup>668</sup> Hill, Thomas E. (Jr.) 'A Kantian Perspective on Political Violence' (1997) 1 (2) *The Journal of Ethics* 105, 126



strict as to circumscribe a large number of intuitively justifiable activities. These include emergency powers and actions taken out of self-defence: these require immediate action, do not allow for the complete luxury of adopting a neutral perspective of practical reason, and treat hostile persons primarily as objects.<sup>669</sup>

To make this acceptable, again, one has to look to the system-level rather than at the instance-level when determining whether a maxim treats humans as rational beings. An approaching assailant operates in a system that treats him as human, not *merely* a means to an end, and having a law that provides for self-defence is not contrary to this. A number of writers, such as Kernstein, have explained how acts of self-defence can be framed within a system that does not treat the assailant merely as a means to an end.<sup>670</sup> As Formosa observes, such necessary responses to violence and other non-consensual incursions into one's dignity and autonomy would not be contradictory to the Humanity formula.<sup>671</sup>

What then results, however, is that we reach Hill's second objection to the Humanity formula, in that the word "merely" qualifies the formula to a level that can include justification for acts of political violence. If one can justify violence in self-defence, for example, at the system-level, it is not *violence* itself that is at issue deontologically. What happens instead is a discussion about how any instance of violence does not *merely* treat others as means to an end, and on what basis that violence can be justified, particularly at the system-level.<sup>672</sup> If one can conceive of a political system that uses force (such as powers of arrest, or legal defences for self-defence), whilst preserving, in some respect, the moral autonomy and dignity of certain targets (such as these hypothetical assailants), it is also possible to conceive of a system that could accommodate forms of political violence that similarly assume and preserve the autonomy of other targets. This is particularly the case where the state against which

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<sup>669</sup> Hill, Thomas E. (Jr.) 'A Kantian Perspective on Political Violence' (1997) 1 (2) *The Journal of Ethics* 105, 127

<sup>670</sup> For example see Kerstein, S. 'Treating Others Merely as Means' (2009) 21 (2) *Utilitas* 163, 177

<sup>671</sup> Formosa, P. 'Dignity and Respect: How to Apply Kant's Formula of Humanity' (2014) 45 (1) *The Philosophical Forum* 49, 60

<sup>672</sup> Hill, Thomas E. (Jr.) 'A Kantian Perspective on Political Violence' (1997) 1 *The Journal of Ethics* (2) 105-140, 137

one is violently protesting is itself acting with unjustified violence: that is, where the state is the assailant in the self-defence analogy.

A number of contemporary writers, without explicitly addressing the Humanity formula in their analyses, echo this exact qualification in their own theories of justifiable political violence. In Delmas' theory of principled resistance, for example, protesters are bound to act in ways that ensure that the interests of other people (including their physical integrity, their values, and their fundamental rights) are respected, in such a way as to "constrain both the legitimate goals and the appropriate means of resistance," which could include constrained acts of violence.<sup>673</sup> It is similarly written, not explicitly but implicitly, in Pasternak's account of political rioting, in the limitations of proportionality and respect for individuals which circumscribe action of justifiable political violence.<sup>674</sup> As such, the deontological position *can* allow for justifiable violent protest, provided that the activists do not treat other people as *merely* means to their own political and social ends.

In summation, then, neither of Kant's formulae can present a total rejection of violence that would be tenable in liberal democratic states. They do however present good reason for persons not to be treated solely as means to an end: and this limitation is something that protesters can factor into their tactical decisions. Delmas and Pasternak are two contemporary writers who present methods of analysing justifications for violence which require protesters to treat others with respect and conscientiousness, and in their work we can see examples of how a principled approach to violence *could* factor in the Universal Law and Humanity formulae. If protesters use violence, therefore, that is in pursuit of a moral maxim or principle, and does *not* treat persons as merely means to an end, then they would not fall foul of the deontological objections to violence. This does impose an important, principled limitation on violence that would preclude, for example, violence exercised out of cruelty; or choosing a violent tactic without due consideration of the effects of that violence on victims. It is likely that this would pose a significant barrier to cases of violence used

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<sup>673</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 49

<sup>674</sup> Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4) *Philosophy and Public Affairs* 384, 406-412

against persons, unless perhaps the target in question was already posing a threat to the protester or others (for example, in cases of purported self-defence against police brutality). The protester would have to assure themselves of the fact that the target was not being treated simply as an instrument in their own designs, and this is likely to rule out violence which harms third parties – and particularly cases of fatal terrorism or assassination, which remove altogether the target’s own capacity to act as a moral agent.

A final difficulty with deontological (non-consequentialist) objections is that, as explored in Chapter 4, it is difficult to define “violence” without reference precisely to its physical and moral consequences.<sup>675</sup> Across all its various definitions, we understand violence intuitively by its effects: harm, damage, distress.<sup>676</sup> Implicit, then, in any attempt at a purely deontological evaluation of violence is a pre-existing judgment of that violence, precisely based on consequentialist reasoning. In order to identify violence in the first place, one must be able to discuss realistically whether any form of violence creates immoral outcomes, and therefore one must take a consequentialist approach as well.

### *Consequentialist limitations*

Consequentialists and utilitarians<sup>677</sup> seek to determine the morality of actions not from the *rightness* of their innate character in principle, but from examining the *goodness* of their consequences.<sup>678</sup> As with the deontological arguments, key consequentialist writers tend to argue against the use of violence whatsoever. These arguments eschew

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<sup>675</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 *Journal of Peace Research* (3) 167-191, 168-172; Pape, R. ‘The Strategic Logic of Suicide Terrorism’ (2003) 97 *The American Political Science Review* (3) 343-361

<sup>676</sup> Feinberg, J. *Harm to Others* (Oxford University Press, New York 1984); Swift, J.S. *On Liberty* (Oxford University Press, Oxford 1859); Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003)

<sup>677</sup> Here I use the terms interchangeably. Both have broad, heterogenous, highly-contested definitions, which vary according to whether one includes not merely foreseen but intended consequences (Anscombe, G. E. M.; Geach, M. and Gormally, L. (eds) *Human life, action and ethics: essays by G.E.M. Anscombe* (Imprint Academic, Exeter, UK)), or whether one must stipulate an intended “good” outcome for utilitarianism only (Shafer-Landau, R. *Fundamentals of Ethics* (Oxford University Press, New York 2010), 112-143). These definitional matters are not important to the focus of this analysis.

<sup>678</sup> Shafer-Landau, R. *Fundamentals of Ethics* (Oxford University Press, New York 2010), 112-143

political violence due to its potential for harm.<sup>679</sup> But this absolute position goes too far. It will be shown that a consequentialist approach only requires that protesters carefully consider the harms that their actions may cause, and factor these harms when considering the likelihood of success, in their using violence in their protests.

Here, there shall be no critique of consequentialism as a philosophy in itself. Concerns such as incommensurability of goods, the unpredictability of consequences for individual actions (let alone rule utilitarian class consequences); the utility monster, rights-based objections, and so forth, have been addressed at great length elsewhere.<sup>680</sup> Again the benefit of the doubt is given here to the basic premises of consequentialist reasoning (including a quantifiable “good,” commensurability with individual liberties as well as majoritarian felicity calculus, and so on) for the purposes of allowing a fair and robust examination of the limitations that consequentialism might pose to political violence. In this section, the focus shall be placed on how, giving prima facie credence to consequentialist moral reasoning for the sake of fair argument, we can examine its objections to *violent protest* more specifically.

Briefly stated, consequentialist arguments against violent protest are based on the presumption that protest violence creates morally bad consequences through the harm or fear of harm it generates.<sup>681</sup> Violence thus entails consequences that adversely affect moral principles, such as liberty (it entails “moral harm”), or happiness, for the purposes of utilitarianism. This moral harm (or injury to happiness) makes violence unjustifiable.

Of course, there are a number of more specific consequentialist perspectives which frame the problem of violence in more nuanced ways. An extreme, narrow consequentialist approach would suggest that any act of violence, by virtue of its innate capability of restricting the freedoms of others, is per se immoral and

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<sup>679</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 52

<sup>680</sup> See *inter alia*: Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 1971), 179-183; Dworkin, R. *Taking Rights Seriously* (6<sup>th</sup> edn Duckworth, London 1991); Nozick, R. *Anarchy, State and Utopia* (1<sup>st</sup> edn Blackwell, Oxford 1974)

<sup>681</sup> Gurr, T.R. *Why Men Rebel* (40<sup>th</sup> anniversary paperback edn Routledge, Abingdon 2016), 3: “violence consumes men and goods, it seldom enhances them.”

unjustifiable.<sup>682</sup> This extreme approach is effectively limited to first-order consequences: that is to say, the immediate harm to the victim injured. This view has been criticised and rejected by many scholars who accept that violence can have a net positive moral effect if it also creates good consequences, and that where violence can be used in such a way that generates net positive consequences, it can be entirely justifiable under this simplistic consequentialist frame.<sup>683</sup> Such an extreme view against first-order consequences of violence would prevent *any* use of force from being justifiable, even if done lawfully for the purposes of self-defence, or by the state.

As such, most consequentialist perspectives instead look to whether the net effect of violence creates better or worse consequences than nonviolence: not simply on the level of a particular action, but also as a “class” of actions which, if widely performed, would have calculable consequences.<sup>684</sup> This can, simply put, be described as the difference between act-utilitarianism and rule-utilitarianism. This entails a calculation of first-order effects, not only on the primary target of that act of violence (for example, a smashed window), but also wider society, including the deleterious effects that such types of violence may have on members of the public and on social institutions (such as panic, fear of crime, and so forth).<sup>685</sup> This in turn includes second-order consequential considerations, such as whether as a general rule one could predict that such violence could inspire others to protest violently for their own various moral causes, or could even induce ruthless state retaliation. The effects of such second-order consequences must also be taken into consideration in this more intricate calculus of utility.

What, then, are the consequences of violent protest that render it unjustifiable, according to these arguments? One of the most influential opponents to political violence, Hannah Arendt, takes a highly nuanced approach, which is worth exploring

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<sup>682</sup> Fiala, A. ‘Pacifism’ (2018) *Stanford Encyclopedia of Philosophy*

<sup>683</sup> Anscombe, G. E. M.; Geach, M. and Gormally, L. (eds) *Human life, action and ethics: essays by G.E.M. Anscombe* (Imprint Academic, Exeter, UK); Nielsen, K. ‘One the Justifiability of Terrorism (State of Otherwise)’ (2003) 41 (2-3) *Osgoode Hall Law Journal* 427, 440, where he refers to this kind of reasoning as “crude utilitarianism”

<sup>684</sup> Shafer-Landau, R. *Fundamentals of Ethics* (Oxford University Press, New York 2010), 112-143

<sup>685</sup> Shafer-Landau, R. *Fundamentals of Ethics* (Oxford University Press, New York 2010), 140

given its influence on many contemporary writers. In her critique of violence, she examines whether violent protest might be justifiable based on its instrumentality.<sup>686</sup> As described above, a core facet of her critique could be described as deontological: that violence by its very nature is *wrongful* and therefore unjustifiable. But a second strain to Arendt's critique is consequentialist in nature. She starts by hypothesising the possibility that this deontological wrongfulness – the way violence cannot be “legitimate” in nature – might nonetheless be “justifiable” if it attained positive ends, which may be worthy in intention. For example, a small amount of violence used instrumentally to overcome oppression might be justifiable. She examines the argument of a number of writers, including Sorel, Fanon and Benjamin, who present violence as a tool that can be instrumental for just moral ends.<sup>687</sup>

However, she then argues that the effects of violence are innately unpredictable.<sup>688</sup> From an act-utilitarian perspective, a small act of violence that prevents an immediate, grievous harm might seem on balance to be justifiable, and could have a relatively small number of immediate calculable consequences. In the long-term, though, its effects can be incalculable, which makes it extremely difficult to rationalise, and therefore to justify. Long-term problems can include the normalisation of violence in public life, whether because it encourages others to participate in violence for their own perceived moral outrages, or because it then justifies and then perpetuates state violence. Finlay has elaborated on this critique: as violence is only justifiable by reference to its potential positive outcomes, under a consequentialist frame, the innate uncertainty of the outcomes of violence imposes “an important limit on its justifiability.”<sup>689</sup> A rule-utilitarian perspective is implied in this critique: if, as a general rule, violent protest were committed by many people who felt the need to protest, it would risk very undesirable second-order consequences. For Arendt and her adherents, this risk renders *all* violent protest unjustifiable in the long-term.

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<sup>686</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 52

<sup>687</sup> Hulme, T.E. (tr) Sorel, G. *Reflections on Violence* (Peter Smith, New York 1941); Farrington, C. (tr) Fanon, F. *The Wretched of the Earth* (Modern Classics edn Penguin, London 2001); Benjamin, W.; Demetz, P. (ed) Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995)

<sup>688</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 79

<sup>689</sup> Finlay, C.J. ‘Hannah Arendt’s Critique of Violence’ (2009) 97 (1) *Thesis Eleven* 26, 29

There are a number of counters to these objections which deserve attention, and which might allow for some violence to be justifiable in protest without a full prohibition. Firstly, a consequentialist prohibition of protest violence must account for the sheer variety of potential instances of violence, some of which will prove relatively harmless compared to the harms they can negate.<sup>690</sup> As per the previous Chapter, violence proves difficult to define in the abstract. To frame violence prescriptively according to categorical qualities is to oversimplify the term into analytic redundancy. In practice, many forms of violence cannot be understood as being worse than the potential state violence that would otherwise be committed. One can refer to the case of the Stansted 15, by way of example. As discussed in Chapter 3, bolt cutters were used to enter a fence, so that the protesters could block the chartered jet which was set to deport a number of refugees to countries where they faced immediate risk of violence and human rights abuses. The very limited amount of property violence necessary to enter the airport pales in comparison to the human rights abuses the detainees would have faced in their countries of destination.<sup>691</sup> Indeed, particularly when addressing the risk of immediate state violence, it will be rare that the violence of protesters can match that of the state.<sup>692</sup> At least then regarding first-order moral consequences, not all protest violence creates a net harm. Second-order difficulties will be discussed presently.

Secondly, consequentialist objections to protest violence cannot imply a commitment to absolute nonviolence in liberal democratic theory. Nonviolence is not itself a moral principle to which a (Weberian) liberal state can meaningfully appeal, as discussed in

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<sup>690</sup> Galtung, J. 'Violence, Peace and Peace Research' (1969) 6 (3) *Journal of Peace Research* 167, 168-172; Cammiss, S., Hayes, G. and Doherty, B. 'Deportation and direct action in Britain: the 'terrorist trial' of the Stansted 15' *Open Democracy* (16/03/2018) <<https://www.opendemocracy.net/en/deportation-and-direct-action-in-britain-terrorist-trial-o/>> accessed 27/07/2019; Cammiss, S., Hayes, G. and Doherty, B. 'Treating the Stansted 15 as Terrorists is Part of a Worrying Trend' *Political Quarterly* (10/01/2019) <<https://politicalquarterly.blog/2019/01/10/treating-the-stansted-15-as-terrorists-is-part-of-a-worrying-wider-trend/>> accessed 27/07/2019

<sup>691</sup> Cammiss, S., Hayes, G. and Doherty, B. 'Deportation and direct action in Britain: the 'terrorist trial' of the Stansted 15' *Open Democracy* (16/03/2018) <<https://www.opendemocracy.net/en/deportation-and-direct-action-in-britain-terrorist-trial-o/>> accessed 27/07/2019

<sup>692</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267

the previous Chapter.<sup>693</sup> A commitment to nonviolence on the premise of the net harm resulting from violence, including risk of second-order violence, would require us to disband the state itself.<sup>694</sup> The state is the principal organ of violence in liberal democratic polity: a very dangerous protest may kill scores of people, while a very ordinary state may kill thousands, if not millions, in pursuit of mundane public policy, let alone conflict or war.<sup>695</sup> The very existence of the state can risk incalculable deaths. Indeed, if a commitment to unqualified nonviolence were taken on the premise of its unpredictable results, obedience to the state (defined by its monopoly on legitimate use of force) would itself be morally illogical. One cannot therefore commit to liberal democratic theory without also implicitly committing to *some* risk of significant first- and second-order harms. If, conversely, one were to make a *qualified* commitment to nonviolence, such that only a certain quantum of violence could ever be permitted, again, there would be many times where the violence of protest pales in comparison to the violence of the state being protested, even at the secondary or rule-utilitarian level.<sup>696</sup> The result would be that a utilitarian must therefore accept that there must, in liberal democratic theory, be occasions where violence which risks large second-order, long-term harms, must be acceptable. What seems to be the principal point of difference is not whether political violence is acceptable, but rather, whether we can accept (non-institutional) protest violence, specifically.<sup>697</sup>

As the liberal-democratic utilitarian cannot claim that *all* political violence creates unjustifiable risks of future harm, instead there must be a much closer examination of the type of violence and the quantum of foreseeable harm it entails. They would have to demonstrate that protest violence is wrong if it unjustifiably and disproportionately

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<sup>693</sup> Benjamin, W.; Demetz, P. (ed) Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995), 277-300. See also the previous section on deontological rationales against violence: a maxim of nonviolence could only impose an imperfect duty under a liberal democratic regime, in any event.

<sup>694</sup> Galtung, J. 'Violence, Peace and Peace Research' (1969) 6 (3) *Journal of Peace Research* 167; Schwarzmantel, J. 'Democracy and Violence: A Theoretical Overview' (2010) 17 (2) *Democratization* 217

<sup>695</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267

<sup>696</sup> Zinn, H. *Disobedience and Democracy: Nine Fallacies on Law and Order* (2<sup>nd</sup> edn South End Press, Cambridge MA 2002), 43-48

<sup>697</sup> Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 217-221; Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 9



places risks on the rights and liberties of others, at the second-order level.<sup>698</sup> Very often, violent protest can have significant negative effects on others, but not necessarily: for example, discriminate violence to oneself or to insured property may present relatively straightforward quanta of damage, with few significant second-order effects.<sup>699</sup> As Barrington Moore Jr. reminds us, each specific act of violent protest needs to be evaluated in the social and historical context in question.<sup>700</sup> Just like with nonviolent protest, it might be justifiable in context, or it might not.<sup>701</sup> However, what this does demonstrate is that the utilitarian objection cannot render *all* violent protest unjustifiable.

There is another natural effect of the consequentialist objection, intimated above, which is that if it *were* to attempt to have universal rather than a case-by-case application, it could extend not only to violent protest, but many nonviolent instances of protest as well. Indeed, even peaceful, lawful protests have consequences that can cost the taxpayer, impact on the liberties of others, and so on.<sup>702</sup> It is not therefore a matter of *violence*, as a (hazily-defined) qualitative category in its own right, universally having a net negative moral consequence. Such a universalist approach fails to put in the hard moral and empirical work of actually evaluating consequences of specific actions.<sup>703</sup> We have to weigh these consequences for all actions, violent or otherwise, lawful or unlawful, to determine their justifiability. There are times when we can reasonably consider violence to be justifiable, as mentioned above. Ergo, violence is not *per se* morally wrong within the argumentation of liberal democratic theory.

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<sup>698</sup> Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004); Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 52.

<sup>699</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 47-52; Brownlee, K. 'Features of a Paradigm case of Civil Disobedience' (2004) 10 (4) *Res Publica* 337, 347-350

<sup>700</sup> Moore, B. Jr. *Injustice: The Social Bases of Obedience and Revolt* (1<sup>st</sup> edn Macmillan, London 1978), 434-457

<sup>701</sup> Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985), 295

<sup>702</sup> Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4) *Philosophy and Public Affairs* 384, 409; Benjamin, W.; Demetz, P. (ed) Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995), 292

<sup>703</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 47-52

It is also worth noting that these consequentialist arguments against violent protest are imbued with an innate historical bias. As Rhodes observes, as a general rule, liberal discourses legitimating protest violence always do so in the past or historic tense, seldom in the present or future tense.<sup>704</sup> Previous uprisings, revolutions, and protests which have helped to shape the cultural history and constitutional framework of the modern liberal democratic state are given legitimacy in retrospect, glorified with the benefit of hindsight and with internalisation of those events as being of cultural significance. Arendt herself, for example, praises the violence of the American Revolution (whilst denouncing that of the French Revolution) in its instrumentality towards the liberation of the colonisers.<sup>705</sup> However, the same favourable analysis is rarely given by commentators when describing present or future protest, which is almost always seen ahistorically as an aberration against, rather than a natural part of, the evolution of the state.<sup>706</sup> Doubtless this is because psychologically, the threat of future risk and upheaval is more emotionally distressing than past violence, even if the latter was much gorier; and the past, having already occurred, has a certainty that the future will always lack in its felicitic calculus.<sup>707</sup> Perhaps the only way that protesters can hope to get the seal of approval is by acting sooner and hoping for recognition within their lifetime.<sup>708</sup>

A similar observation could be made about geographical rather than temporal distance: that individuals, and even states, are more likely to support violent protest for democratic causes if it is happening overseas. American media framing of the Arab

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<sup>704</sup> Rhodes, J.P. *The Voice of Violence: Performative Violence as Protest in the Vietnam Era* (Praeger, Westport 2001), 12; Lawrence, B.B. and Karim, A. (eds) *On Violence: A Reader* (Duke University Press, Durham and London 2007), 1-13

<sup>705</sup> Arendt, H. *On Revolution* (Penguin, London 2006); Finlay, C.J. 'Hannah Arendt's Critique of Violence' (2009) 97 (1) *Thesis Eleven* 26; Disch, L. 'How could Hannah Arendt glorify the American Revolution and revile the French? Placing On Revolution in the historiography of the French and American Revolutions' (2011) 10 (3) *European Journal of Political Theory* 350

<sup>706</sup> Hobsbawm, E.J. *Revolutionaries: Contemporary Essay* (Weidenfeld and Nicolson, London 1973); Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016)

<sup>707</sup> Chenoweth, E. and Stephan, M.J. 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2008) 33 (1) *International Security* 7

<sup>708</sup> Elsbach, K.D. and Sutton, R.I. 'Acquiring Organizational Legitimacy Through Illegitimate Actions: A Marriage of Institutional and Impression Management Theories' (1992) 35 (4) *The Academy of Management Journal* 699

Spring after December 2010 was overwhelmingly positive, focusing on narratives of burgeoning democracy and the involvement of young people in a popular movement which appealed to American audiences.<sup>709</sup> The Obama administration's response was partial and ambivalent. Whilst remaining cautious over military and diplomatic consequences of potential regime change across a number of the affected states, the US was openly supportive of principles of democracy and liberty emerging in popular discourse, and vacillated between pressing for political reform in the affected states, and openly supporting the protesters.<sup>710</sup> Where protesters overseas act in support of particular principles or interests which the home state holds in common, that state has an active interest in watching even violent protest unfold. The consequentialist balance for the home state weighs in favour of violent protest, where it would not do so for a domestic protest.

To summarise: consequentialist objections to violent protest do require protesters to consider seriously the short and long-term effects of their actions, and this can pose a serious limitation on what sorts of violence might be justifiable in context. It certainly places a significant burden on them to research, consider, and calculate the immediate and long-term consequences of their actions. It does not, however, mean that all violence is unjustifiable, because there can be occasions where the net effect of limited violence can be better than the net effect of nonviolence, even at a second-order level. It must depend upon a calculation of risk in context, not on a general prohibitive rule.

One final observation about the consequentialist argument is closely linked to a subsequent section, on the risk of one violent protest action inspiring more and more violence at a geometric rate, and thus endangering social cohesion as a second-order effect. This specific concern will be addressed in "Social Cohesion," below.

### Nonviolence as preference

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<sup>709</sup> McDonald, D.A. 'Framing the "Arab Spring": Hip Hop, Social Media, and the American News Media' (2019) 56 (1) *Journal of Folklore Research* 105

<sup>710</sup> Pinto, Maria do Céu de Pinho Ferreira 'Mapping the Obama administration's response to the Arab Spring' (2012) 55 (2) *Revista Brasileira de Política Internacional* 109

Another argument (related to, but distinct from, the deontological and consequentialist arguments noted above) focuses less on the specific evils of violence, and instead looks to the virtues of nonviolence.<sup>711</sup> Under this argumentation, nonviolence is a principle to which democracies (or at least, many citizens in any given democracy) aspire. Nonviolent means of dialogue are morally superior and, all other things being equal, the only justifiable means of making moral argument. The preference for nonviolence imposes on protesters the obligation to consider whether a nonviolent alternative to their protest violence is possible and effective before committing to any violent protest action.

A breakdown of the general position can be presented as follows. Violence presents risks of moral harm – to liberty, to dignity and personal integrity, and so on.<sup>712</sup> Nonviolence does not present these risks. Therefore, all other things being equal, nonviolence risks less moral harm. This makes nonviolence preferable to rational moral actors who wish to reduce moral harms. The argument usually then proceeds to say that, as a matter of fact, nonviolence is always a possible option, and one which is at least as practical as violence is in terms of attaining a desired outcome. As such, it is argued, there is no occasion where violence *can be* preferable: and so therefore it is always morally irrational and, therefore, unjustifiable.<sup>713</sup>

It can be shown in this section, however, that although generally speaking nonviolence entails fewer risks of harm, and therefore is to be preferred to violence, there can be times where nonviolence fails to protect against certain harms, and where violence instead is more justifiable.

It has already been noted, in Chapter 4 and earlier in this Chapter, that appeals to nonviolence as a liberal democratic (or constitutional moral) principle in itself are open to a variety of criticisms. Principally, the state cannot exist without violence. Nonviolence is not itself a moral ground of liberal constitutional morality, or else the

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<sup>711</sup> Butler, J.P. *The Force of Non-Violence* (Verso, London 2020)

<sup>712</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970); Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004), 12

<sup>713</sup> Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004)

Weberian State would be a self-contradiction.<sup>714</sup> Indeed the state depends upon violence to achieve certain functions (execution of justice, and so on) necessary for it to retain the legitimacy derived from its constitutional moral grounds of justice, liberty, and so forth.<sup>715</sup> This violence need not manifest frequently or dramatically: it happens systemically and structurally. Usually the threat of violence for punishment, and the structures and hierarchies on which the state relies, are sufficient for the purpose.<sup>716</sup>

However, most contemporary proponents of nonviolence in protest, including Keane, do not question the existence or purpose of state-mandated violence in political life.<sup>717</sup> What they seek is its minimisation, given the risks that it poses to liberties and happiness.<sup>718</sup> By limiting violence solely to the employ of the state, subject to the rule of law, the risks both of its immediate harm and its spreading are reduced considerably.<sup>719</sup> Commentators such as Arendt and Judith Butler present nonviolent protest as a morally positive (or at least neutral) mode of action that provides the democratic dialogic functions of protest, without the attendant risks attached to violence.<sup>720</sup> As with the deontological and consequentialist arguments, then, we find that the strongest proponents of nonviolence tend to advocate for the *total* unjustifiability of violence.

Nonviolent resistance can be highly effective, as well as highly principled.<sup>721</sup> Such nonviolence need not be timid, uncreative, or inefficacious. Butler, for example,

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<sup>714</sup> Owen, D.S. and Strong, T.B. (eds) *Weber, M. The vocation lectures: "Science as a vocation", "Politics as a vocation"* (Hackett Publishers, Indianapolis 2004)

<sup>715</sup> Benjamin, W.; Demetz, P. (ed) Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995), 277-300

<sup>716</sup> Galtung, J. 'Violence, Peace and Peace Research' (1969) 6 (3) *Journal of Peace Research* 167. Again, as described above, deontologically, a maxim of nonviolence could only impose imperfect duties, in any event.

<sup>717</sup> Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004); Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970)

<sup>718</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 16-23; Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004)

<sup>719</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 23-28; Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004), 12

<sup>720</sup> Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004)

<sup>721</sup> Chenoweth, E. and Stephan, M.J. 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2008) 33 (1) *International Security* 7

argues for a radical nonviolence that has transformative powers rooted in solidarity, compassion and dialogue.<sup>722</sup> Many cite the successes of Gandhi in the Indian Revolution, or Martin Luther King Jr. in the Civil Rights movement in the US, as evidence of the powerful effect that principled nonviolent resistance can have.<sup>723</sup> As such nonviolence can present an alternative to violent protest that is both effective, and less prone to the risks concomitant to violence. It need not be *more* effective than a violent option: it need only be *no less* effective. Given its ready availability and its lower propensity for moral harm, so the argument goes, nonviolence will always be the more morally rational option over violence, which means that violent protest cannot be morally justifiable as a choice.<sup>724</sup>

However, these arguments for nonviolence fail to demonstrate that all violent protest is unjustifiable. It can be shown that the *preference* for nonviolence, *all other factors being equal*, therefore becomes heavily contingent upon those factors: that is, whether that nonviolence is going to be as effective and practical as, and less harmful than, a violent alternative.

The main critiques against these nonviolence arguments do not question the proposition that *all other things being equal*, nonviolent protest is generally preferable: in the vast majority of cases it is widely agreed, even among writers such as Delmas and Pasternak, that protest violence is undesirable compared to nonviolent methods of redress.<sup>725</sup> Instead, thought must be given to instances where *not* all other factors are equal. Firstly, there may be circumstances where nonviolence can risk moral harms where, paradoxically perhaps, violence would not. Secondly, there may be times where nonviolence may be unavailable or ineffective in comparison to certain types of violence in context, in which case its viability as an alternative is questionable. Inasmuch as either condition applies, the argument (that nonviolence's preferential

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<sup>722</sup> Butler, J.P. *The Force of Non-Violence* (Verso, London 2020)

<sup>723</sup> Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston M.A. 1973))

<sup>724</sup> Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston M.A. 1973), 63-71

<sup>725</sup> Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4) *Philosophy and Public Affairs* 384, 406-412, 406-407; Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 48-49

status makes protest violence unjustifiable) ceases to take effect, and violent protest may therefore become justifiable.

With reference to the lower moral harm of nonviolence, it is important to note that this is in effect an empirical claim. Appeals to nonviolence, within liberal democratic governance, really are an appeal to minimum violence necessary to preserve moral interests like liberty. Nonviolence is chiefly an instrumental principle in liberal democratic theory, under the harm principle, to maximise liberty and autonomy of citizens.<sup>726</sup> If so, this appeal to nonviolence depends upon an empirical question of what actually creates more harm in context. Schwarzmantel has discussed this in terms of a utilitarian argument, of whether the liberty-deprivation which is effected by an act of violence is commensurate to the equivalent moral harm of the nonviolent alternative.<sup>727</sup> This being so, it is important to question the presumption that nonviolence in all cases empirically results in less moral harm. Nonviolent protest can also be morally harmful both in action and omission – whether that is the extreme example of health workers going on strike, or simply the fact that all protests divert state resources away from potentially important causes.<sup>728</sup> As well as *nonviolent* protest having the possibility for *great moral harm*, it is possible that *violent* protest can cause *net reduction* in moral harms. A small act of property damage that sabotages equipment to be used for unjustifiable, unlawful killing – for example, slashing tyres of a truck delivering Agent Orange to an airbase – presumably reduces foreseeable risk of unjustifiable moral harm, rather than increases it.

The natural response to this counter-scenario is to ask why nonviolent resistance, such as laying in front of said vehicle to prevent its departure to the airbase, could not produce a similar net reduction in moral harm without the instrumental moral harm of property damage. If a less harmful, nonviolent alternative could have the same effect, then there would be no morally rational reason to opt for the violent action.<sup>729</sup> In short,

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<sup>726</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 400-420

<sup>727</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 23-28

<sup>728</sup> Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston M.A. 1973), 69-71; Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267

<sup>729</sup> Indeed activists can have good reason to move away from violent methods in order to seek long-term concessions: Dudouet, V., Cunningham, K.G., and Chenoweth, E. 'Dynamics and

why commit to violence when peaceful protest might work just as well? This leads onto the second facet of the nonviolence-as-preference argument that needs attention, namely the presumption that nonviolence is always an option, and that it always “works” in the sense of preventing net moral harm.

There are a number of examples one could raise where this conclusion does not easily follow. Notably as mentioned earlier, in the Stansted 15 case, without using bolt cutters to cut a hole through the fencing, the protesters would not have been able to obstruct the take-off of the airplane that the Home Office was using to deport the foreign nationals.<sup>730</sup> Without some measured and deliberate violence from the activists, the passengers would have been sent to countries where they faced extraordinary risks to their lives. It is no use suggesting that other methods not involving quietly cutting through the fence would have been more appropriate. For example, trying to obstruct Home Office officials within the airport itself would have presented enormous logistical difficulties, caused even more disruption to innocent passers-by, and risked escalation of state violence by alarmed law enforcement personnel inside the airport itself. There are times where measured violence is, in context, more reasonable than many available nonviolent options.<sup>731</sup> And if one accepts that limited protest violence *can* reduce moral harm in comparison to a nonviolent equivalent, then the absolute prohibition on the former based on the requirement of “all other things being equal” dissipates.

There are, regrettably, many very profound forms of entrenched injustice where the claim that nonviolent resistance “works” has not proven to be empirically true. The Black Lives Matter campaign is centred on the very fact that traditional institutional methods fail to address institutional racial killings, and that peaceful protests over

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Factors of Transition from Armed Struggle to Nonviolent Resistance’ (2013) 50 (3) *Journal of Peace Research* 401

<sup>730</sup> Cammiss, S., Hayes, G. and Doherty, B. ‘Deportation and direct action in Britain: the ‘terrorist trial’ of the Stansted 15’ *Open Democracy* (16/03/2018) <<https://www.opendemocracy.net/en/deportation-and-direct-action-in-britain-terrorist-trial-o/>> accessed 27/07/2019; Cammiss, S., Hayes, G. and Doherty, B. ‘Treating the Stansted 15 as Terrorists is Part of a Worrying Trend’ *Political Quarterly* (10/01/2019) <<https://politicalquarterly.blog/2019/01/10/treating-the-stansted-15-as-terrorists-is-part-of-a-worrying-wider-trend/>> accessed 27/07/2019

<sup>731</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 47-52



decades have made unacceptably slow progress.<sup>732</sup> The majority of BLM protests are peaceful, of course, but in 2020 there were multiple instances of statue defacement and, most significantly, hostile clashes with riot police, where activists claimed to be operating under the aegis of BLM as a movement.<sup>733</sup> As Maze has argued, even a presumed preference for nonviolence, per Arendt, may need to recognise that there are times where there is a second-order normative role for violence in opening space for first-order principles of liberty and justice, and so on, where they are oppressed by the current system.<sup>734</sup> What Nielsen called “categorical pacifism” is a tactical choice, and one which may be unfit to effect deep, structural change in the face of institutionalised injustice.<sup>735</sup>

Nonviolent resistance is prone to certain pragmatic limitations. As Braatz observes in his article, *The Limitations on Strategic Nonviolence*, there are very few instances where *solely* nonviolent activism is capable of creating deep structural change.<sup>736</sup> The examples most frequently cited to confirm the transformative power of nonviolent resistance – the Civil Rights movement, and Gandhi’s movement of nonviolent resistance to British rule in India – are frequently raised without fair historical reference to the many years of violent struggle without which those movements would have lost their impetus, tactical power, and emotional appeal.<sup>737</sup> The success of these movements depended on a combination of peaceful protests, violent resistance, and political compromise.

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<sup>732</sup> Lowery, W. *They Can’t Kill Us All: The Story of Black Lives Matter* (Penguin London 2017); Russell, R. ‘Black Lives Matter: Toward a Modern Practice of Mass Struggle’ (2016) 25 (1) *New Labour Forum* 34

<sup>733</sup> New York Times, ‘America’s Reckoning on Racism Spreads Beyond Policing’ (10/06/2020) <<https://www.nytimes.com/2020/06/10/us/protests-black-lives-matter-george-floyd.html>> accessed 16/06/2020

<sup>734</sup> Maze, J. ‘Towards and Analytic of Violence: Foucault, Arendt, and Power’ (2018) 25 *Foucault Studies* 120, 140; Oksala, J. *Foucault, Politics, and Violence* (Northwestern University Press, Evanston, Illinois 2012), 144

<sup>735</sup> Nielsen, K. ‘One the Justifiability of Terrorism (State of Otherwise)’ (2003) 41 (2-3) *Osgoode Hall Law Journal* 427, 439

<sup>736</sup> Braatz, T. ‘The Limitations of Strategic Nonviolence’ (2014) 26 (1) *Peace Review* 4

<sup>737</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 26-35; The Conversation ‘The forgotten violence that helped India break free from colonial rule’ (09/11/2016) <<https://theconversation.com/the-forgotten-violence-that-helped-india-break-free-from-colonial-rule-57904>> accessed 03/08/2020

Indeed, using these mythical paragons of nonviolence in order to demand nonviolence from the oppressed, without analysis of the groundwork of violence that informed their historical contexts, is at best reductionist, and at worst disingenuous. Quoting BLM activists in his research, Lowery restates that having a “seat at the table” of peaceful political engagement is useless if one is not given “a plate;” that voting for Barack Obama, and peaceful, lawful marches, do nothing to prevent Black protesters from being teargassed, and then having no reliable and effective legal recourse against this state violence.<sup>738</sup> Being required to demonstrate peaceful civility without the favour being returned is demoralising. Those who are told that there is “no excuse” for property damage during protest naturally responded that there is “no excuse” for the numbers of Black people who are killed in police custody, without any meaningful accountability or reform.<sup>739</sup> As Delmas observes, it is “hypocrisy and even absurdity” to demand nonviolence from those whose lives are “dominated by violence:” demanding their pacification, and their continuous oppression, under a state violence that is far deadlier than that of the activists.<sup>740</sup> There are times, therefore, that appeals to nonviolence simply fail to address the immediate dangers of an oppressive system that will continue to cause very significant moral harms: and continued appeals to the failed possibilities of peaceful protest may come across as naïve, or worse still, complicit with those systems of oppression.

Those with such grievances may contemplate violence as a symbolic or instrumental component of their activism, but then reconsider it on balance with other valid moral and practical considerations.<sup>741</sup> Again, the historical claim that the Civil Rights Movement was a success without the use of force fails to engage in an analysis of the many violent struggles without which the movement would not have been so successful. Indeed many within the movement, aside from Dr King himself, had

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<sup>738</sup> Lowery, W. *They Can't Kill Us All: The Story of Black Lives Matter* (Penguin London 2017), 101

<sup>739</sup> Lowery, W. *They Can't Kill Us All: The Story of Black Lives Matter* (Penguin London 2017), 158

<sup>740</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 32

<sup>741</sup> Dudouet, V., Cunningham, K.G., and Chenoweth, E. ‘Dynamics and Factors of Transition from Armed Struggle to Nonviolent Resistance’ (2013) 50 (3) *Journal of Peace Research* 401; Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 151-160

considered the use of violence, but primarily rejected it on practical, not moral, grounds.<sup>742</sup> There are many practical reasons why one may prefer to use nonviolent methods (ease, less stringent legal repercussions, availability of a nonviolent method, and so on). Conversely, there are multiple moral factors in play in deciding whether to employ any form of violence. Absolute prohibition without considering normative consequences of both violent and nonviolent options, again, fails to do the hard work of addressing these balances and making a principled decision on the facts.

Even proponents of nonviolence such as Gene Sharp, who would describe it as generally more desirable, will still say that this does not necessarily make nonviolence morally good in all circumstances, regarding its intentions or aims, or even its consequences.<sup>743</sup> Very morally egregious causes, like white nationalism, can adopt nonviolent tactics; and morally upstanding causes can use nonviolent tactics in ways which can cause a considerable amount of moral harm.<sup>744</sup> Much like violence, nonviolence is employed instrumentally. Violence is an instrument which often functions on the premise of an immediate deprivation of liberty to its targets, and so has what might be called a procedural moral harm written into it; but as discussed previously, even a robust consequentialist position cannot take issue with violence purely for its first-order effects.<sup>745</sup> The real focus of contention is on the second-order moral effects: and the substantive moral harms of the consequence of a protest may be much worse for nonviolent protests for egregious causes, than for violent protests for virtuous ones.

It would be a more morally coherent, and more practically reasonable, variation of the rule of nonviolence-as-preference to take it as just that: not an absolute prohibition, but a preference where all other facts are equal. If practical reason requires maximum

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<sup>742</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017), 116-126; Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 26-35

<sup>743</sup> Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston M.A. 1973), 70; Butler, J.P. *The Force of Non-Violence* (Verso, London 2020), 21

<sup>744</sup> Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston M.A. 1973), 70; Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267

<sup>745</sup> Hill, Thomas E. (Jr.) 'A Kantian Perspective on Political Violence' (1997) 1 (2) *The Journal of Ethics* 105

compliance with moral principles, it would be sensible to take the view that minimum infringement of liberties and other principles is desirable in any given action. The vast majority of the time, conditions may be such that nonviolence is indeed more morally rational than violence. Just as the state, as a regulator, must limit its violence in proportion to the severity and urgency of the facts in question, so perhaps should activists operate under a principle of constrained and proportionate violence for the purposes solely of maximising moral coherence in any given context.<sup>746</sup>

Indeed, in most instances, protest violence tends to emerge only where previous institutional and peaceful means of redress have failed, and cause protesters to “escalate” to more serious means of demonstrating dissent.<sup>747</sup> The Ferguson example is instructive here. After the death of Michael Brown at the hands of police in August 2014, after initial violence during that month, there were months of predominantly peaceful protests and calls for the justice system to investigate the incident, with (relatively) few instances of rioting or looting. Much greater arson and rioting took place in November, after the grand jury pressed no charges on the officer accused of murder. Over the course of the year, the very worst of the arson and violence to police all occurred in instances after the police had fired tear gas and live rounds at protesters.<sup>748</sup> Protesters seem to respond to *state* escalation of violence, and to the perceived impunity of that state violence.

If so, then even proponents of nonviolence-as-preference must concede that this cannot then create an obligation of nonviolence in all cases of protest. It certainly does not account for the immediate and destructive violence of the liberal democratic state. Butler’s powerful and persuasive appeal for revolutionary and absolute nonviolence explicitly relies upon a wilful suspension of “reality” that though admirable, and certainly something we can aspire towards, does not presently fit within the liberal

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<sup>746</sup> Braithwaite, J. ‘Limits on Violence; Limits on Responsive Regulatory Theory’ (2014) 36 (4) *Law and Policy* 432. For examples of principled constraints and proportionality of protest violence, respectively, see Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 48; Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 406-412

<sup>747</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003)

<sup>748</sup> Lowery, W. *They Can’t Kill Us All: The Story of Black Lives Matter* (Penguin London 2017), 58-59

democratic model on which the current research is founded.<sup>749</sup> She requires that we reimagine the state in order for radical nonviolence to be tenable. Within the scope of liberal democratic theory as it stands, however, her theory remains, tragically, aspirational.

What the preference for nonviolence does do, nonetheless, is require protesters to consider whether nonviolent options *are* possible, viable, and likely to cause less harm than a violent alternative. This is not a weak limitation, nor a low bar to overstep. In most cases, nonviolent options are available and practical, and in considering their tactics protesters should consider how, with creativity and strategic acumen, they can use those tactics to their advantage. In many circumstances that limitation would indeed lead protesters away from violent methods. It does not, however, entail that this will be the case should the nonviolent methods prove unavailable, useless, or unlikely to prevent more harm than they would cause.

### Needlessness

The crux of the needlessness argument is that violence is always, or virtually almost always, unnecessary.<sup>750</sup> This rests upon a number of presumptions, some of which have already been explored in the foregoing sections of this Chapter, but to summarise, they include the following. All other things being equal, a nonviolent action contains less moral harm than a violent one. Normative rationality demands that we make the least deviation possible from moral principles, including liberty: that we cause, in the language of this thesis, the least moral harm. Violence involves moral harm to liberty. It is then further argued that there is always a nonviolent alternative to violence in achieving social and political goals. Therefore, based on these presumptions, as there is always a nonviolent option, and the nonviolent option will always incur less moral harm, moral reason demands that the nonviolent option be chosen. The violent option is unnecessary. It is, therefore, unjustifiable.

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<sup>749</sup> Butler, J.P. *The Force of Non-Violence* (Verso, London 2020), 10

<sup>750</sup> For persuasive accounts based on the needlessness argument, see inter alia: Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston MA 1973); Butler, J.P. *Prekarious Life: The Powers of Mourning and Violence* (Verso, London 2004); Gandhi, M. *Young India 1919-1922* (B.W. Huebsch, New York 1923)

It should be clear that this argument runs very closely to the “nonviolence as preference” argument mentioned above – particularly in its presumptions that nonviolent options are always available and effective, and that nonviolent options always incur less moral harm. It will be found that these presumptions can be falsified in a similar manner to the foregoing section, and therefore the counterargument will be shown to be ineffective as a *universal* prohibition against protest violence in liberal democracies.

Before further critique of this counterargument, however, it is worth taking time to note that, much like the “nonviolence as preference” counterargument, there are times when this counterargument presents very strong reasons not to engage in certain forms of protest violence. It is widely accepted that where it is available and effective, nonviolent protest generally is preferable in pursuit of consistent moral claims to liberty, dignity, and so forth: especially so as to avoid unintended consequences of violent actions.<sup>751</sup> Given the harm that violence often poses to its target, and the risk that an act of violence can also incur unpredictable additional harms and losses (for example, how an act intended to incapacitate can kill), it is important to consider the ways in which its use must be limited. The “needlessness” counterargument forces the protester to truly interrogate whether an act of violence is necessary to achieve certain aims – in effect creating an obligation on the actor to consider whether the violence can be proportionate and necessary for their stated aims.<sup>752</sup> Nonetheless, important though it is to ask the question, this interrogation does not always lead to the conclusion that violence is needless in all contexts.

The first presumption in the needlessness counterargument that can be falsified is that nonviolence is always an available and effective option. This has been explored in the preceding section in some depth. There are times when nonviolent action is insufficient to prevent the harms in question, such as avoiding the violence of

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<sup>751</sup> Washington, J.M. (ed) King, M.L. Jr. *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* (Harper Collins, New York 2003; Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 79

<sup>752</sup> For a similar process for rationalising political rioting see: Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 406-412

immediate police brutality.<sup>753</sup> Occasionally, where institutional and peaceful options fail, options involving some form of violence are the only options remaining. Delmas argues, for example, that in the case of the Attica Prison riot of 1971, years of legal petitions, internal processes and complaints-making led to no improvement in atrocious prison conditions, and effective means of redress were actively withheld from prisoners. It was not until the riot that changes were made to substantially improve prisoner welfare.<sup>754</sup> As Pasternak notes, describing riots as needless violence overlooks the “debilitating impact of pervasive socioeconomic and racial injustices” that leave oppressed and marginalised groups with few alternative, realistic means of redress.<sup>755</sup> Both the qualifications of necessity, and availability of alternatives, need to be interpreted in the context of the specific situation.

An example with a less extreme use of necessary violence could, alternatively, be the toppling of the Edward Colston statue by BLM protesters in 2020.<sup>756</sup> The slave trader’s statue had remained in Bristol city centre after decades of peaceful protests, petitions, local democratic processes, council decisions and vetoes, and general failure on behalf of local government to have the slave trader’s statue removed from its public place – or even to have a plaque installed to provide a gloss on Colston’s involvement in the slavery and murder of hundreds of thousands of people.<sup>757</sup> It was not until protesters forcibly tore down the statue and plunged it into Bristol harbour that the statue was removed – and subsequently installed in a local museum.<sup>758</sup> That peaceful,

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<sup>753</sup> Braatz, T. ‘The Limitations of Strategic Nonviolence’ (2014) 26 (1) *Peace Review* 4; Coates, Ta-Nehisi ‘Nonviolence as Compliance’ *The Atlantic* (27/04/2015) <<https://www.theatlantic.com/politics/archive/2015/04/nonviolence-as-compliance/391640/>> accessed 03/03/2019

<sup>754</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 180-184

<sup>755</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 401

<sup>756</sup> Ng, K. ‘Edward Colston: Who was the Bristol slave trader and why was his statue pulled down?’ *The Independent* (08/06/2020) <<https://www.independent.co.uk/news/uk/home-news/edward-colston-statue-bristol-slave-trader-black-lives-matter-protest-a9553946.html>> accessed 03/08/2020

<sup>757</sup> Dresser, M. ‘Remembering Slavery and Abolition in Bristol’ (2009) 30 (2) *Slavery & Abolition* 223

<sup>758</sup> In January 2022 a jury in Bristol Crown Court acquitted the “Colston 4” of criminal damage, although the precise rationale for the decision remains unknown. I have argued elsewhere that the various legal defences offered to the jury are not themselves especially convincing, and that the protesters *did* act violently – and in defiance of the law – but rather that their actions were legitimate counterclaims against an unjustifiable state legitimacy claim

institutional systems of dispute resolution operate in liberal democracies does not itself entail that they function, nor that when they fail to function that this failure itself becomes subject to review and redress. In such cases nonviolent tactics may be comparatively ineffective, and, where the violent option is low-cost, low-risk, and symbolically and instrumentally powerful, it can be justifiable when addressing a pressing injustice that the nonviolent option will not be able to address.<sup>759</sup>

Secondly, it is possible to rebut the presumption that protest violence is always less morally justifiable than the nonviolent alternative, and therefore undesirable in comparison. As discussed in the previous section, the claim that nonviolent action incurs less moral harm than a violent option is an empirical claim. It has been noted that nonviolence itself does not guarantee a lack of coercion, deprivation of liberties, or other moral harms caused by protesters: and that peaceful protest, or even lawful obedience and compliance, can have egregious first and second-order effects.<sup>760</sup> If this preference for nonviolence is rendered contextually contingent rather than universally true, so then is the argument for the needlessness of violence also rendered contingent and non-universal.

A final consideration, that merits “needlessness” being considered in its own right as against “nonviolence-as-preference,” is that the needlessness counterargument is weighted heavily in favour of the state. “Necessity” is a high threshold for justifying violence, and which is in any event contextually defined.<sup>761</sup> The problem is that the state jealously guards the ability to define necessity, especially in its courts. An interesting example is presented by Fallon in her examination of self-defence arguments raised by Native American peoples, against prosecutions for their protests against the development of the Dakota Access Pipeline, which threatens their ability

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failure. Greenwood-Reeves, J. ‘The Colston Four: Justifying Legitimate Violent Protest Within, and Without, the Law’ *SLSA Blog* (08/01/2022) <<http://sfsablog.co.uk/blog/blog-posts/thecolston-four-justifying-legitimate-violent-protest-within-and-without-the-law/>> accessed 15/02/2022

<sup>759</sup> Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985)

<sup>760</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267

<sup>761</sup> Grant, D.S. and Wallace, M. ‘Why Do Strikes Turn Violent?’ (1991) 96 (5) *American Journal of Sociology* 1117; Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 50



to live safely on their land.<sup>762</sup> After the Standing Rock protests, persons who damaged and sabotaged piping equipment found that the courts did not recognise their self-defence arguments – effectively, a necessity defence based on the requirement of self-preservation – on the premises that the harm averted was insufficiently proximate and the action unnecessary and disproportionate to the perceived threat.<sup>763</sup> Lawyers and moral philosophers disagree on whether self-defence is the necessity defence *par excellence* or a conceptually distinct form of defence, but regardless, they can both apply in this case.<sup>764</sup> Both depend on an urgent and immediate threat to an important right or interest. In the Standing Rock cases the existential threat was against life itself. But, as the laws which define necessity and self-defence are framed by the state’s courts, the onus at law is placed on the protester to comply with the state’s definition. The state’s conceptions of property, necessity, and violence are distinct from, yet dominant over, the lived experiences of the local (and structurally disadvantaged) community in question.<sup>765</sup>

Even outside of positive legal dogma on necessity as a term of art, or a legal defence, the same difficulty remains in that the state still seeks to dictate what *morally* constitutes a case of necessity. The state is usually more generous when it comes to justifying its own *raison d'État* than with the *force majeure* of its dissenting citizens.<sup>766</sup> A prohibitively high necessity threshold, under the classic liberal model of writers such as Rawls, demands that the protester exhaust all institutional and peaceful forms of redress even before considering peaceful, civil disobedience.<sup>767</sup> This presumption imposes severe practical limitations on oppressed groups who might otherwise be

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<sup>762</sup> Fallon, A.J. ‘Break the Law to Make the Law: The Necessity Defense in Environmental Civil Disobedience Cases and Its Human Rights Implications’ (2018) 33 *Journal of Environmental Law and Litigation* 375

<sup>763</sup> It is worth noting that structural inequalities and injustices are seldom recognised by the dominant system of any state, and seldom have parity when it comes to remedies in the courts. See Crenshaw, K. *Critical Race Theory: the key writings that formed the movement* (New Press, New York 1995)

<sup>764</sup> Horder, J. ‘Self-defence, necessity and duress: understanding the relationship’ (1998) 11 (1) *Canadian Journal of Law and Jurisprudence* (1) 143

<sup>765</sup> Johnson, L.T. and Kane, R.J. ‘Deserts of Disadvantage: The Diffuse Effects of Structural Disadvantage on Violence in Urban Communities’ (2018) 64 (2) *Crime and Delinquency* 143

<sup>766</sup> Neocleous, M. ‘Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics.’ (2007) 6 (2) *Contemporary Political Theory* 131; Neocleous, M. *Critique of Security* (Edinburgh University Press, Edinburgh 2008)

<sup>767</sup> Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 1971), 363-368

marginalised by those very systems – such as the criminal justice system, or mainstream political fora.<sup>768</sup> Crenshaw has examined how the structures and presumptions of law often fail to address the injustices experienced by underprivileged groups: the presumption that those systems can equally and consistently be relied upon by all persons overlooks the particular needs of those disadvantaged groups.<sup>769</sup> It fails to acknowledge where those systems of redress have failed and themselves are the object of dissent – such is the case in the BLM protests, in the USA and the UK, where the focus of outrage is precisely institutional failure to address systemic racial injustice.<sup>770</sup> Flatly declaring violence unnecessary because of the presence of ineffective institutional processes usually comes from a place of privilege, and overlooks the debilitating nature of oppression and hegemony that renders other forms of redress impossible.<sup>771</sup>

These observations do not entail that protesters do not have a moral obligation to consider whether protest violence is necessary and therefore justifiable. These reflections do however require us to reconsider the very high threshold for “necessity” that is traditionally espoused by states, and whether it is coherent – when liberalism prides itself on the moral autonomy of its citizens – for us to presume that it is the state, and not the individual, who has a moral right to weigh the necessity and moral justifiability of protester actions.<sup>772</sup> As a moral condition to the justifiability of action, relying upon the state’s conception of “necessity” is an arbitrary and unjustifiable abandonment of a morally autonomous actor’s duty seriously to consider their own moral actions. In short, it must be for the morally autonomous protester, and not the state, to determine the necessity of their actions in the moral calculation of their actions.

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<sup>768</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 32

<sup>769</sup> Crenshaw, K. *Critical Race Theory: the key writings that formed the movement* (New Press, New York 1995)

<sup>770</sup> Lowery, W. *They Can’t Kill Us All: The Story of Black Lives Matter* (Penguin London 2017), 101

<sup>771</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 32; Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 401

<sup>772</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 29-74

## Instrumentality

The standard instrumental arguments against violent protest are less concerned with the moral valence of its actions or consequences. Instead these arguments focus on the practical deficiencies of violent protest compared to nonviolent alternatives. It can be shown that although they present useful guidance on the practical limitations of violence, and the pitfalls of using violence in a manner which proves counterproductive, these arguments do not entail that *no* political violence can ever be effective. Rather, they demonstrate yet another limitation on when violence can be justifiable, based upon its likelihood of success in context.

Perhaps the most widely cited works in in the social sciences which support the instrumentality objection belong to Stephan and Chenoweth. According to their exhaustive quantitative studies, violent protest is typically counterproductive in a number of important respects. Chiefly, though it gathers widespread public attention, violence (particularly to persons) can alienate members of the wider public, whose support would otherwise be necessary for the movement to make long-term institutional or systemic changes.<sup>773</sup> Secondly, protest violence incurs retribution and further violence from the state, and therefore poses additional practical risks to the participant, whilst also alienating the support of state actors, which is also needed for systemic change.<sup>774</sup> Chenoweth found that across the 323 resistance campaigns from 1900 to 2006 which she analysed, nonviolent resistance movements were approximately twice as likely to gain full or partial concessions from states than violent movements.<sup>775</sup>

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<sup>773</sup> Chenoweth, E. and Stephan, M.J. 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2008) 33 (1) *International Security* 7

<sup>774</sup> Chenoweth, E. and Stephan, M.J. 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2008) 33 (1) *International Security* 7; see also Braithwaite, J. 'Limits on Violence; Limits on Responsive Regulatory Theory' (2014) 36 (4) *Law and Policy* 432; Della Porta, D. 'Research on Social Movements and Political Violence' (2008) 31 (3) *Qualitative Sociology* 221; Wang, D.J. and Piazza, A. 'The Use of Disruptive Tactics in Protest as a Trade-Off: the Role of Social Movement Claims' 94 (4) *Social Forces* 1675

<sup>775</sup> Chenoweth, E.; Stephan, M.J. (ed) *Why Civil Resistance Works: the strategic logic of nonviolent conflict* (Columbia University Press, New York 1980)

The upshot of these findings is that, for many protests in liberal democratic states where violence is inflicted upon persons, violence is less effective at making large scale concessions. It may often be the case that violent protesters know that there is only a small chance that their actions will effect, let alone systematically change, structures of oppression.<sup>776</sup> But the data does present a considerable counterargument against any general presumption that, because violence gathers media attention, it therefore is necessarily successful at achieving long-term goals.<sup>777</sup> Zlobina and Gonzalez Vazquez have similarly conducted research that suggests that the public perceives violent protest as being successful in drawing attention, but lacking in legitimacy.<sup>778</sup> Serious political organisations have good reasons to abandon violent tactics: particularly when they are seeking lasting political consensus, or wanting to be able to participate in party politics for the foreseeable future.

In *Shooting Hipsters*, Spens astutely observes that most protest violence allows for too many possible interpretations, and gives too much power to media organisations to either trivialise or demonise violent actors, for activists to maintain a coherent and compelling narrative explaining and justifying their protest violence.<sup>779</sup> As discussed in the previous Chapter, incidental or opportunist protest violence in particular often lacks an easily discernible moral argument. Nevertheless, even instrumental or symbolic violence can allow for multiple conflicting interpretations. The instrumentality counterargument can probably best be summed up by K.E. Boulding, writing towards the end of the social upheavals of the 1960s:

Violence and disorder allow for unclear claims being made by the protesters, possibly with very different aims, which is confusing and off-putting to the

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<sup>776</sup> Scott, James C. *Domination and the Art of Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1990), 92

<sup>777</sup> Dudouet, V., Cunningham, K.G. and Chenoweth, E. 'Dynamics and Factors of Transition from Armed Struggle to Nonviolent Resistance' (2013) 50 (3) *Journal of Peace Research* 401

<sup>778</sup> Zlobina, A. and Gonzalez Vazquez, A. 'What is the Right Way to Protest? On the Process of Justification of Protest, and its Relationship to the Propensity to Participate in Different Types of Protest' (2018) 17 (2) *Social Movement Studies* 234, 245

<sup>779</sup> Spens, C. *Shooting Hipsters: Rethinking Dissent in the Age of Public Relations* (Repeater, London 2016), 19-23

public to whom protests must appeal. It also engenders public disdain, and risks state backlash as well as the risk of counter-protest and alienation.<sup>780</sup>

While maintaining *per* Stephan and Chenoweth that social movements engaged in widespread violence to the person usually lose the broader public support necessary to gain long-term concessions, there are a few possible responses to this argument which demonstrate where certain forms of violence *can* be of short and long-term instrumental value.

There are a number of caveats to Stephan and Chenoweth's conclusions, which indicate where violence *might* have a useful instrumental role. For instance, their focus on long-term concessions overlooks other purposes and roles of violence in protest. Violence can, in context, be instrumentally useful for short-term purposes. Examples include BLM protesters throwing tear gas cannisters back to masked police officers.<sup>781</sup> The aim of the action is not itself to achieve racial justice: its aims are self-preservation, distraction, and symbolic reciprocity of state violence. In these instances of protester violence, which after all are responding to (and protesting against) police violence, to demand that the action achieve the overall outcome of the social movement is to decontextualise the act of violence *ad absurdum*. In other instances, however, violence can aim for, and achieve, long-term significant concessions. As Pasternak observes, even instances of riot can gain important concessions from governments – for example, she investigates how race riots in the 1960s and 1980s directly informed public policy and acted as catalysts for equality legislation in the UK.<sup>782</sup>

Just as context determines the justifiability of violence morally, so it determines its chances for success pragmatically. “Success,” and whether it is particularly “long-term” or “short-term,” will always need to be contextually construed.<sup>783</sup> In the example

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<sup>780</sup> Boulding, K.E. ‘Towards a Theory of Protest’ (1967) 71 (2) *Concord* 165, 168-169

<sup>781</sup> Czachor, E. ‘Portland Protester Uses Lacrosse Stick to Throw Tear Gas Back at Federal Officers’ *Newsweek* (23/07/2020 )<<https://www.newsweek.com/portland-protester-uses-lacrosse-stick-throw-tear-gas-back-federal-officers-1519997>> accessed 04/08/2020

<sup>782</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 399-400

<sup>783</sup> Nielsen, K. ‘On the Justifiability of Terrorism (State or Otherwise)’ (2003) 41 (2-3) *Osgoode Hall Law Journal* 427

above the immediate aim of throwing tear gas back to police officers in BLM protests is instrumental to short-term goals of self-preservation. It is also not always easy to quantify what constitutes “success.” Some forms of violence may have more symbolic values and successes. BLM protesters’ toppling of the statue of Edward Colston in Bristol, for example, for his historical involvement in slavery, is an example of a different method of violence (and selection of target) chosen for a very different tactical purpose.<sup>784</sup> Bellentani and Panico have explored how statues are innately symbolic, conveying political and moral meanings.<sup>785</sup> The toppling of the slave trader’s statue likewise encourages multiple symbolic interpretations, and has generated a great deal of dialogue about BLM, systemic racism, and Britain’s colonial history. As such it has succeeded in generating democratic dialogue and raising public awareness of the relevant issues.<sup>786</sup> It can be difficult to identify successes of such a discursive, non-quantifiable nature, but this does not make them irrelevant to the attainment of long-term political goals.

Secondly, Stephan and Chenoweth’s research focuses predominantly on violence to persons. As discussed in the previous Chapter, this narrow view of violence – though useful for the purposes of limiting the variables in a sociological study – fails to account for much protest violence. It also typifies violence according to perhaps its most controversial manifestation – where humans are injured or killed – rather than its less controversial manifestations, such as symbolic property damage.<sup>787</sup> Long-term success in terms of political concessions depends on the violence in question and its broader context, whether it is off-putting to the wider public, and therefore

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<sup>784</sup> Ng, K. ‘Edward Colston: Who was the Bristol slave trader and why was his statue pulled down?’ *The Independent* (08/06/2020) <<https://www.independent.co.uk/news/uk/home-news/edward-colston-statue-bristol-slave-trader-black-lives-matter-protest-a9553946.html>> accessed 03/08/2020]

<sup>785</sup> Bellentani, F. and Panico, M. ‘The meaning of monuments and memorials: toward a semiotic approach’ (2016) 2 (1) *Punctum* 28

<sup>786</sup> Olusoga, D. ‘The toppling of Edward Colston’s statue is not an attack on history. It is history’ *The Guardian* (08/06/2020) <<https://www.theguardian.com/commentisfree/2020/jun/08/edward-colston-statue-history-slave-trader-bristol-protest>> accessed 09/07/2020

<sup>787</sup> Martin, A.W., McCarthy, C. and McPhail, J.D. ‘Why Targets Matter: Towards a More Inclusive Model of Collective Violence’ (2009) 74 (5) *American Sociological Review* 821

counterproductive.<sup>788</sup> Violence to property does not generally draw the same level of public hostility as violence to persons.<sup>789</sup>

Similar considerations apply to other forms of violence: for example, violence to the self. Violence to the self can in fact draw a large amount of public sympathy, and can be instrumental in creating a narrative of self-abnegation. As described in Chapter 4, the hunger strikes during the Troubles, for example, remain a powerful symbol of sacrifice, and an oft-cited factor in examining political negotiations prior to the Belfast Agreement.<sup>790</sup> None of this detracts from the potential that violence to other persons can have on the general public: but what it does suggest is that there are types and targets of violence that do not suffer from the instrumentality argument in the same detrimental way.

In order to avoid Spens' and Boulding's pitfalls of conflicted and off-putting narratives, the protesters' use of tactical choice of targets, precise use of violence, and considered trade-offs between disruption and compromise, can all allow for the message to the wider public to be suitably curated and palatable.<sup>791</sup> It is easier to present a clear moral argument, and avoid uncharitable interpretations in the media, if any use of violence is (generally speaking) small, against property, reasonably necessary, and in pursuit of a clear moral agenda. Press statements and publications alongside the acts of violence can also help to steer the narrative and explain the decisions made by the protesters. Perhaps the tactical violence used by the Stansted 15 – cutting through the airport fence in order to prevent an unlawful deportation

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<sup>788</sup> Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004); Galtung, J. 'Violence, Peace and Peace Research' (1969) 6 (3) *Journal of Peace Research* 167, 170

<sup>789</sup> Martin, A.W., McCarthy, C. and McPhail, J.D. 'Why Targets Matter: Towards a More Inclusive Model of Collective Violence' (2009) 74 (5) *American Sociological Review* 821

<sup>790</sup> Hennessey, T. *Hunger Strike: Margaret Thatcher's Battle with the IRA: 1980-1981* (Irish Academic Press, Newbridge 2013); Yuill, C. 'The Body as Weapon: Bobby Sands and the Republican Hunger Strikes' (2007) 12 (2) *Sociological Research Online* 1 <<https://journals.sagepub.com/doi/pdf/10.5153/sro.1348>> accessed 06/04/2020

<sup>791</sup> Wang, D.J. and Piazza, A. 'The Use of Disruptive Tactics in Protest as a Trade-Off: the Role of Social Movement Claims' (1994) 94 (4) *Social Forces* 1675

flight, and clearly stating to the media why they felt this was necessary – is a good example of this.<sup>792</sup>

As well as the target of violence, the scale of violence is another important factor in this trade-off: relatively minor damage does not present the same risk of alienation as, say, suicide terrorism, which, as Abrahms discusses, gets international media attention at the cost of global condemnation.<sup>793</sup> Likewise, widespread and indiscriminate property damage in a riot is treated much less favourably than smaller acts of violence to property that appear discriminate, principled and constrained.<sup>794</sup> This is not to say that large-scale violence is necessarily morally unjustified – that depends upon the deontological and consequentialist analyses discussed previously – but it does have significant practical drawbacks when it comes to gaining public support and therefore winning concessions in the long term. As such, it is important for protesters to tactically consider methods of violence which have the greatest impact with the least risk of public alienation – where this is the case, the instrumentality argument fails.

Finally, it is worth echoing Nielsen’s argument that instrumentalist arguments present a practical, not a moral, limitation to protest violence, until it can be demonstrated that the “futility” of violence renders it disproportionate, unnecessary, and therefore unjustifiable.<sup>795</sup> This is effectively another empirical claim which requires evidence that any specific act of violence will *not* be effective in context. If it can be demonstrated that the act of violence would be ineffective (however defined), then it could be described as both unnecessary and disproportionate, and therefore unjustifiable given the moral harms that violence generally incurs. If such an assessment is made – for example, that violence to persons in the protest in question

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<sup>792</sup> Cammiss, S., Hayes, G. and Doherty, B. ‘Deportation and direct action in Britain: the ‘terrorist trial’ of the Stansted 15’ *Open Democracy* (16/032018) <<https://www.opendemocracy.net/en/deportation-and-direct-action-in-britain-terrorist-trial-o/>> accessed 27/07/2019

<sup>793</sup> Abrahms, M. ‘Are Terrorist Attacks Really Rational? The Palestinian Example’ (2004) 48 (3) *Orbis* 533; Lomasky, L. ‘The Political Significance of Terrorism,’ in Frey, R. G. and Morris C. W. (eds) *Violence, Terrorism, and Justice* (Cambridge University Press, New York 1991)

<sup>794</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 406-412

<sup>795</sup> Nielsen, K. ‘One the Justifiability of Terrorism (State of Otherwise)’ (2003) 41 (2-3) *Osgoode Hall Law Journal* 427



will more likely alienate than inspire the public – then correctly, as Stephan and Chenoweth indicate, such an action becomes unjustifiable.<sup>796</sup> However, absent such a finding, the instrumentality limitation fails to bite.

The instrumentality limitation therefore requires not that protesters abandon violent methods in all cases, but rather that they select their methods with both morality and instrumentality in mind. If violence is to be used, protesters must ensure that the effect of that action will present a sufficiently clear message, and has a reasonable chance of success – however success is framed by the protesters in question. This calculation needs to be undertaken alongside the deontological and consequentialist calculations mentioned previously. Again these are not necessarily low bars for protesters to overstep, and it can take a great deal of research, planning and consideration for a protester to consider even relatively modest protest violence a viable and justifiable option.

#### Social cohesion

The final nonspecific objection to violent protest is a consequentialist argument, based on the long-term effects of individuals deciding to partake in protest violence. It is argued that if one citizen were to be morally permitted to protest violently, and to decide when that was justifiable, then other citizens reasonably could be expected to be so entitled as well. This is not dissimilar to the Kantian Universal Law formula referred to above: to allow for one person to protest violently implies that others should be entitled to act likewise in similar circumstances.<sup>797</sup>

If so, and every citizen took it upon themselves to decide not only whether to disobey the law, but also whether to commit acts of violence in so doing, then not just the

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<sup>796</sup> Chenoweth, E. and Stephan, M.J. ‘Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict’ (2008) 33 (1) *International Security* 7

<sup>797</sup> This traditional liberal criticism of violent protest has an ancient pedigree. Malcolm, N, (ed) Hobbes, T. *Leviathan* (Oxford University Press, Oxford 2012); Gregor, M. (tr.) Kant, I. *The Metaphysics of Morals* (Cambridge University Press, Cambridge 1991), 55-65; Paton, H.J. (tr.) Kant, I. *Groundwork of the Metaphysics of Morals* (Harper & Row, New York 1964), 98-107

moral principle of the rule of law would be endangered, but society itself.<sup>798</sup> Proponents of this counterargument often further argue that there exist what Rawls called “social bonds” between citizens, and between them and their social institutions, which are valuable to a peaceful and orderly society. Citizens have duties to support just institutions, as they provide the best means of achieving moral principles like justice and equality; and without mutual fair cooperation and obedience to law, the social bonds and reciprocal respect and trust between citizens is threatened.<sup>799</sup> This undermines those just institutions and therefore threatens civil society itself.

A number of the presumptions in this argument are of course subject to intense debate. For example, the existence and moral value of “social bonds” between citizens, and the capacity for these bonds to morally bind citizens, are far from uncontroversial premises.<sup>800</sup> Likewise, whether these social bonds necessarily support just institutions, and whether such just institutions are indeed unquestionably the best means of achieving morally worthy aims, is also debatable.<sup>801</sup> For the purposes of this research however, the benefit of the doubt is given to the existence and moral value of such social bonds, for the sake of producing a fair and robust assessment of this potential limitation to protest violence.

Another presumption, that the unacceptability of *all persons* protesting means that no *individual* can protest, has been addressed somewhat already with relation to the Universal Law argument. As Hill notes, for this to be persuasive, one would need to accept that there could *never* be any instance of permissible violent protest even under heinous conditions of oppression.<sup>802</sup> Again, nonetheless, the benefit of the doubt will be given to the social cohesion counterargument to the extent that the moral

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<sup>798</sup> e.g. Malcolm, N, (ed) Hobbes, T. *Leviathan* (Oxford University Press, Oxford 2012); Waldron, J. *The Dignity of Legislation* (Cambridge University Press, Cambridge 1999), 59-62

<sup>799</sup> Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge MA 1971), 115; Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977)

<sup>800</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979)

<sup>801</sup> Berkey, B. ‘Against Rawlsian Institutionalism about Justice’ (2016) 42 (4) *Social Theory and Practice* 706

<sup>802</sup> Hill, Thomas E. (Jr.) ‘A Kantian Perspective on Political Violence’ (1997) 1 (2) *The Journal of Ethics* 105, 122; see also Macpherson, C.B. (ed) Locke, J. *Second Treatise on Government* (Hackett, Indianapolis 1980)

permissibility of violent protest does not entail the universal moral *obligation* of violent protest. The Universal Law formula requires that if morally true for the individual the *obligation* to protest would then exist for all in the same circumstances, whereas in truth the social bonds argument is more concerned with the *possibility*, not obligation, of widespread protest.<sup>803</sup> The analogy then between the social cohesion and Universal Law counterarguments is not quite perfect: the former only requires the risk that others might, whereas the latter requires that others must, act in a similar fashion. The social cohesion counterargument therefore makes a less demanding claim.

Presuming the existence and moral value of social bonds, the counterargument then proceeds to pose two serious social and political questions: firstly, could violent protest then engender or encourage others to act with similar violence, either through inspiration or retaliation; and should this be possible, would this not then harm social bonds, cause widespread disorder, and lead to moral harm? Arendt argues contra Benjamin<sup>804</sup> that violent rebellion cannot be justified, even with the worthiest of aims, due to its unpredictable and dangerous consequences. It effectively reduces to an argument that one cannot rationally calculate the moral harm of violence because of unknown variables, and so it cannot be morally rational to pursue it. Political violence often overreaches its stated aims, inspires or incites violence in others, and overflows to excessive and even opportunistic violence. If this is so, the innate unpredictability of future events means that justifying violence, when it can lead to such unknowable additional harm, will always be morally irrational and therefore illegitimate.<sup>805</sup>

This counterargument is highly influential, and its warning to protesters not to take unnecessary risks remains a potent and important message: but the argument must be framed with a number of important caveats. The first is that under the presumptions of the liberal democratic model, all moral decisions are the autonomous individual's to make, or else all citizens would make decisions based on morally-arbitrarily

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<sup>803</sup> Gregor, M. (tr.) Kant, I. *The Metaphysics of Morals* (Cambridge University Press, Cambridge 1991), 55-65; Paton, H.J. (tr.) Kant, I. *Groundwork of the Metaphysics of Morals* (Harper & Row, New York 1964), 98-107

<sup>804</sup> Benjamin, W.; Demetz, P. (ed) Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995), 277-294

<sup>805</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 76-80

obedience to an authority.<sup>806</sup> Therefore moral decisions can only intelligibly be decided by the individual anyway.<sup>807</sup> This does not nullify the counterargument, for it is itself an appeal to the protester to make a rational moral calculus to the exclusion of irrational violence. It does however mean that it must be up to the individual to determine what risks, if any, there may be to social cohesion and social bonds as a result of their action or omissions, violent or otherwise, and to therefore determine the justifiability of their intended protest violence.

The remaining caveats more directly circumscribe the effect of the social cohesion counterargument. The first major caveat is that the presumption that violent protest engenders further violence is, again, itself an empirical claim, and one that must be subject to calculation of risk in a highly context-dependent way. This “slippery slope” argument implies both the effect of widening disobedience and a subsequent breakdown of society as a result: but neither claim seems to be grounded in empirical evidence. It is possible to have violence (with its first-order moral harm) that inspires no further violence (or second-order moral harm). The Stansted 15 case is an interesting example of a small use of violence that not only encouraged no further first-order violence – indeed it led directly to a reduction in violence, regarding the risk of human rights abuses faced by the detainees due to be deported – but also does not appear to have had any second-order effects of widening the use of violence.<sup>808</sup> Violence *need not* inspire further violence, let alone unpredictable or widespread violence: and as such it falls to the individual protester to determine whether the risk of additional violence is likely given the tactics and context of the protest at hand.

As an aside, there seems to be a fundamental contradiction in the social cohesion counterargument. The existential threat which the counterargument fears implies that even one act of protest might destabilise society itself, in the long term. Yet the counterargument already presupposes the current existence and ubiquity of these

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<sup>806</sup> Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 233-241

<sup>807</sup> Brownlee, K. ‘Features of a Paradigm case of Civil Disobedience’ (2004) 10 (4) *Res Publica* 337, 340-343

<sup>808</sup> Cammiss, S., Hayes, G. and Doherty, B. ‘Treating the Stansted 15 as Terrorists is Part of a Worrying Trend’ *Political Quarterly* (10/01/2019) <<https://politicalquarterly.blog/2019/01/10/treating-the-stansted-15-as-terrorists-is-part-of-a-worrying-wider-trend/>> accessed 27/07/2019

social bonds, a robust and mostly just state, robust just institutions, reciprocal equality and fairness between citizens, liberal democratic fora for politics and dispute resolution, and so on.<sup>809</sup> The counterargument demands a society that is simultaneously sturdy and precarious. If widespread, uncontrollable incivility were ever to arise due to protests against the perceived illegitimacy of the state and its laws, one might ask whether the state truly did have much persuasive, viable legitimacy and support, or even de facto authority, in the first place.<sup>810</sup>

The second caveat is that, as Buchanan observes, it is also possible to have disobedience which does not undermine the just institutions of the state.<sup>811</sup> Indeed, as Delmas persuasively writes, disobedience towards corrupt or heinous laws can reinforce rather than destroy the rule of law and the good order of society. Likewise, the “social bonds” that the argument presupposes might be reinforced rather than eroded where acts of protest are able to address heinous laws or policies that undermine the moral principles of justice, equality, fairness and democracy that underpin those social bonds.<sup>812</sup>

Thirdly, Zinn noted that the social cohesion counterargument has also been made against even peaceful protest and civil disobedience: violence itself is not truly the issue here, but the nature of dissent.<sup>813</sup> In many cases, civil disobedience and protest often aim precisely to outrage, spread dissent, and antagonise, testing – if not outright rejecting – social bonds tying citizens to one another.<sup>814</sup> But even lawful forms of protest that aim to inspire and encourage dialogue get branded as destructive to social

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<sup>809</sup> Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 1971)

<sup>810</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017); Raz, J. ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 (4) *Minnesota Law Review* 1003, 1005-1006

<sup>811</sup> Buchanan, A. ‘Political Legitimacy and Democracy’ (2002) 112 (4) *Ethics* 689, 703-704; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 94-106

<sup>812</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 55-58; Markovits, D. ‘Democratic Disobedience’ (2005) 114 (8) *Yale Law Review* 1897

<sup>813</sup> Zinn, H. *Disobedience and Democracy: Nine Fallacies on Law and Order* (2<sup>nd</sup> edn South End Press, Cambridge MA 2002)

<sup>814</sup> Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179; Soares, M., Barbosa, M., Matos, R. and Mendes, S.M. ‘Public Protest and Police Violence: Moral Disengagement and Its Role in Police Repression of Public Demonstrations in Portugal’ (2018) 24 (1) *Peace and Conflict: Journal of Peace Psychology* 27

cohesion. The “Take The Knee” protests by Black athletes, refusing to salute the US national flag but instead making a silent, peaceful, lawful gesture against structural violence, were derided by certain authorities in the USA as uncivil, and destructive to the civic bonds of nationhood and patriotism.<sup>815</sup> Peaceful, lawful protest can be called uncivil; peaceful but unlawful civil disobedience can be called an affront to democracy and civil society. If civil disobedience, and even lawful, peaceful protest, can threaten social cohesion, then we need to interrogate again what it is about *violence* that makes it especially objectionable: and it is not necessarily its threat to social bonds. If so, then the counterargument fails, because some other objection to violence needs to be found.

It is not only *nonviolent protest* that can be accused of threatening social cohesion. Even *obeying the law without protest* can lead to unpredictable consequences adverse to the freedoms of others – whether the perpetuation of state violence, the omission to prevent systemic violence, or even complicity in oppression.<sup>816</sup> Obedience to laws which depend upon inequality, injustice or unfairness can destabilise civic bonds between citizens as mutually-concerned equals in the long term. All acts and omissions entail moral consequences, including obedience to law. Practical reason demands that we make all choices based on moral principles, reason, and available information: and this includes obedience to law.<sup>817</sup> Whether obedience to a particular law causes more harm than good, and whether it can strengthen or weaken the social bonds that tie us, can only ever be an empirical question.<sup>818</sup> Again, this would then inform the moral calculus of the individual protester as to whether violence could be justifiable in context.

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<sup>815</sup> Muir, H. ‘The fearful boo those who take the knee. But that won’t stop the world from changing’ *The Guardian* (09/06/2021) <<https://www.theguardian.com/commentisfree/2021/jun/09/boo-take-the-knee-fans-boris-johnson-england-footballers>> accessed 22/02/2022; Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 65

<sup>816</sup> Delmas, C. ‘Disobedience, Civil and Otherwise’ (2017) 11 (1) *Criminal Law and Philosophy* 195, 200

<sup>817</sup> Raz, J. ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 (4) *Minnesota Law Review* 1003, 1025-1027

<sup>818</sup> Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 107-108

As such, even presuming the existence and moral value of social bonds, the counterargument can be applied to civil disobedience, lawful protest, and even consensual obedience. It fails to address why *violence in protest* would especially be objectionable, without requiring a calculus of moral harm and likelihood of risk that applies just as much to lawful protest or even obedience – and which in any event the individual must calculate for themselves as a morally autonomous subject.

### Summary: learning from limitations

The foregoing nonspecific objections have been shown to be incapable of sustaining a coherent, *total* prohibition of protest violence. What these counterarguments do demonstrate, however, is that there are important moral and pragmatic limitations to the violence that can reasonably and justifiably be used in certain protests. For example, the deontological arguments show that violence in protest must be done in a way that treats other persons not *merely* as objects, but as subjects.<sup>819</sup> The consequentialist and social bonds counterarguments demand that protesters must consider the potential long-term consequences of violent tactics, not merely the immediate effects.<sup>820</sup> The nonviolence-as-preference and needlessness counterarguments require an honest calculation of nonviolent alternatives based upon available information and a sincere desire to act in accordance with moral principles.<sup>821</sup> The instrumentality counterargument demands not only that protesters act in ways which are effective in the long-term, but also by virtue of this, that their struggle is worthwhile and justifiable based on its possible ends.<sup>822</sup>

Several theorists have given guiding principles to how violent protest implement such limitations and retain moral legitimacy. Delmas' "constraints" for principled disobedience, in her book *A Duty to Resist*, do not explicitly address each counterargument at length but they do help to meet their respective requirements. Her

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<sup>819</sup> Hill, Thomas E. (Jr.) 'A Kantian Perspective on Political Violence' (1997) 1 (2) *The Journal of Ethics* 105, 137

<sup>820</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970)

<sup>821</sup> Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4) *Philosophy and Public Affairs* 384, 406-412

<sup>822</sup> Chenoweth, E. and Stephan, M.J. 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2008) 33 (1) *International Security* 7

injunction that protesters act with “respect to other people’s interests,” including their physical integrity, moral values, and fundamental rights, reflects the deontological imperative to treat others not merely as objects but as humans with equal dignity.<sup>823</sup> Her constraint that protesters “should generally seek the least harmful course of action feasible to achieve their (legitimate) goal,” similarly forces the protester to consider the consequentialist, social cohesion, and instrumentality concerns. Taking a slightly different angle, Pasternak’s theory of political rioting includes a proportionality assessment of justifiability, based upon theoretical frameworks used for conceptualising “just war.”<sup>824</sup> Those engaging in political riot must consider the necessity, likelihood of success, and proportionality of the methods engaged. These constraints implicitly address the needlessness and instrumentality counterarguments mentioned above. The aim of the present research is not to produce a new list of guiding principles, to add or subtract from those of writers such as Delmas or Pasternak, or to assess the rigour of their tests. The aim is to show that it is possible to conceive of a framework for calculating the moral coherence and justifiability of protest violence with caveats that, as have been explored in some depth here, allow for protest violence to be justifiable in context.

Consequentialist and deontological arguments are core components of determining what forms of protest violence can be justifiable in accordance with the principles of constitutional morality. The preference for nonviolence remains a very powerful consideration when protesters consider their tactics. Likewise, the instrumentality consideration is of crucial importance not only for determining which tactics will be effective, but also whether they can be justified in the long-term plan for the social movement in question. Such limitations actually present very taxing questions for any social movement precisely because they do interrogate the justifiability of violence in protest. However, it has been shown that these questions, once asked, can in good faith be addressed and answered in favour of protest violence under certain conditions and according to certain limitations.

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<sup>823</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 49

<sup>824</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 386-387



These nonspecific limitations having been explored, it is now necessary to examine the limitations to protest violence specific to its coherence with the very framework of constitutional morality itself.

## Chapter 6: Specific Limitations to the Legitimacy of Violent Protest

The more general arguments against protest violence – addressed in the preceding Chapter – do not themselves demonstrate that it is always morally incoherent or unjustifiable, but do present important limitations and qualifications on the justifiability of violence. The present Chapter asks specifically whether protest violence can ever be morally coherent and therefore justifiable, specifically within the constitutional morality framework of a liberal democratic state. Even if the violent protesters' legitimacy claim against the state is correct, and there is logical fallacy in the state's legitimacy claim for authority and obedience because of a morally unjustifiable law, can protester violence ever be justifiable under the moral grounds of a liberal democracy?<sup>825</sup>

Chiefly these arguments are about moral rational consistency. Does violent protest contradict the moral foundations of constitutional morality? If one of the purposes of liberal democracy is to control and limit violence, in order to maximise the liberty of subjects, does not the inherent risk to liability posed by violence undermine that purpose?<sup>826</sup> How can protesters critique the state for contradicting constitutional morality, while their own protest actions undermine the constitutional principles of the rule of law, democracy, and liberty?

This Chapter identifies four “specific limitations” that relate directly to how violence can, or cannot, be consistent with the foundational principles of constitutional morality – principles from which arguments and counterarguments about legitimacy claims derive their normative force. The first is that, as the state possesses the monopoly over legitimate violence, protest violence – generally being unlawful – undercuts this monopoly, and so is contradictory to the very nature of the liberal democratic state.<sup>827</sup>

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<sup>825</sup> For a general discussion on democracy and violence see Schwarzmantel, J. ‘Democracy and Violence: A Theoretical Overview’ (2010) 17 (2) *Democratization* 217

<sup>826</sup> Gurr, T.R. *Why Men Rebel* (40<sup>th</sup> anniversary paperback edn Routledge, Abingdon 2016); Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004).

<sup>827</sup> Owen, D.S. and Strong, T.B. (eds) *Weber, M. The vocation lectures: "Science as a vocation", "Politics as a vocation"* (Hackett Publishers, Indianapolis 2004). Not all protest

The second is that liberty, as a constitutional principle underlying any liberal democracy, is always endangered by violence, and so there will always be an inconsistency between constitutional morality and protest violence.<sup>828</sup> The third is that protest violence undermines the institutions of liberal democracy that give effect to its constitutional moral principles, and so protest violence will undermine foundational principles such as justice, or the rule of law.<sup>829</sup> The fourth is that violence breaches the conditions of “discourse ethics,” which are essential to a flourishing democratic state: in particular, that violence prevents equal engagement and fairness with institutional means of problem-solving and discussion central to a liberal democracy, and enshrined in its foundational constitutional moral principles.<sup>830</sup> As such, protest violence undermines the very principle of democracy itself.

It can however be demonstrated that none of these arguments creates a contradiction between protest violence and liberal democratic theory that renders the former irreconcilable with the latter. The argument over legitimacy can be resolved by distinguishing the state’s monopoly over *legally legitimate* violence from *morally legitimate* violence. The state’s legitimacy over lawful violence does not render unlawful violence necessarily immoral; and the moral reasons why we would want the state to limit unlawful violence do not necessarily render that violence unjustifiable. Then it can be shown that the “liberty,” “rule of law,” and “democracy” limitations could nonetheless allow for violent protest to be justifiable where the net harm caused by the protest action is less than the harm which the activist aims to prevent, and where it appears necessary to so act.

### “Legitimate” state monopolies on violence

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violence is unlawful, however (see Chapter 5, specifically on illegality and protest): where that violence is lawful, this argument ceases to take effect.

<sup>828</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970); Butler, J.P. *The Force of Non-Violence* (Verso, London 2020)

<sup>829</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001); Buchanan, A. ‘Political Legitimacy and Democracy’ (2002) 112 (4) *Ethics* 689, 713-718;

<sup>830</sup> McCarthy, T. (tr) Habermas, J. *The Theory of Communicative Action* (Polity, Cambridge 1984); Lenhardt, D. and Nicholsen, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990), 89

It is important to first address the presumption of the state's monopoly over "legitimate" violence, which is a cornerstone of liberal theories of the state.<sup>831</sup> It is often presumed that the state descriptively *does* hold such an exclusive right of violence, and frequently it is presumed that the state prescriptively *should* have such a right.<sup>832</sup> If these two presumptions are both valid, then subsequent claims about legitimacy of unlawful protest violence – which is not sanctioned by the state – would run contrary to a fundamental aspect of the theory of the state itself. In order for discussions about the internal consistency of unlawful protest violence<sup>833</sup> to make sense within liberal theory, it is necessary to demonstrate that the presumed state monopoly either does not exist, should not exist, or has certain limitations which might permit for justifiable violent protest.

The descriptive component, it should be noted, does not impose any significant bar on justifying protest violence. The use of "legitimate" here entails a slightly different meaning to that posited previously in this thesis. For Weber, the modern state *legitimizes* its monopoly of force through its legality: "by virtue of the belief in the *validity of legal statute* and functional 'competence' based on rationally created rules."<sup>834</sup> This *legal validity* implies a legal normativity rather than a moral one: that is to say, by accepting a rules-based order of laws as internally valid, rather than whether they are morally binding per se, one accepts that the state has an exclusive *legal right* to violence.<sup>835</sup> This is distinct from the conception of *moral* legitimacy in the present thesis. Under the model of this thesis, the state's *legitimate* monopoly on violence can only be explained or justified to the extent that it is itself *morally* justifiable. Per Raz, legal legitimacy is not the same as moral legitimacy.<sup>836</sup>

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<sup>831</sup> Owen, D.S. and Strong, T.B. (eds) *Weber, M. The vocation lectures: "Science as a vocation", "Politics as a vocation"* (Hackett Publishers, Indianapolis 2004)

<sup>832</sup> Newell, M.E. 'How the normative resistance of anarchism shaped the state monopoly on violence' (2019) 25 (4) *European Journal of International Relations* 1236; Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004), 12

<sup>833</sup> Again, lawful violent protest, including violence to the self, would fall outside of the scope of the "legitimacy" argument in any event. As such the focus here is solely on unlawful protest violence, which does, incidentally, make for the bulk of protest violence.

<sup>834</sup> Owen, D.S. and Strong, T.B. (eds) *Weber, M. The vocation lectures: "Science as a vocation", "Politics as a vocation"* (Hackett Publishers, Indianapolis 2004). Emphasis added.

<sup>835</sup> Hart, H.L.A. *The Concept of Law* (2<sup>nd</sup> edn Oxford University Press, New York 1994)

<sup>836</sup> Raz, J. 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 160

If the *moral* legitimacy of the state's particular law in question is deemed to be lacking, its normative force (as a moral reason to act, rather than a legal norm) is put to question, as discussed in previous Chapters. The descriptive, legal "legitimate" monopoly on use of violence is then shown to be hollow. Legally and descriptively, it is internally valid and correct that the state has a legal right to violence, particularly under a legal positivist construction; yet morally or prescriptively, the reasons for presumed nonviolence from subjects becomes open to interrogation.

This being so, the descriptive argument – that the state *does* possess the monopoly over legitimate violence – reduces to a statement that the state has a monopoly on deciding what violence is *lawful*. This does not entail that violence outside of state sanction is morally unjustifiable. But what of the prescriptive argument? This second component of the argument, posited by writers such as Schwarzmantel, presumes that the state monopoly of violence, exercised in accordance with law, is the best means of reducing excess violence by nonstate actors, and rendering its use subject to the rule of law, to democratic scrutiny, public accountability, and principled application.<sup>837</sup> If violence is unavoidable to political life, and its excesses can lead to unjustifiable infringement of the liberties of other citizens, so it is argued, violence should be limited, principled, and, per the Weberian model, kept under the "legitimate" legal monopoly of the state.<sup>838</sup> As Keane phrased it, the aim is that "the means and institutions of violence must always be publicly accountable, and that surplus violence can and shall be removed from the world."<sup>839</sup>

Prescriptive arguments appealing to a monopoly on legitimate violence are presumed to be persuasive for as long as the state's actors are deemed to be acting justifiably in its use. They presume that the state's monopoly discourages the use of widespread violence, and that the institutions of checks and balances reduce the risk of harms caused by the state's own excess violence.<sup>840</sup> However, it is necessary to challenge

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<sup>837</sup> Malcolm, N, (ed) Hobbes, T. *Leviathan* (Oxford University Press, Oxford 2012); Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001); Cover, R.M. 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601

<sup>838</sup> Owen, D.S. and Strong, T.B. (eds) *Weber, M. The vocation lectures: "Science as a vocation", "Politics as a vocation"* (Hackett Publishers, Indianapolis 2004)

<sup>839</sup> Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004), 12

<sup>840</sup> Newell, M.E. 'How the normative resistance of anarchism shaped the state monopoly on violence' (2019) 25 (4) *European Journal of International Relations* 1236

presumptions that limiting permissible violence solely to the employ of the state necessarily reduces the risk of such harms. As the previous Chapter explored, there are many times where the state uses excessive, morally unjustifiable violence, and where the public institutions of redress and accountability fail to enforce acceptable limits on its use. For example, the BLM movement in particular is a vivid reminder that the checks and balances supposedly written into the legislature, criminal justice system, and courts, can often perpetuate unjustifiable, racialised, structural violence.<sup>841</sup> Where the state does not reduce excess violence through such limitations, or indeed perpetuates it, it fails to reassure us convincingly into placing the *moral* right to violence into the sole hands of the state. This being so, the second component of the “legitimacy” argument fails where we have reason to suspect both that the state’s use of violence may be unjustifiable, and that the checks and balances which help to reduce this excess violence are failing to impose limitations on this excess violence.

Furthermore, the prescriptive presumption assumes that protest violence outside of the law is likely to widen the risks of excessive violence – through unprincipled, unchecked violence, disproportionate harms inflicted by individuals, and so forth.<sup>842</sup> As the previous Chapter demonstrated, with regard to consequentialist and social-cohesion arguments, however, this assumption can be falsified. Protest violence need not widen the risk of unjustifiable excess harm. Indeed in cases such as that of the Stansted 15, a small amount of unlawful violence can successfully *narrow* the risk and magnitude of foreseeable harms, without encouraging widespread violence or disorder.<sup>843</sup> Again, Delmas has observed that it is possible that where laws or policies exist which *undermine* democratic, constitutional principles, breaking those laws or policies can indeed reinforce rather than undermine those principles.<sup>844</sup> We then return to the fact that these calculations of risk are effectively empirical in nature. The

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<sup>841</sup> Lowery, W. *They Can’t Kill Us All: The Story of Black Lives Matter* (Penguin London 2017)

<sup>842</sup> Newell, M.E. ‘How the normative resistance of anarchism shaped the state monopoly on violence’ (2019) 25 (4) *European Journal of International Relations* 1236; Honoré, T. ‘Must We Obey? Necessity as a Ground of Obligation’ (1981) 67 (1) *Virginia Law Review* 39, 43

<sup>843</sup> Cammiss, S., Hayes, G. and Doherty, B. ‘Deportation and direct action in Britain: the ‘terrorist trial’ of the Stansted 15’ *Open Democracy* (16/032018) <<https://www.opendemocracy.net/en/deportation-and-direct-action-in-britain-terrorist-trial-o/>> accessed 27/07/2019

<sup>844</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 62-66

protester in question must determine whether their tactical choices will increase or decrease the risk of widening violence by other persons, and of causing unjustifiable harm.

If there is no absolute reason to presume the state's monopoly on *morally justifiable* violence, the next question is to ask: what are the moral arguments against protest violence that render it necessary to exclude from liberal democratic politics? One might start with reference to the deontological, consequentialist, or instrumentalist qualms about violence. If so, the previous Chapter gives good examples of how protest violence can nonetheless be morally and instrumentally justified, subject to certain limitations. Alternatively, one could argue that protest violence is antithetical to liberal democratic thought. The next three subsections address the main ways in which these objections manifest, and demonstrate that there are ways in which protest violence can nonetheless be reconciled with liberal democratic political thought.

### The Liberty Objection

The crux of this argument is that liberty is a constitutional principle foundational to liberal democracies.<sup>845</sup> Although nonviolence itself is not a moral ground within liberal theory, liberty is such a moral ground. Liberty entails the power of individuals to choose conceptualisations of a good life and pursue them: this in turn entails being able to plan for them, protect them from harm, and to do so without interference.<sup>846</sup> Violence (other than to the self) necessarily involves the harm, or risk of harm, to the property or persons (or other interests) of others, which in turn may limit their freedoms in exercise of those interests.<sup>847</sup> As Gurr phrased it, violence “consumes men and goods, it seldom enhances them.”<sup>848</sup> Violence is therefore always contrary to at

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<sup>845</sup> For a classic argument to this effect: Mill, J.S. *On Liberty* (Oxford University, Oxford 1859)

<sup>846</sup> Mill, J.S. *On Liberty* (Oxford University, Oxford 1859); Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

<sup>847</sup> Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004); Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970); Martin, A.W., McCarthy, C. and McPhail, J.D. ‘Why targets matter: towards a more inclusive model of collective violence’ (2009) 74 (5) *American Sociological Review* 821; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 400-420; Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 170

<sup>848</sup> Gurr, T.R. *Why Men Rebel* (40<sup>th</sup> anniversary paperback edn Routledge, Abingdon 2016), 3

least one of the moral grounds to which the violent protester appeals. As such, violent protesters will always present an inconsistent moral argument, in claiming to uphold constitutional morality, while interfering with liberty. Violent protest therefore makes incoherent legitimacy claims, and is not morally logical, and therefore not morally justifiable.

This is one of the strongest and most crucial arguments against violent protest under rational-normative logic, particularly as regards legitimacy counterclaims under the constitutional morality principle. It produces a necessary limitation on the justifiability of violence: it creates a sort of moral short-circuit. By infringing on liberty, violence in pursuit of morality defeats itself.<sup>849</sup> This argument is important inasmuch as it presents a way in which violence can be seen as morally inconsistent and morally unintelligible, ergo unjustifiable, in the context of a liberal democratic state. In particular, disproportionate, reckless violence will clearly be unjustifiable, even by the arguments posited by proponents of radical disobedience theories.<sup>850</sup>

Nonetheless, there are qualifications which apply to certain steps in this argument that permit for *some* scope for violent protest to be justifiable. Again, the purpose of the following counterarguments is not therefore to discredit writers such as Butler or Arendt, whose critiques of violence do demonstrate that this moral short-circuit exists and must be considered seriously. The aim however is to demonstrate that this short-circuit does not itself render all forms of protest violence morally incoherent.

The first qualification to note is that liberty itself is not an unqualified and absolute moral principle. Again, as writers such as Simmons and Lyons remind us, no moral principle is absolute, in the sense that it must outweigh all other moral and material considerations.<sup>851</sup> We place limitations on the exercise of liberty for the purpose of

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<sup>849</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970); Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 400-420

<sup>850</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 48-50

<sup>851</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton N.J. 1979), 25; Lyons, D. 'Reason, Morality, and Constitutional Compliance' (2013) 93 (4) *Boston University Law Review* 1381, 1383



other moral principles.<sup>852</sup> For example, the liberty of suspects – those not yet found guilty of any offence – is justifiably limited in the pursuit of justice. We justifiably impose limitations on the liberty of companies to choose with whom they enter contracts, if they would otherwise be operating a discriminatory practice: doing so prevents unjustifiable inequality.<sup>853</sup> From 2020 onwards, coronavirus regulations across many liberal democratic states imposed severe limitations the liberty and freedoms of movement and association of individuals, pursuant to the protection of public health.<sup>854</sup> As such, as with all moral principles, liberty is not an absolute and infeasible reason for action: it must be considered alongside other moral grounds and reasons for action.<sup>855</sup> The question is not whether an action impacts on liberty *at all*, but whether it does so rationally and justifiably. Liberty alone cannot create absolute obligations in a vacuum.

To determine when an act of violence may *justifiably* intrude upon liberty, one must inquire both into the nature of the violence in question, and the nature of the liberty (and other relevant moral principles) affected.

Violence, unavoidably, is a broad, contentious, and differential term. As discussed in previous Chapters, the targets of violence (property, person, self, data) can alter the normative consequences of that action and the harm caused, or the liberty deprived.<sup>856</sup> With the possible exception to violence to the self,<sup>857</sup> violence (to the person, property

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<sup>852</sup> Hume, D. ‘Of the Original Contract’ in Miller, E.F. (ed) *Essays: Moral Political, and Literary Vol 1* (Liberty Classics, Indianapolis 1985)

<sup>853</sup> Pittman, R.C. (1960) ‘Equality Versus Liberty: The Eternal Conflict’ 46 (8) *American Bar Association Journal* 873; Mercat-Bruns, M. ‘Multiple discrimination and intersectionality: issues of equality and liberty’ (2017) 67 (223-224) *International Social Science Journal* 43

<sup>854</sup> In the UK, see for example: Coronavirus Act 2020

<sup>855</sup> Lyons, D. ‘Reason, Morality, and Constitutional Compliance’ (2013) 93 (4) *Boston University Law Review* 1381, 1382-1383; Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 26

<sup>856</sup> Martin, A.W., McCarthy, C. and McPhail, J.D. ‘Why targets matter: towards a more inclusive model of collective violence’ (2009) 74 (5) *American Sociological Review* 821; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 400-420; Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 170

<sup>857</sup> Violence to the self can nonetheless have adverse secondary effects on the liberties of other persons, in terms of redirection of state resources, impact on others’ mental health, psychological or political coercion, and so forth. See Hennessey, T. *Hunger Strike: Margaret Thatcher's Battle with the IRA: 1980-1981* (Irish Academic Press, Newbridge 2013); The Telegraph, ‘Unemployed man sets himself alight outside Birmingham Jobcentre’ (29/06/2012) <<https://www.telegraph.co.uk/finance/jobs/9365087/Unemployed-man-sets->

or other interests of another) involves some interference of interests of other persons. However, as Galtung observed, not all violations have the same normative consequences in terms of deprivation of liberty: interference with a human's person creates more immediate limitations to their freedom than harm to corporate or public property would, for example.<sup>858</sup> Attacking a person may have very severe normative consequences, whereas graffiti (especially to public or corporate property) may cause few moral harms, in the sense of liberties or freedoms lost.<sup>859</sup> To paraphrase Martin, McCarthy and McPhail, targets matter.<sup>860</sup>

This being so, we can conclude that some actions may be more harmful than others to the liberty of other people. Indeed certain deprivations of liberty may generate a *net gain* to liberty, where the immediate harm caused produces less interference with the free autonomy of other individuals than the harm it would prevent. A good example of this would be the wire-cutting of the airport fence by the Stansted 15.<sup>861</sup> No person's individual freedoms to pursue their conceptualisations of the good were impeded by this action, but it allowed the protesters to prevent the much more immediate risk to life and liberty caused by the refugees' unlawful deportation to countries where they risked violence and human rights abuses. In such cases, it would be preposterous to say that limited, principled violence, to *prevent* unjustifiable violence or harm, would itself be unjustifiable on the liberty objection alone.<sup>862</sup>

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[himself-alight-outside-Birmingham-Jobcentre.html](#)> accessed 04/10/2019; Grojean, O. 'Violence Against Oneself,' in Snow, D.A., della Porta, D., Klandermans, B.; and McAdam, D. (eds.) *The Blackwell Encyclopedia of Social and Political Movements* (Blackwell, Oxford 2012)

<sup>858</sup> Galtung, J. 'Violence, Peace and Peace Research' (1969) 6 (3) *Journal of Peace Research* 167, 170; Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267-268; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 412-416; Martin, A.W., McCarthy, C. and McPhail, J.D. 'Why targets matter: towards a more inclusive model of collective violence' (2009) 74 (5) *American Sociological Review* 821

<sup>859</sup> Young, A. and Halsey, M. "'Our Desires Are Ungovernable": Writing Graffiti in Urban Space' (2006) 10 (3) *Theoretical Criminology* 275, 297

<sup>860</sup> Martin, A.W., McCarthy, C. and McPhail, J.D. 'Why targets matter: towards a more inclusive model of collective violence' (2009) 74 (5) *American Sociological Review* 821

<sup>861</sup> Cammiss, S., Hayes, G. and Doherty, B. 'Deportation and direct action in Britain: the 'terrorist trial' of the Stansted 15' *Open Democracy* (16/032018) <<https://www.opendemocracy.net/en/deportation-and-direct-action-in-britain-terrorist-trial-o/>> accessed 27/07/2019

<sup>862</sup> One potential response to this would be to argue that "two wrongs do not make a right." Such a criticism makes two errors of oversimplification. First, it suggests that both moral harms are equally bad or harmful. Second, it suggests that the first act of moral harm (on the part of the state) can be negated necessarily through peaceful, nonviolent means by the

Intention and motive are normatively significant: ordinarily for example, one might consider violence used in self-defence to be morally (and legally) justifiable, where the same violence without such motivation would be unjustifiable.<sup>863</sup> So, while incidental, opportunistic or spiteful violence may be less defensible, violence that is protective of moral considerations like liberty, and is considered and rationalised with regard to countervailing moral considerations, may have greater justificatory rationale, or at least be more persuasive as part of a moral-rational argument.<sup>864</sup> Like all moral decisions, determining the justification of protest violence demands a balance of competing moral claims, and a presumption against violence need not yield an absolute prohibition.<sup>865</sup>

One might instead argue, as Keane does, that the problem with balancing justifiable deprivations of liberty is that it is not the place of the protester to make such decision, but rather that we entrust the state to determine which deprivations of liberty are justifiable.<sup>866</sup> If so, one is making a claim that the state is best placed to determine the balance of deprivation of liberties through the use of violence. This being so, the discussion in the preceding section, on the state's monopoly on violence, comes to bear: and again, this demands that we critique the presumption that the state is indeed the best and most capable moral arbiter for making such determinations.

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protester, rather than by a violent response. Regarding the first error, this thesis' analysis of costs to liberty and other constitutional moral principles does not seek to suggest that any two forms of violence are equal: indeed it suggests, per Chapter 5, that protesters ought to engage in actions which involves the least possible moral harm in the circumstances in order to address the initial injustice. On the second error, again as discussed in the previous Chapter, it has been demonstrated that, although nonviolent protest is preferable where it is available and effective, these conditions are not always true.

<sup>863</sup> Rhodes, J.P. *The Voice of Violence: Performative Violence as Protest in the Vietnam Era* (Praeger, Westport 2001), 4

<sup>864</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 21-24

<sup>865</sup> Delmas, C. 'Political Resistance for Hedgehogs' in: Waluchow, W. and Sciarafa, S. (eds) *The Legacy of Ronald Dworkin* (Oxford University Press, Oxford and New York 2016), 36

<sup>866</sup> Classically this argument can be found in the works of Malcolm, N. (ed) Hobbes, T. *Leviathan* (Oxford University Press, Oxford 2012); Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001); Cover, R.M. 'Violence and the Word' (1986) 95 *Yale Law Journal* 160; Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004), 12

In short, an analogous line of reasoning to the consequentialist limitations discussed in the previous Chapter applies here. The “liberty” argument solely applies where the harm to liberty is not justified with relation to other principled reasons for action. There are practical approaches to rational normativity that protesters can apply when determining whether a specific act of violence may be a justifiable infringement of liberty. Pasternak’s framework for political rioting, adopting “just war” theories for necessity, success and proportionality, were discussed in the previous Chapter.<sup>867</sup> Similarly, it was seen how Delmas’ “constraints” on principled disobedience – which include respect to persons including life and bodily integrity, pluralism of perspectives and identities, and human rights – do not entail a prohibition on violence so as to render protest violence absolutely morally unjustifiable.<sup>868</sup> These moral evaluations must be undertaken by the protester as an individual, morally autonomous agent.<sup>869</sup>

It is worth bearing in mind, also, that there may be times when peaceful protest, even lawful protest, can cause more harm to liberty than a specific act of violence might. Gene Sharp, writing on the politics of nonviolent resistance, noted that certain forms of strike action, boycott, withdrawal of labour, or other lawful protests, can be extremely effective precisely because of their coercive effect on their targets, and the limitations they place on the freedoms of others.<sup>870</sup> An argument that violent protest is *absolutely* unjustifiable because of its impact on the liberty of others would, if taken seriously, require the *absolute* unjustifiability of many other forms of civil disobedience, and lawful, peaceful protest, which are otherwise widely considered to be both defensible and praiseworthy in liberal democratic states.

One final fallacy upon which this counterargument relies, which is worthy of addressing, is that there is a justifiable status quo which is overturned by unjustifiable violence. This presumption is erroneous where there is a legitimacy claim deficit. If

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<sup>867</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384, 386-387

<sup>868</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 49

<sup>869</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton N.J. 1979), 29

<sup>870</sup> Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston M.A. 1973), 69-71; Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267

there is an unintelligible (therefore unjustifiable) legitimacy claim error by the state, a breach in the moral grounds of its legitimacy claims has been identified. A moral inconsistency *already exists*, and it is the fault of the state. Liberty, equality, justice, or some other foundational principle, would already have been jeopardised in order for the legitimacy counterclaim to take effect, and a moral reason for protest to arise in the first place. This being so, it would be disingenuous to claim that, while the state continues to breach its moral commitments, any protester action must be beyond reproach. This would place too great a moral burden on the less powerful actors in the dynamic, and would only further emphasise the hypocrisy of the state's moral dialogue.<sup>871</sup>

It can be established (as per previous Chapters) that unlawful violence is not itself morally wrong. It *can* have instrumental value, and *can* be necessary where other recourse is unsuitable or unavailable. Therefore where, all moral factors being considered, the violence is necessary to remedy an unjustified state failure to meet moral grounds, it *might* be justifiable in the grounds of constitutional morality, where the liberty that it deprives is less onerous than the deprivations to liberty (or to other moral principles) unjustifiably caused by the state or its agents – particularly where there is no satisfactory alternative mode of redress.

It therefore falls to individuals to determine both the moral illegitimacy of a particular state action or law, and the moral justifiability of protest violence as a legitimacy counterclaim.<sup>872</sup> This entails that there may be times when protesters must cease to rely upon and serve the rule of law, and the state's institutions of justice, where their own judgment demands. But does this not demand that protesters act in ways contrary to the principles of the rule of law, and justice: both of which are constitutional moral principles that place political decision-making power and authority in the hands of the state, not the individual?

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<sup>871</sup> Lowery, W. *They Can't Kill Us All: The Story of Black Lives Matter* (Penguin London 2017), 101

<sup>872</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 38-42; Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton N.J. 1979), 200

## The Rule of Law Objection

This argument claims that violent protest is always going to run contrary to democratic ideas and moral grounds beyond liberty: that protest violence undermines the institutions through which collective decisions are made and enforced. The most robust defence of this proposition is given by Waldron. Given morally autonomous citizens' varying conceptualisations of what is good, a second-order moral decision-making process is needed in liberal democracies to maximise individual liberties and have principled rules, fairly decided, for the purposes of limiting harmful behaviours and organising a legal order.<sup>873</sup> Competing moral arguments in a liberal-democratic polity demand solutions by democratically-elected lawmakers, enforced and administered under the rule of law in order for them to be considered fairly applicable to all.<sup>874</sup> The principles of justice, and the rule of law, demand fair, equally-applied enforcement of the law.<sup>875</sup> Violent protest (usually) breaks the law, undermining and demonstrating a lack of respect for the rule of law. Defying such processes runs contrary to those moral grounds. Therefore, appeals to morality by violent protesters will be defeated by those other important moral grounds and claims.<sup>876</sup>

Any violent protest that does not break the law, such as violence to the self, would fall outside the scope of this argument. Lawful activity, however violent, would not breach the principles of the rule of law, or undermine institutions which enforce the law. As such the following discussion will presume that the violent protest in question is unlawful.

The rule of law, under Bingham's formulation, requires that all persons (public or private) be subject to the equal application of laws, which are publicly promulgated and enforced by the courts.<sup>877</sup> This is of central importance to a liberal democratic state that makes claim to legitimacy in part due to its obedience to, and enforcement

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<sup>873</sup> Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004), 197

<sup>874</sup> Buchanan, A. 'Political Legitimacy and Democracy' (2002) 112 (4) *Ethics* 689, 713-718

<sup>875</sup> Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2001); Bingham, T.H. *The Rule of Law* (Penguin, London 2011)

<sup>876</sup> Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004); Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 82

<sup>877</sup> Bingham, T.H. *The Rule of Law* (Penguin, London 2011)

of, such laws.<sup>878</sup> It is also important for the administration of juridical justice, which depends upon equal and fair application of the law in all similar cases. Similar difficulties arise with regard to *social* justice. For Rawls, under the classic modern conception of social justice, the principle requires obedience to law in order to support the institutions of a mostly-just state, including obedience to law.<sup>879</sup> Under these conceptions of the rule of law and of both juridical and social justice, disobedience through violent protest would undermine both the principle of equal application of the law to all persons, and the institutions which seek to enforce law in a mostly-just state.

This is a strong objection to protest violence under the legitimacy claim heuristic, and places significant limitations on the justifiability of protest violence. It indicates a similar “moral short-circuit” to the one seen in the liberty argument. The protester’s pursuit of justice would, if using protest violence that was unlawful (as it generally is), itself run contrary to those foundational principles of justice and the rule of law, and so therefore be self-defeating. It is nonetheless possible to demonstrate that this contradiction need not be fatal to the justifiability of violent protest, provided that the protester carefully balances the moral harms of undermining those principles against the moral harms averted as a result of their chosen protest tactics.

In the first instance, it is possible to make similar observations to those made in the “liberty” argument, above. Justice and the rule of law are both principles of constitutional morality, and thus reasons for action. However, like liberty and all other moral principles, they are comparative to other moral grounds, and thus defeasible.<sup>880</sup> Our obligations to them are contextual, or might only be met to the best of one’s ability in the given circumstances.<sup>881</sup> Just as there can be no absolute principle of liberty, there

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<sup>878</sup> Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2001)

<sup>879</sup> Rawls, J. *A Theory of Justice* (1st edn Harvard University Press, Cambridge M.A. 1971). Although justice can be conceived as an important principle of constitutional morality in its own right, for the purposes of the present argument it can be subsumed within the “rule of law” argument, as both reduce down essentially to a claim that it defies constitutional morality to break the law. For a detailed argument specifically examining the limitations of the justice arguments see Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 72-107

<sup>880</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton N.J. 1979), 26

<sup>881</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 17-18

can be no absolute principle of justice.<sup>882</sup> As such, where the protest in question seeks to serve important moral principles, it might be justifiable to break the law – and undermine the rule of law, or of justice – if it were to significantly reduce the risk of grave harm to other principles, such as liberty.

Edward Snowden’s unlawful whistleblowing of the mass data-gathering of the National Security Agency poses an interesting example of how consciously breaking the law might undermine justice or the rule of law, yet seem justifiable given its other merits.<sup>883</sup> As discussed in Chapter 4, Snowden knowingly broke the law, and evaded arrest so that he could release the information of systematic, unconstitutional gathering of citizens’ private data by a government military organisation.<sup>884</sup> Against Rawls’ classic formulation of civil disobedience as requiring fidelity to law – that is, willingness to be arrested – Brownlee argues that Snowden’s evasion from capture does not lack the conscientiousness required for the action to be called “civil disobedience.”<sup>885</sup> She argues that his evasiveness was required so that he could complete the whistleblowing and analysis of the data without being stopped by embarrassed authorities. The aim of this present example is not to determine whether Snowden’s action does or does not count as “civil disobedience.” Nor does it require us to determine if his actions constitute “violence,” particularly. It does however demonstrate that consciously undermining legal institutions, and breaking the law, can serve other important moral principles.

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<sup>882</sup> Indeed, “justice” may not be one universal and all-encompassing concept. Different spheres of economic, political, social, moral and juridical justice may demand examination in their own contexts. Teubner argues that juridical justice itself is a constant tension between the fairness achieved through doctrinal consistency and the fairness demanded by various, competing, changing and external social considerations: Teubner, G. ‘Self-Subversive Justice: Contingency or Transcendence Formula of Law?’ (2009) 72 *Modern Law Review* 1

<sup>883</sup> Scheuerman, W.E. ‘Whistleblowing as civil disobedience: The case of Edward Snowden’ (2014) 40 (7) *Philosophy & Social Criticism* 609

<sup>884</sup> It may also be important to note here that whistleblowing, as a specific political act, depends upon (among other things) the motivation of the actor, the recipient, and the moral denunciation of the state, which distinguishes it from other forms of unlawful truth-telling, such as acting as an informant or spy: Jubb, P.B. ‘Whistleblowing: A Restrictive Definition and Interpretation’ (1999) 21 *Journal of Business Ethics* 77. These conditions also reflect the requirements of acting in accordance with constitutional morality: acting in accordance with moral principles, engaging in democratic dialogue, and making legitimacy counterclaims against the perceived illegitimacy of state law and actions.

<sup>885</sup> Brownlee, K. ‘The Civil Disobedience of Edward Snowden: A Reply to William Scheuerman’ (2016) 42 (10) *Philosophy and Social Criticism* 965, 966



Where it does so effectively, those conflicts with the rule of law or justice arising from whistleblowing might be justifiable in context. It has been argued that “political vigilantism” through government whistleblowing can be justified where the state covers up serious wrongdoing, where lawful attempts at whistleblowing are thwarted or ineffective, and where precautions are taken to reduce the potential harms that could arise from releasing confidential information.<sup>886</sup> Where this is the case, the prima facie undermining of the rule of law is justified not only in terms of the harms it mitigates or prevents, but its service of other important moral principles, like democracy or justice.

Indeed, unlawful protest may *serve* principles of justice or the rule of law more than it defeats them, in certain circumstances. Delmas argues that where the state is enforcing laws that themselves flout the rule of law, or perpetuate injustices, the subversion of those laws can better serve those moral principles than mere obedience.<sup>887</sup> By rejecting those pernicious laws, she argues, the protester may do a better job of maintaining the principles of justice and legality than the state. As ever, the precise tactics chosen by the protester will determine whether they are necessary, proportionate, and justifiable to their stated aims.<sup>888</sup> For example, where the protester engages in principled disobedience, such violence ought not to violate the basic interests of persons.<sup>889</sup> This might entail, for example, that violence to non-personal property is generally preferable, as it is less harmful to moral grounds of justice and fairness than violence against the person.<sup>890</sup> To adopt a Rawlsian phrase, “reflective equilibrium” of the

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<sup>886</sup> Delmas, C. ‘The Ethics of Government Whistleblowing’ (2015) 41 (1) *Social Theory and Practice* 77

<sup>887</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 52-54

<sup>888</sup> Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384

<sup>889</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 47-51; Wang, D.J. and Piazza, A. ‘The Use of Disruptive Tactics in Protest as a Trade-Off: the Role of Social Movement Claims’ 94 (4) *Social Forces* 1675, 1699-1710; Lefkowitz, D. ‘On a Moral Right to Civil Disobedience’ (2007) 117 (2) *Ethics* 202, 216-217; Brownlee, K. ‘Features of a Paradigm case of Civil Disobedience’ (2004) 10 (4) *Res Publica* 337, 349-350

<sup>890</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 170; Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267-268; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 412-416; Martin, A.W., McCarthy, C. and McPhail, J.D. ‘Why targets matter: towards a more inclusive model of collective violence’ (2009) 74 (5) *American Sociological Review* 821

relevant moral principles and the normative consequences of one's actions or inactions needs to be weighed and considered collectively.<sup>891</sup>

It is also important to note that this objection fails to address why *violent* protest specifically should be considered pernicious to justice or the rule of law. Nonviolent civil disobedience explicitly undermines the rule of law and the institutional conception of justice, but there are endless defences for civil disobedience in liberal democratic theory precisely *because* it challenges those (failing) institutional structures.<sup>892</sup> The Snowden example shows this clearly: it is not the nature of *violence* per se that is at issue, but intentionally breaking the law and undermining the institutions which seek to enforce it.<sup>893</sup> This being so, it is not violence that is at issue (which in any event, for Snowden's actions, would be debateable), but unlawful acts of protest. As such when evaluating the justifiability of protest actions, it is the moral consequence of those unlawful actions, rather than their nature *per se* as violent, that must be considered.<sup>894</sup>

There may even be instances in which lawbreaking in protest can be undertaken without undermining the rule of law or principles of justice, or in which it does so in more limited ways. Under Rawls' conception of civil disobedience for example, lawbreaking need not itself undermine just institutions where the activist then accepts arrest and punishment – showing “fidelity to law.”<sup>895</sup> As such, again, it is not the nature of *violence* that is at issue: it is whether, all moral consequences considered, the protest action is unjustified. It is therefore possible that even violent protesters, by accepting

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<sup>891</sup> Rawls, J. *Political Liberalism* (Columbia University Press, New York 1993), 48-51; Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004), 34

<sup>892</sup> Rawls, J. *A Theory of Justice* (1st edn Harvard University Press, Cambridge M.A. 1971); Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179; Zinn, H. *Disobedience and Democracy: Nine Fallacies on Law and Order* (2<sup>nd</sup> edn South End Press, Cambridge MA 2002)

<sup>893</sup> Brownlee, K. ‘The Civil Disobedience of Edward Snowden: A Reply to William Scheuerman’ (2016) 42 (10) *Philosophy and Social Criticism* 965

<sup>894</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 17-18; Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267;

<sup>895</sup> Rawls, J. *A Theory of Justice* (1st edn Harvard University Press, Cambridge M.A. 1971). Brownlee disagrees on whether one must accept arrest in order for one's disobedience to be “conscientious” and thus civil, but this debate is not directly relevant to the current discussion. See Brownlee, K. ‘Features of a Paradigm case of Civil Disobedience’ (2004) 10 (4) *Res Publica* 337

punishment for their unlawful protests, might reduce the costs to the rule of law or to justice in undertaking their protests in a like manner.

But where the protesters are specifically critiquing those very systems of justice and law, and addressing a legitimacy counterclaim against them, it may be understandable that they do *not* think that it serves justice or the rule of law to become subject to those allegedly illegitimate systems.<sup>896</sup> Even if Rawls is correct that institutions of justice create the conditions *necessary* for fairness, justice and other moral grounds to flourish, this does not demonstrate that this institutional order is *sufficient* to safeguard those moral grounds in practice.<sup>897</sup> In reality, democracies sometimes do not self-remedy defects in their justice systems through these channels efficiently.<sup>898</sup> Where the state perpetuates oppression and prevents first-order moral principles such as justice from flourishing, Oksala argues, violence has a second-order normative role for opening up the possibility of better serving those first-order moral principles.<sup>899</sup> One can see similar argumentation in the justification of BLM protests, for example. Where legislative, political, and judicial means of redress are systematically thwarted by ingrained institutional racism, protest – even violent protest – opens up avenues for redress where those institutions of justice fail.<sup>900</sup>

As such, the prima facie affront to justice and the rule of law which violent protest entails can be mitigated. Firstly, provided that the action is committed pursuant to other principles of constitutional morality, and done respectfully and mindfully of its consequences, then those infringements can be justifiable. Secondly, protesters can mitigate the costs to justice and the rule of law by accepting arrest. But thirdly, and more fundamentally, where those very systems of justice are the subject of a

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<sup>896</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017)

<sup>897</sup> Zinn, H. *Disobedience and Democracy: Nine Fallacies on Law and Order* (2nd edn South End Press, Cambridge MA 2002); Gilbert, P. 'A Substantivist Construal of Discourse Ethics' (2009) 13 (3) *International Journal of Philosophical Studies* 405

<sup>898</sup> Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 105-130

<sup>899</sup> Oksala, J. *Foucault, Politics, and Violence* (Northwestern University Press, Evanston, Illinois 2012), 144; Maze, J. 'Towards and Analytic of Violence: Foucault, Arendt, and Power' (2018) 25 *Foucault Studies* 120, 140

<sup>900</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017)

legitimacy counterclaim, the presumption that accepting arrest and punishment *serves* the rule of law or justice is itself in question. In those circumstances, it may better serve justice and the rule of law to subvert illegitimate laws than to accept their legitimacy.

### The Democracy Objection

This argument bases itself on the understanding that violence, per Arendt, diminishes discourse by reducing the target's ability to communicate and voice their own opinions.<sup>901</sup> Schwarzmantel elaborates on this, saying that violence does not operate via "the force of the better argument, or through appeals to authority," but through "fear."<sup>902</sup> Violence can destroy or intimidate its targets, preventing them from freely speaking and participating in democratic processes. This does not merely diminish the target's own participatory rights: it creates an environment where violence, or the fear of violence, can deter other citizens from freely participating.<sup>903</sup> As such, the argument goes, violence is antithetical to the principle that in a liberal democratic state, all citizens should be able freely and equally to participate in the exchange of ideas.<sup>904</sup> This being so, violence is contradictory to the principle of democracy, itself a constitutional moral principle, and therefore is self-defeating in a legitimacy counterclaim.

Habermas, in *Moral Consciousness and Communicative Action*, elaborates on a theory of "discourse ethics" which very much reflects and expands upon this reasoning.<sup>905</sup> For Habermas, the ability for all persons to be able to agree on the principles and rules of their own self-government depends upon certain conditions that make for a safe and propitious environment for the exchange of ideas. These rules are necessary in order

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<sup>901</sup> Arendt, H. *On Violence* (1st edn Penguin, London 1970); Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 82

<sup>902</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 13

<sup>903</sup> Lenhardt, D. and Nichol森, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990), 89; Habermas, J. *Theory of Communicative Action* (Polity Press, Cambridge 1989)

<sup>904</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 13

<sup>905</sup> Lenhardt, D. and Nichol森, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990)

for those living within a society to be able to contribute freely to the collective goals of democracy and justice. This includes rules that all competent people should have equal rights to participate. It also entails that there can be “no coercion” against any person in their participation.<sup>906</sup> Violence, being prone to engender the coercion of its victims, would fall foul of this prerequisite.<sup>907</sup> Victims’ dialogic responses to violence cannot be guaranteed to be based on appeals to reason or principle, but will often be a result of coercion and intimidation: so the dialogue it generates cannot be trusted to be based on reasoned opinion.<sup>908</sup> As such, violent protest would undermine the very possibility of a free exchange of ideas, necessary for the principles of democratic engagement and participation to be possible.

This limitation on the justifiability of violent protest is very important – protesters must be mindful of the negative effects of their actions not only on potential victims of violence, but also the wider public environment of free discourse. If protesters are to claim that their actions are justifiable in line with principles of constitutional morality, they must avoid the potential chilling effect of their actions on immediate victims and on wider society. It can however be demonstrated that certain acts of violent protest might have little negative effect – or even a positive effect – on public democratic participation, in circumstances where the violence is limited, does not *disproportionately* affect the participation of others in open dialogue, and in particular, where it facilitates open participation by marginalised groups.

In the first instance, it is possible to critique Habermas’ narrow, formalist approach to achieving democratic participation and justice purely through formalist rules and limitations. Gilibert has discussed the ways in which Habermas’ construction of discourse ethics fails to identify “substantive” aspects of justice and democracy which must be realised, beyond merely creating *necessary* formal conditions for free

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<sup>906</sup> Lenhardt, D. and Nicholsen, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990), 89

<sup>907</sup> McCarthy, T. (tr) Habermas, J. *The Theory of Communicative Action* (Polity, Cambridge 1984); Lenhardt, D. and Nicholsen, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990), 89. It is also possible to claim that violence itself is not dialogic, as it seeks not to persuade but intimidate and coerce other interlocutors: Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 82

<sup>908</sup> Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 82

democratic dialogue.<sup>909</sup> Another criticism that can be levelled against Habermas is that his theory presumes that democratic dialogue can and should reach consensus and unanimity, which is both unrealistic and undesirable in a morally heterogeneous, pluralist society.<sup>910</sup>

Neither of these observations serve to justify protest violence *per se*.<sup>911</sup> However, they demonstrate lacunae in Habermas' theory which may allow room for justifications for violent protest further down the line. First, they show that Habermas' formalist approach overlooks the importance of how justice and democracy can *substantively* be achieved, which may at times require actions which fall outside the narrow confines of his formalist rules. Setting out the "necessary" conditions for democratic dialogue does not itself guarantee that this dialogue will successfully reach reasonable conclusions about justice and morality. Second, they demonstrate that his formalist approach fails to reflect what Connolly called the "agonistic," perpetually conflict-ridden nature of democracy, which we should conceptualise more as a process, rather than a finished product.<sup>912</sup> As such, if we are to use Habermas' theory to critique violence, we need to think about the conditions that truly allow for democratic dialogue in the real world.

The irony is that violence itself is a condition necessary for democratic dialogue. Once again, we must note Schwarzmantel's paradoxical observation that violence itself cannot be eradicated from liberal democratic politics.<sup>913</sup> Violence seems antithetical to democracy but it really belies it. Violence not only forms the state in its initial creation.<sup>914</sup> The state then applies forms of violence directed towards perceived threats, to preserve the legal order. Violence is integral to the creation and maintenance

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<sup>909</sup> Gilabert, P. 'A Substantivist Construal of Discourse Ethics' (2009) 13 (3) *International Journal of Philosophical Studies* 405

<sup>910</sup> Plot, M. 'Communicative Action's Democratic Deficit: A Critique of Habermas' Contribution to Democratic Theory' (2009) 3 *International Journal of Communication* 825

<sup>911</sup> See for example Plot, M. 'Communicative Action's Democratic Deficit: A Critique of Habermas' Contribution to Democratic Theory' (2009) 3 *International Journal of Communication* 825, 847

<sup>912</sup> Chambers, S.A. and Carver, T. (eds) Connolly, W. *Democracy, Pluralism and Political Theory* (Routledge, Abingdon 2008)

<sup>913</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 8

<sup>914</sup> Benjamin, W.; Demetz, P. (ed) Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995)

of the state: latently, systemically, and structurally.<sup>915</sup> Without the use or threat of violence by the state, in liberal democratic theory, the risk of lawlessness, social upheaval and chaos would destroy the conditions necessary for democratic dialogue at all. This violence includes removing potential threats to security, liberty, justice, and other constitutional moral principles to which the state makes claim for legitimacy. And it is through achieving these aims that the state's use of violence finds its justificatory force in liberal democratic theory.<sup>916</sup> Violence which protects these principles may be considered legitimate and justified. Conversely, any exercise of force by the state which failed to pursue such a moral aim would be considered illegitimate and unjustifiable.

Yet though this state violence is necessary for the functions of a legal order, the very existence of state violence will always risk diminishing the participatory rights of citizens. The state is uniquely capable of using force in ways destructive to minority groups, marginalised groups, or political enemies, even if that force is only structural or institutional.<sup>917</sup> In an ideal system violence *could* be removed from political life: but this does not reflect the reality of oppression and inequality that exists in the world.<sup>918</sup> Rather than its outright eradication, liberal theory requires the *rationalisation* of violence in political life.

One cannot have political discourse without the presence of violence: even Habermas himself noted that this necessary violence is inescapable in liberal democratic theory.<sup>919</sup> If one cannot rule out the existence of violence in democratic states, as Habermas' model of discourse ethics would ideally require, instead we can only ask which forms of violence best provide the conditions necessary for a robust and fair democratic environment. One must therefore frame *principled and calculated* violence

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<sup>915</sup> Foucault, M. *Society Must Be Defended: Lectures at the Collège De France, 1975-76* (Picador, New York 2003)

<sup>916</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 8

<sup>917</sup> Crenshaw, K. *Critical Race Theory: the key writings that formed the movement* (New Press, New York 1995)

<sup>918</sup> Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004), 158-159; also Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001)

<sup>919</sup> Lenhardt, D. and Nicholson, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990), 105-106

as a prerequisite to the conditions necessary for discourse ethics. It is not the presence of violence that must be interrogated here, then, but the forms, purposes, and effects of that violence. Which types, and what extent, of violence can be *justifiable* given the potential harm it can have on discourse?

We have already seen that the traditional limitations on political violence – limiting it to the state’s monopoly, for example – might try to achieve principled aims of liberty-maximisation, but they suffer from certain flaws. The state can effect unjustifiable violence at an enormous scale.<sup>920</sup> It can and does perpetuate forms of systemic and institutional violence that unjustifiably hurt minority groups.<sup>921</sup> These are morally irrational, morally unjustifiable forms of violence: they themselves undermine core constitutional moral principles, such as equality and liberty. They also can have precisely the same deleterious effect which the “democracy” objection accuses violent protest of having: the effect of intimidating, coercing or excluding participation from democratic life.

Such unjustifiable systemic violence is prevalent throughout liberal democratic societies. A *prima facie* state of peace, to which Weberian traditionalists point in their justification for the state monopoly of violence, itself is based on substantive unfairness and injustices that would undermine discourse ethics generally.<sup>922</sup> Liberal theory presumes that the peace preserved by the “system” is nonviolent, but it is violent in the sense that it must systematically use state violence to enforce an order which inescapably has disproportionate, detrimental effect on minority groups.<sup>923</sup> What is more, as with the BLM example, this rhetoric of civility and peaceful discourse seems to valorise docility for the oppressed while failing to allow for violence perpetrated against them to be immediately prevented.<sup>924</sup> As Lowery

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<sup>920</sup> Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 105-130

<sup>921</sup> Lebron, C.J. *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York 2017)

<sup>922</sup> Gilibert, P. ‘A Substantivist Construal of Discourse Ethics’ (2009) 13 (3) *International Journal of Philosophical Studies* 405

<sup>923</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 29-36, 61-68

<sup>924</sup> Lowery, W. *They Can’t Kill Us All: The Story of Black Lives Matter* (Penguin London 2017), 158; Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 32



explains, decades of peaceful work through institutional means and noninstitutional protest have failed to effect the change sought by Black people in the USA. Presuming the free flow of discourse will allow reason to prevail is optimistic, ideologically simplistic, and blind to the fact that minority experiences remain systematically marginalised by the consensus of the privileged majority.<sup>925</sup>

If one of the fundamental appeals of deliberative democratic theory is the free and equal participation of citizens, including through public fora of discourse, then blindness to systemic and structural disadvantage and political exclusion significantly undermines that appeal. As Iris Young put it:

Exhorting citizens to engage in respectful argument with others they disagree with is a fine recommendation for the ideal world that the deliberative democrat theorizes.... This is not the real world of politics, however, where powerful elites representing structurally dominant social segments have significant influence over political processes and decisions.<sup>926</sup>

This being so, we should be critical of the presumption that the *absence* of (protest) violence actually does – or even can – create even the formal conditions of participation that the likes of Arendt and Habermas hope for, let alone the substantive conditions of democratic participation.

Conversely, there might be forms of protest violence that are comparatively more morally rational, and therefore justifiable, than perpetuating an oppressive state of supposed peace. As against the aforementioned systemic and legal violence perpetrated by the state, protest violence that seeks to reject or correct this wider violence may be comparatively justifiable. D'Arcy argues that the land defence of Kanasatake is perhaps the paradigm example of justifiable, democratic, militant

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<sup>925</sup> Lowery, W. *They Can't Kill Us All: The Story of Black Lives Matter* (Penguin London 2017), 101

<sup>926</sup> Young, I. M. 'Activist Challenges to Deliberative Democracy' (2001) 29 (5) *Political Theory* 670, 676

(indeed, violent) protest against structural state violence and oppression.<sup>927</sup> The tragic history of the Mohawk people living near Oka, Quebec, entailed centuries of having their entitlement to their land encroached upon, either by force or by appropriation under a colonial legal system which systemically failed to recognise the First Nations people's rights to the land.<sup>928</sup> In 1990, the plans of a local golf club to expand further onto Mohawk lands were found to be lawful by the Superior Court of Quebec. The mayor of Oka ordered the clearing of the remainder of The Pines territory to allow for the construction of a further eighteen holes for the golf course – all (lawfully) without consultation with, or compensation for, the Mohawk. On 11 March 1990, protesters barricaded the road to the Pines. In July, the police sent armed officers to disband the barricade, firing concussion grenades and tear gas. In the firefight that ensued, the Mohawk were able to repel the hostile police onslaught; after months of escalations, in August the land defenders negotiated a surrender, which would result in the plans for the golf course expansion to be scrapped.<sup>929</sup> D'Arcy highlights that notwithstanding the use of violence, “the Mohawks exhibited remarkable restraint and took great pains to minimize the risk of death or injury.”<sup>930</sup> The land defenders were able to explain their grievances to people across the country, and demonstrate the justifiability of their defensive actions. Once again, this violent protest was the direct result of (colonial) institutional means of redress systemically failing the First Nation peoples: political and judicial protections for their continued peaceful habitation of the land had entirely become eroded. Where the institutional means of voicing and settling grievances fail (or indeed are designed to fail) oppressed groups, violent protest can act as an important means not only of establishing a channel for opening democratic dialogue, but also of self-preservation.

Frazer has similarly theorised that maintaining a “silence” that allows “the worst violence to proceed” can be worse than protest violence that challenges that greater

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<sup>927</sup> D'Arcy, S. *Languages of the Unheard: why militant protest is good for democracy* (Zed Book, London and New York 2014), 60

<sup>928</sup> Miller, J.R. *Skyscrapers Hide the Heavens: a History of Indian-white Relations in Canada* (3rd edn University of Toronto Press, Toronto 2000)

<sup>929</sup> Marshall, T. 'Oka Crisis' *The Canadian Encyclopedia* (2013) <<https://www.thecanadianencyclopedia.ca/en/article/oka-crisis>> accessed 22/02/2022

<sup>930</sup> D'Arcy, S. *Languages of the Unheard: why militant protest is good for democracy* (Zed Book, London and New York 2014), 59

violence.<sup>931</sup> As discussed in both the “liberty” and “rule of law” arguments above, Delmas echoes this in her theory of principled disobedience: where violence is used to undermine laws or policies which effect unjust violence, those protest actions can create a net benefit to justice.<sup>932</sup> This helps to address the “substantivist” justice which the narrower Habermasian view lacks.<sup>933</sup> In circumstances where protesters can calculate that their actions may create a net benefit to a robust, constitutionally moral democracy, the Arendtian and Habermasian objections fail to be persuasive.

Another point to note is that Habermas identifies *coercion* as the quality which deters free and equal participation in the sharing of ideas.<sup>934</sup> This categorisation is broader than violence.<sup>935</sup> As Singer notes, coercion, in the sense of preventing another from exercising their own will, can be achieved through acts of nonviolence as well.<sup>936</sup> Yet we do not prohibit many forms of nonviolent actions which limit those participatory rights – strikes, boycotts, and so forth.<sup>937</sup> If so, it is not *violence* that is necessarily the enemy of democratic participation for Habermas, or even Arendt, but any process or event which can limit the free participation of citizens in the democratic process.

This being so, the very concept of “coercion” may be interrogated here. If the evil of coercion is that the target is unable to effect their own will independently, we could observe that this privation can be also caused by a number of other social ills. Poverty, poor education, underinvestment in infrastructure – these are just a few examples of the institutional failures (which the state directly or indirectly causes), which can cause thousands, if not millions, of people to be unable to effect their own will

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<sup>931</sup> Frazer, E. and Hutchings, K. ‘Avowing Violence: Foucault and Derrida on politics, discourse and meaning’ (2011) 37 (1) *Philosophy and Social Criticism* 3, 10

<sup>932</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 52-54

<sup>933</sup> Gilabert, P. ‘A Substantivist Construal of Discourse Ethics’ (2009) 13 (3) *International Journal of Philosophical Studies* 405

<sup>934</sup> Lenhardt, D. and Nicholsen, S.W. (trs) Habermas, J. *Moral Consciousness and Communicative Action* (Polity, Cambridge 1990), 89

<sup>935</sup> Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179, 181

<sup>936</sup> Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 82

<sup>937</sup> Sharp, G. *The Politics of Nonviolent Action* (1<sup>st</sup> edn Porter Sargent, Boston M.A. 1973), 69-71; Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979), 267; Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179, 181

independently, or to participate freely as equal citizens within a democratic polity.<sup>938</sup> As such, rather than considering violence to be the sole or main cause of this privation, we need to be more critical of the wider structural difficulties that cause social and political deprivation.

Just as the consequentialist arguments in the previous Chapter demonstrate, to truly evaluate the role of violence in causing any such moral harms, we need to be much more precise about the role and purpose of any specific act of violence in its normative context. As previously stated, certain forms of protest violence might make room for greater participation, where they address unjust laws or policies that are causing unjustifiable coercion of marginalised groups.<sup>939</sup> Conversely, in many cases, violence directed at persons may fall foul of both Delmas' injunction that protesters respect the fundamental rights and interests of their fellow citizens, and Pasternak's proportionality requirement.<sup>940</sup> Personal violence would also be more prone to realise Arendt's concern that the target, and others, might be intimidated by the reality or threat of violence and thus less willing or able to freely participate in democratic dialogue.<sup>941</sup> It must fall to the protester carefully to assess the potential moral harms that their tactics may entail.

Crucially, to avoid the democracy-based objection, protest violence must be capable of justifying itself in terms of opening up room for a reasonable debate through justifiable means. D'Arcy has similarly discussed how rather than determining the justifiability of protest based on whether it is violent or nonviolent, instead we should base our distinction on whether the activism is democratic or non-democratic.<sup>942</sup> He has advanced a theory of a "democratic standard" of militant protest, based on certain paradigm criteria which render such activism justifiable. These include that the

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<sup>938</sup> Pogge, T. *World Poverty and Human Rights* (Polity Press, Cambridge 2002)

<sup>939</sup> D'Arcy, S. *Languages of the Unheard: why militant protest is good for democracy* (Zed Books, London 2014); Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 52-54

<sup>940</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 49-54; Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4) *Philosophy and Public Affairs* 384

<sup>941</sup> Arendt, H. *On Violence* (1st edn Penguin, London 1970); Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 82

<sup>942</sup> D'Arcy, S. *Languages of the Unheard: why militant protest is good for democracy* (Zed Book, London and New York 2014)

activism provide an opportunity to resolve the dispute where peaceful means have proven untenable; that it should provide affected persons with agency in resolving their grievances; that it should empower individuals to govern themselves through “inclusive, reason-guided public discussion;” and that militant action taken should be limited to those acts which can publicly and plausibly be defended under “democratic values of common decency and the common good.”<sup>943</sup> In this way, militant activism (including violent protest) can actually uphold democratic ideals by “weakening the capacity of elites and institutions to thwart reason-guided public discussion from dictating the terms of social co-operation.”<sup>944</sup> Violent protest can create conditions for public discourse that do not exist under the limitations of the state’s own structured violence.

Another response to Habermas’ critique is that violence is itself discourse, and therefore has a purpose and a role in democratic dialogue.<sup>945</sup> As discussed in Chapter 4, protest violence can serve an important function in dialogue: though it seems counterintuitive to peaceful democratic dialogue, it acts as a “red light” showing pathological problems in the existing systems of dialogue.<sup>946</sup> Daase and Deitelhoff have described how resistance, including violent protest, shines a light on the “invisible,” normalised rules which become entrenched and institutionalised, and prove difficult to even observe, let alone to eradicate from political life.<sup>947</sup> Protest violence can be used to highlight injustices of which the public would otherwise be unaware, and thus themselves unable to effect any will with regard to voicing an opinion.

It is also not clear that all acts of violence actually do create a chilling effect, as Arendt and Habermas intimate: this is, much like the “social chaos” argument in the previous Chapter, a “slippery slope” argument that demands empirical evidence to

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<sup>943</sup> D’Arcy, S. *Languages of the Unheard: why militant protest is good for democracy* (Zed Book, London and New York 2014), 64-70

<sup>944</sup> D’Arcy, S. *Languages of the Unheard: why militant protest is good for democracy* (Zed Book, London and New York 2014), 71

<sup>945</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 6

<sup>946</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 60-61

<sup>947</sup> Daase, C. and Deitelhoff, N. ‘Opposition and Dissidence: Two Modes of Resistance Against International Rule’ (2019) 15 (1) *International Political Theory* Special Issue 11

substantiate.<sup>948</sup> We should be focused less on whether any protest action is violent, and more focused on whether that action actually does help or hinder democratic dialogue. If it facilitates greater dialogue, and poses minimal harms to others or to moral principles in so doing, it can actually create a net gain for democratic dialogue.

However, there are certain actions which seem to remove other citizens' rights of participation so greatly that it would be difficult, if not impossible, to reconcile them with this justificatory logic. As Arendt observed, the destruction of another person as a participant – through their death, or even nonfatal inhibitions which prevent them from exercising democratic rights, such as persistent intimidation or use of physical violence – could have such a total silencing effect that it would be irreconcilable with the principle of democracy itself.<sup>949</sup> Such an action would of course, as previously discussed, likely fall foul of the deontological limitations on protest violence as well.

That being said, we should not therefore declare that any form of violence which is alarming or distressing necessarily breaches this limitation. Firstly, many acts of violence do not, empirically, reduce the capacity of other persons (even victims) from speaking freely. Those who were impacted by the Ferguson riots, for example, were able to continue to speak freely, participate in democratic processes, and even had additional fora of expression as media outlets interviewed them, providing them if anything with greater access to modes of communication and participation.<sup>950</sup> It must be a question of fact, in any given instance of protest violence, to determine the extent to which it actually does limit other people's participatory capacities. Secondly, and more fundamentally, an agonistic conception of a modern democracy entails the possibility – and at times probability – that one will be confronted with contrary

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<sup>948</sup> Buchanan, A. 'Political Legitimacy and Democracy' (2002) 112 (4) *Ethics* 689, 703-704; Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 94-106; Nielsen, K. 'One the Justifiability of Terrorism (State of Otherwise)' (2003) 41 (2-3) *Osgoode Hall Law Journal* 427, 432

<sup>949</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 52

<sup>950</sup> Terkel, A. 'Police Officer Caught On Video Calling Michael Brown Protesters 'F\*\*\*ing Animals'' *The Huffington Post* (07/07/2014) <[https://consent.yahoo.com/collectConsent?sessionId=3\\_cc-session\\_b7945179-f4f7-4f7a-b5e0-6e1998efb599&lang=en-us&inline=false](https://consent.yahoo.com/collectConsent?sessionId=3_cc-session_b7945179-f4f7-4f7a-b5e0-6e1998efb599&lang=en-us&inline=false;)> accessed 09/04/2020; Follman, M. 'Michael Brown's Mom Laid Flowers Where He Was Shot—and Police Crushed Them' *Mother Jones* (27/08/2014) < <https://www.motherjones.com/politics/2014/08/ferguson-st-louis-police-tactics-dogs-michael-brown/> > accessed 09/04/2020

perspectives that are challenging, disruptive, and even distressing.<sup>951</sup> This is the case whether or not those espousing those contrary views are acting violently. What is normatively important is whether they are trying to inhibit others from free participation, or whether the effect of their actions would have that effect.

As such, the “democracy” limitation does impose considerable barriers to protesters in choosing violent protest tactics. They must be sure that their actions do not inhibit the capacity of persons to express their own thoughts freely, and to participate in democratic processes. The limitation can nevertheless allow for the existence of justifiable violent protest. First, as violence is inescapable in liberal democratic theory, we must eschew Habermas’ and Arendt’s idealistic, total prohibition of violence, in favour of a view by which only justifiable violence is permitted – whether on the part of the state or the protester. Second, protest violence can be performed in a way which creates a net gain to democratic dialogue, rather than causing a diminishment of democratic participation. To the extent that any act of protest violence meets these criteria, it may be justifiable notwithstanding the “democracy” limitation.

### Chapter Conclusions: the effect of nonspecific and specific limitations on protest violence

The purpose of the last two Chapters has been to provide a more detailed exploration of principled and pragmatic limitations on political violence, which set the boundaries past which it risks incoherence with liberal democratic rationality. The deontological limitations demand that protesters not treat others merely as means to their own political ends.<sup>952</sup> Accordingly, this precludes forms of violence against the person which are either intentionally cruel, or that significantly threaten or undermine the dignity and moral autonomy of the target. The consequentialist concerns require that protesters must seriously calculate the normative harms that their actions may incur, both immediately and in terms of potential escalations of protester and state

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<sup>951</sup> Chambers, S.A. and Carver, T. (eds) Connolly, W. *Democracy, Pluralism and Political Theory* (Routledge, Abingdon 2008), 234-239

<sup>952</sup> Hill, Thomas E. (Jr.) ‘A Kantian Perspective on Political Violence’ (1997) 1 (2) *The Journal of Ethics* 105

violence.<sup>953</sup> Protest actions should be proportionate to their stated aims, with preferences for those actions which will create the least moral harm – including where possible, nonviolent protest action. The action must be calculated realistically to achieve its stated aims, with due consideration for whether the action will create long-term barriers to success by alienating members of the public.<sup>954</sup> The protesters need to consider rationally the extent to which their actions interfere with moral principles such as liberty, justice or democracy, and ensure that any such interference be proportionate and necessary to a realistic net gain for such moral principles.

These limitations can help us to evaluate some of the prima facie presumptions about when protest violence can be justified, which are common in the literature. For example, we can critique Rawls' presumption that alternative institutional and peaceful means of redress should generally be sought first.<sup>955</sup> At first glance, it seems to fit with a number of the limitations discussed in this thesis, in many cases. That the protester should attempt to seek institutional and peaceful redress first reduces the risk of widening social uncertainty; otherwise, countless members of the public might otherwise abandon public and / or peaceful means of redress in favour of violence.<sup>956</sup> It also serves to show that the protester is not merely using violence for opportunistic purposes, but is doing so out of a perceived necessity: it therefore helps to address allegations regarding needlessness, preference for nonviolence, and contradictions to justice and the rule of law.

However, the principle also can be shown to be less stringent a limitation than Rawls may have considered. It has been demonstrated that it is for the protester, not any other authority, to determine when such avenues have been exhausted, and to determine the question of necessity.<sup>957</sup> It is after all the protester's own moral decision, as an autonomous liberal agent, to determine whether they believe any of their own actions

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<sup>953</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 47-52; Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4) *Philosophy and Public Affairs* 384

<sup>954</sup> Pasternak, A. 'Political Rioting: a Moral Assessment' (2018) 46 (4) *Philosophy and Public Affairs* 384

<sup>955</sup> Rawls, J. *A Theory of Justice* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 1971)

<sup>956</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 76-80

<sup>957</sup> Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 29-74



is morally justifiable or necessary. This means that it is for the protester to consider whether those means of redress are safe, suitable, timely, likely to uphold principles of constitutional morality, and therefore worthy of barring alternative means of redress. This is particularly important if the nature of the grievance is urgent, immediate, and imposes onerous burdens on the protester than cannot wait for the outcomes of lengthier processes.<sup>958</sup>

To take a different presumption which is common in liberal democratic theory, it can be shown that the presumed preference for violence to property rather than other persons largely seems to withstand scrutiny.<sup>959</sup> The deontological and prudential (public-alienation) limitations would make it very difficult to justify violence to persons, particularly to any person not themselves engaged in violent action. Violence to the person also creates the greatest risk of the target, and others, being dissuaded from free participation, per the Arendtian and Habermasian objections to violence.<sup>960</sup> It also is less likely to cause the social movement to lose long-term popular support, which answers in part Chenoweth and Stephan's instrumentalist critique.<sup>961</sup> This is not to say, however, that violence against persons can *never* be justified. Provided the right circumstances, a protester could use violence against a person while not treating that person as merely a means to an end: for example, when using measured use of force in self-defence.<sup>962</sup> Nonlethal harm is more likely to fit within these limitations. These limitations do heavily circumscribe the circumstances of justifiable violence, nevertheless, and require that they be limited to where it is justifiable both practically and in principle.

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<sup>958</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 32

<sup>959</sup> Galtung, J. 'Violence, Peace and Peace Research' (1969) 6 (3) *Journal of Peace Research* 167, 168-172; Martin, A.W., McCarthy, C. and McPhail, J.D. 'Why Targets Matter: Towards a More Inclusive Model of Collective Violence' (2009) 74 (5) *American Sociological Review* 821

<sup>960</sup> Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970), 52

<sup>961</sup> Chenoweth, E. and Stephan, M.J. 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2008) 33 (1) *International Security* 7

<sup>962</sup> Hill, Thomas E. (Jr.) 'A Kantian Perspective on Political Violence' (1997) 1 (2) *The Journal of Ethics* 105, 126

Similarly, damage to property that belongs to those considered “innocent” bystanders, is likely to fall foul of these limitations.<sup>963</sup> Failure to consider the owners’ own liberties and autonomy is likely to run counter to the deontological limitation. It may also come across as misdirected, disproportionate and unnecessary, as is often the criticism of riot or other indiscriminate property violence in protest.<sup>964</sup> This again can have knock-on effects on future popular support for the movement. Conversely, property damage directed at supposedly culpable persons may not engender such criticisms. Corporate, public or insured property in particular may be preferable targets, as moral and economical harms to these forms of property are more diffuse: the economic losses are spread across hundreds or thousands of persons, or even non-natural persons.<sup>965</sup> Public support is also more likely where that damage is considered artful and creative, as is the case with for example graffiti – particularly, as Young and Halsey suggest, if it is targeted at public or corporate property, rather than the property of the elderly, vulnerable or deceased.<sup>966</sup> Once again however, it is for the protester, rather than any other purported authority, to make their own calculation as morally autonomous agents.

The constitutional morality/legitimacy counterclaim framework of this research can be used not merely to retrospectively determine the justification of a historical protest: it can be used by protesters to justify a planned course of future activism. These heuristics cannot treat others *merely* as means to an end, if they require that protesters frame their counterclaims in light of the very principles they seek to uphold, such as equality, dignity, and justice. One can think of these principles of constitutional morality as comprising the moral imperatives factored at the system-level, from which the justifiability of action at instance-level derives, when the protester makes their

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<sup>963</sup> Martin, A.W., McCarthy, C. and McPhail, J.D. ‘Why Targets Matter: Towards a More Inclusive Model of Collective Violence’ (2009) 74 (5) *American Sociological Review* 821

<sup>964</sup> Keane, J. *Violence and Democracy* (Cambridge University Press, Cambridge 2004); Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 170

<sup>965</sup> Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 170

<sup>966</sup> Young, A. ‘Criminal Images: The Affective Judgement of Graffiti and Street Art’ (2012) 8 (3) *Crime Media Culture* 297; Young, A., Halsey, M. ‘“Our Desires Are Ungovernable”: Writing Graffiti in Urban Space’ (2006) 10 (3) *Theoretical Criminology* 275

choice of tactics and targets.<sup>967</sup> In other words, by incorporating reflection on these moral principles into the very decision to protest, the framework this research posits guides the protester to consider the rights of others, the moral and practical effects of their planned actions, and its justifiability in accordance with stated moral principles.

These heuristics are also premised on the notion of democratic dialogue: the mutual, reciprocal communicativeness of which relies on the capacity of protesters and targets alike to be willing to engage in this moral dialogue.<sup>968</sup> The framework asks the protester to consider the message they intend to send, and how it can be interpreted – and indeed, misinterpreted.<sup>969</sup> Careful consideration of targets, clear messaging and communication through the media and online fora, and creative and engaging protest tactics are all rational approaches to planning a protest which is both morally defensible and practically effective. As such, this framework can be used to help render such protest morally justifiable, as an argument that can be publicly made and critiqued, by requiring the activist to centre their methods and purposes in the context of democratic dialogue.

The limitations outlined in this research do not preclude other principled and practical limitations on justifiable protest violence. The constraints to principled disobedience to which Delmas refers, and the “just war” proportionality criteria suggested by Pasternak, for example, can be used alongside these limitations and provide potential frameworks for testing the justifiability of potential protest actions.<sup>970</sup> It is possible that other frameworks could make evaluations based on separate but relevant criteria. The aim here is just to produce one coherent and comprehensive framework for

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<sup>967</sup> Hill, Thomas E. (Jr.) ‘A Kantian Perspective on Political Violence’ (1997) 1 (2) *The Journal of Ethics* 105, 126

<sup>968</sup> Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179; Guhathakurta, M. ‘Democratic Dialogue’ in Coghlan, D. and Brydon-Miller, M. *The SAGE Encyclopedia of Action Research* (2014) <<http://0-methods.sagepub.com.wam.leeds.ac.uk/reference/encyclopedia-of-action-research/n92.xml>> accessed 30/05/2019

<sup>969</sup> Spens, C. *Shooting Hipsters: Rethinking Dissent in the Age of Public Relations* (Repeater, London 2016), 19-23

<sup>970</sup> Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 49-52; Pasternak, A. ‘Political Rioting: a Moral Assessment’ (2018) 46 (4) *Philosophy and Public Affairs* 384

assessing protest violence justifiability, within the boundaries of liberal democratic theory.

It is now possible to condense these findings into definitive conclusions about the role of violent protest in liberal democratic morality, and the effect that these limitations might have on the justifiability of such actions.

## Conclusions

The thesis can now be summarised quite succinctly. There are grounds of morality, principles founded in liberal democratic states’ “constitutional morality,” from which they make claims to obedience through the laws, policies and actions they undertake. These claims to obedience, or “legitimacy claims,” prove unpersuasive when the laws of the state fail reasonably to follow from those principles which the state itself cites in its bid for authority. Violent protest – like any other form of protest - can act as democratic dialogue, addressing these perceived legitimacy deficits and presenting a form of moral argument, even where the use of violence seems spontaneous or opportunistic. However, these “legitimacy counterclaims” cannot themselves be convincing moral arguments if they too seem contrary to moral reason. As such, violent protest must observe certain limitations, beyond which it too risks losing its power as a convincing moral argument. Those limitations were explored in depth in the preceding two Chapters.

In reaching these main findings, nine significant advances to our understanding of violent protest in liberal democracy have been achieved, through this thesis. With each advancement, this research has been able to make a number of novel and important developments to scholarship in the various areas it covers.

First, it has presented principles of constitutional morality as the foundational grounds for state claims to authority. This goes beyond other writers, such as B eteille, in their observations and conceptions of constitutional morality as an ethos, or a broad sense of constitutionality in the abstract.<sup>971</sup> Second, it does so by demonstrating that states appeal to specific moral principles in claims to obedience. The research has demonstrated how these principles are written into the state’s own laws, policies and texts, and their appeals for obedience. Whereas most research on the subject looks to moral constitutional principles through an aspirational normative lens only – observing certain moral or political principles to which laws *ought* to “fit” within a political community – this research has gone further by demonstrating how states not

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<sup>971</sup> For example, B eteille, A. ‘Constitutional Morality’ (2008) 43 (40) *Economic and Political Weekly* 35; Raz, J. ‘Authority and Consent’ (1981) 67 (1) *Virginia Law Review* 103

only should, *but do*, use these principles when making arguments for *obedience*.<sup>972</sup> This demonstrates clearly not only the relationship between these principles and claims to legitimacy, in an ideal political world: it shows that as a matter of real politics, states do, *and must*, make claim to these principles in order to claim legitimacy as liberal democracies.

Third, it has presented legitimacy not as a status which is historically, mystically or sociologically claimed by states.<sup>973</sup> Instead it conceives of legitimacy merely as a moral argument: a claim, making appeal to moral principles, which the state must use in order to seek obedience from citizens. This develops beyond Raz's service conception of authority by interrogating the fundamental basis of any claim to authority: legitimacy is *simply* a moral argument (with starting axioms, subsequent syllogisms, and a final conclusion for obedience), subject to interpretation and contention, and needs to be treated as one.<sup>974</sup> This is a novel approach to an ancient problem: legitimacy not being a status, or a condition, but a moral claim that must be argued like any other moral claim.

This thesis has been able to make this novel finding by, fourth, presenting "legitimacy claims" as a coherent framework of understanding appeals to moral authority for obedience to law in a three-step moral argument. This encompasses a) an appeal to a claimed constitutional moral principle, or principles plural, b) a law or policy that claims to cohere with this principle / these principles, and c) a morally rational outcome, with obedience being a rational response to a coherent appeal to a moral principle.<sup>975</sup> This simple but novel approach to the problem of duties of obedience frames legitimacy in an effective, clear and logical way, which is a great benefit when

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<sup>972</sup> See by way of example: Dworkin, R. *Law's Empire* (1<sup>st</sup> edn Hart, Oxford 1998); Dworkin, R. *Justice for Hedgehogs* (1<sup>st</sup> edn Harvard University Press, Cambridge M.A. 2011)

<sup>973</sup> Buchanan, A. 'Political Legitimacy and Democracy' (2002) 112 (4) *Ethics* 689; Simmons, A.J. *Justification and Legitimacy: Essays on Rights and Obligations* Cambridge University Press, Cambridge 2001); Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017)

<sup>974</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986); Raz, J. 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 (4) *Minnesota Law Review* 1003

<sup>975</sup> For a detailed example of this relating to a recent violent protest, see Greenwood-Reeves, J. 'The Democracy Dichotomy: Framing the Hong Kong 2019 Street Protests as Legitimacy Counterclaims against an Incoherent Constitutional Morality' (2020) 21 (1) *Asia-Pacific Journal on Human Rights and the Law* 35

trying to analyse the justificatory force of laws' claims against supposedly morally-autonomous citizens.

Fifth, although many other writers such as Brownlee, Ganesh and Zoller have presented protest as democratic or moral dialogue, this research goes further by situating protest within the legitimacy claim framework as a "legitimacy counterclaim" against a perceived inconsistency in a state appeal to legitimacy.<sup>976</sup> This does not attempt to explain or justify political violence in the abstract: it roots it precisely in the same constitutional principles from which the state itself makes claims to legitimacy. This is useful for a number of reasons. It creates a coherent and consistent yardstick for evaluating protest justifications, as "moral dialogue" regarding moral arguments.<sup>977</sup> It is also useful because it uses the same criteria as state justifications – the same principles and the same need for internal logical coherence to those principles – which makes comparison between state and protester moral logic easier and more coherent.

Sixth, this thesis has interrogated violence, and presented a method of moral analysis based not upon arbitrary definitional factors, but aspects of moral rationales and moral harms. Traditional conceptions of violence in liberal democratic theory, such as those adopted by Tilly, focus on the mechanical: on causes, targets, and harms.<sup>978</sup> But violence itself is understood not merely by these criteria, but precisely by its moral consequences. This conception of violence allows us to go further than the work of theorists such as Tilly, Benjamin, and James C. Scott, because it looks beyond violence as a distinct category of action, and instead can be used to interrogate the moral consequences of *any* action.<sup>979</sup> Theoretically this framework could be used to examine *nonviolent* protest action as well: strikes, boycotts, and even *obedience* to the law in

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<sup>976</sup> Brownlee, K. *Conscience and Conviction: the Case for Civil Disobedience* (Oxford University Press, Oxford 2012); Ganesh, S and Zoller, H.M. 'Dialogue, Activism and Democratic Social Change' (2012) 22 (1) *Communication Theory* 66

<sup>977</sup> Etzioni A. 'Moral Dialogues' in: Library of Public Policy and Public Administration *Happiness is the Wrong Metric, vol 11* (Springer, Cham 2018)

<sup>978</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003)

<sup>979</sup> Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003); Benjamin, W.; Demetz, P. (ed) Jephcott, E. (tr) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, New York 1995); Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1<sup>st</sup> edn Yale University Press, New Haven 1985)

question. By focusing instead on the moral consequence, or “moral harm,” of an action, we can separate violence from the cultural associations and political biases which attach to it, as well as the mechanical criteria that limit the concept, and instead focus forensically on the moral merits and drawbacks of a specific protest action, within these legitimacy claim dynamics.<sup>980</sup>

Seventh, therefore, it has been possible to conceive of protest violence *as a legitimacy counterclaim* and therefore as moral dialogue within the legitimacy claim heuristics. This is where the fusion of political theory, legal theory, sociology, and moral theory have allowed this work to take a focused, interdisciplinary approach to understanding and framing protest violence in a constitutional, liberal democratic context. This is a novel advancement on preceding literature, which has generally either examined political violence in a social and political context, a legal context, or a moral context, but not all simultaneously.<sup>981</sup> And, as described above, it roots itself in the same principles and moral logics that the state uses to make claims to legitimacy. In doing so, it becomes easier to compare protester and state claims of justifiability, based on the same criteria.

Eighth, the research has shown how violent protest as a counterclaim can *itself* be consistent with the constitutional moral principles to which protesters appeal. The preceding two Chapters have explored how, rather than placing complete prohibitions on violent protest, many arguments against violence instead produce invaluable limitations on what level of protest violence can be coherent with the principles of liberal democratic theory.<sup>982</sup> By exploring the contours of what these limitations actually can prohibit, it is possible therefore to trace what these limitations can permit.

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<sup>980</sup> On the importance of examining violence according to its moral consequences see: Galtung, J. ‘Violence, Peace and Peace Research’ (1969) 6 (3) *Journal of Peace Research* 167, 168-172

<sup>981</sup> See for example the more sociological approaches of Tilly, against the moral approach of writers like Arendt: Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003); Arendt, H. *On Violence* (1<sup>st</sup> edn Penguin, London 1970)

<sup>982</sup> Of particular value was the analysis of Thomas Hill Jr. on the limitations of deontological critiques of violence, and Kleingeld on imperfect duties: Hill, Thomas E. (Jr.) ‘A Kantian Perspective on Political Violence’ (1997) 1 (2) *The Journal of Ethics* 105; Kleingeld, P. ‘A Contradiction of the Right Kind: Convenience Killing and Kant’s Formula of Universal Law’ (2019) 69 (274) *The Philosophical Quarterly* 64



Ninth, and in summation, this research has therefore provided a broad yet comprehensive analysis of how violence can be morally coherent with principles of liberty, justice, and democracy. It has systematically reviewed all major arguments against violence and interrogate their merits, so as to examine their application within this novel conception of legitimacy. In doing so, it creates a comprehensive analysis of arguments *justifying* violence by looking precisely to those *counterarguments against* violence, as sources for limitations on its practice. Each of these findings constitutes a novel and important contribution to theory. Collectively, it is hoped that they present a coherent and compelling critique of liberalism, violence, and democracy.

As a final point regarding the successes listed above: it is important to note that this framework is used to demonstrate how, using *liberal democratic theory's own logic*, violent protest can be justifiable within such societies. It does not demonstrate the justifiability of any particular protest with regard to other frameworks of political theory – communitarianism, feminism, and so on.<sup>983</sup> As such, it must be regarded in part as a critique on liberal democratic theory, using its own language and tools. It demonstrates how liberal democratic states must, if they profess by this political philosophy, account for the possibility of accepting that violent protest against their regimes can be justifiable, even by their own much-lauded political principles.

This does present something of a limitation in the thesis, however. By focusing on liberal democratic theory, it necessarily overlooks other useful theoretical critiques of statehood, violence, protest, and legitimacy.<sup>984</sup> Narrowing the theoretical approach this way was necessary not only as a result of spatial constraints, but the need to tackle state arguments for legitimacy and moral authority on their own rather orthodox terms. Nonetheless, it is possible that future work can focus on these approaches with more freedom. Having established the ways in which states present arguments for legitimacy using traditional liberal democratic logics, it is hoped that further research

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<sup>983</sup> Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004)

<sup>984</sup> For examples: Crenshaw, K. *Critical Race Theory: the key writings that formed the movement* (New Press, New York 1995); Lorde, A. *The Master's Tools Will Never Dismantle the Master's House* (Penguin, London 2018); Butler, J.P. *Precarious Life: The Powers of Mourning and Violence* (Verso, London 2004)

may be able to critique these legitimacy claim heuristics through other theoretical lenses.

These nine research successes are, however, only one set of rather theoretical achievements for this thesis. It also has potential practical application in historical and political analysis. By making reference to explicitly-stated constitutional moral principles and examining the claims to legitimacy made by both state and protester, it allows us to evaluate real political violence and analyse its justificatory rationale in context. It can help explain not merely “progressive” or popular protest causes, but even more unpopular and problematic ones.

### Practical applications: The US Capitol Incident and beyond

The storming of the US Capitol by Trump supporters in January 2021 provides an excellent case study of legitimacy claim heuristics in action.<sup>985</sup> After the failure of multiple attempts to overturn election results in state and federal courts, pro-Trump protesters, operating under the belief that there had been widespread voter fraud, descended upon the Capitol building with the intention of interrupting the confirmation of Biden’s election, and to intimidate and threaten acts of violence against a number of legislators.

The legitimacy claims framework helps to explain the principles cited by the protesters – liberty, truth, democracy – which they saw, erroneously, to be imperilled by an allegedly illegitimate “theft” of Trump’s election victory.<sup>986</sup> These foundational moral principles, cited frequently in interviews with participants at the incident, formed the bedrock of many protesters’ rationales. “The steal” undermined these sacred American principles: it was, in their eyes, monstrously inconsistent with the moral principles which are foundational to the American liberal democratic polity. This perceived legitimacy claim deficit, they sincerely believed, demanded immediate action.

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<sup>985</sup> For further details of the riots and analysis into the liability of former president Donald Trump, see: BBC, ‘US Capitol Riots’ (2021) <<https://www.bbc.co.uk/news/topics/c37r4jqnn21t/us-capitol-riots>> accessed 10/02/2021

<sup>986</sup> Tsavaris, H. ‘What motivated the Capitol rioters’ *CNN* (19/01/2021) <<https://edition.cnn.com/2021/01/19/opinions/capitol-rioters-motivation-tsavaris/index.html>> accessed 10/02/2021

Furthermore, many protesters sincerely believed that the very fact that Trump's attempts to revert the results had failed, demonstrated that the legal and institutional means of redress were inadequate to address this pressing and urgent wrong. The continuous failure of challenges to election results in the courts, and a persistent belief in the corruption of "deep state" operatives, led many within the movement to distrust the efficacy and trustworthiness of institutional processes and figures.<sup>987</sup> The protesters, *in their own perception of what was morally justifiable* in these circumstances, believed that peaceful and institutional means of redress would be insufficient. As such, they chose to manifest their legitimacy counterclaim through violent protest. In part these tactics were chosen instrumentally, out of a desire for a practical outcome (the overturn of the illegitimate election result). They were also chosen in part symbolically, out of a deep-rooted republican attitude to revolutionary violence as self-defence in the face of perceived oppression, or in the face of perceived assaults on fundamental constitutional principles or rights.<sup>988</sup> The protests, in short, precisely demonstrate how the legitimacy claim (and counterclaim) heuristics can apply to a multitude of protests.

This is not to say that the framework therefore justifies the unjustifiable: far from it. The Capitol assault example goes to show how one can use this framework to *analyse the incoherence* of these legitimacy counterclaims and their justificatory power. Firstly, in the present case, the protesters' grounds for perceiving a legitimacy claim deficit on the part of the state were misguided. Many of the protesters were misinformed as to the (in-)validity of votes cast, the merits of the legal case for discounting valid votes, and the existence of a shadowy conspiracy against the

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<sup>987</sup> New York Times, '77 Days: Trump's campaign to subvert the election' (30/01/2021) <<https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>> accessed 10/02/2021

<sup>988</sup> This American attitude towards violence against perceived tyranny precedes Trump's re-election by decades, if not centuries. See: Paine, T. *Common Sense* (Penguin, London 2004); Politico, 'Americans Increasingly Believe Violence is Justified if the Other Side Wins' (09/10/2020) <<https://www.politico.com/news/magazine/2020/10/01/political-violence-424157>> accessed 10/02/2021; The Conversation 'Is violent political protest ever justified?' (28/03/2017) <<https://theconversation.com/is-violent-political-protest-ever-justified-72630>> accessed 20/02/2021

American people.<sup>989</sup> Error as to the material facts upon which *perceived* illegitimacies are based can therefore undermine the coherence of that legitimacy counterclaim. Secondly, we can see how these misconceptions also led to an unjustifiable form of protest per counterclaim. The belief that peaceful and institutional means of redress were irredeemably crooked led not only to the original claim of the state's legitimacy deficit: it lent itself to claims that direct action, including threats of violence, were the best – or only – suitable means of redress. If there genuinely were an attempt by Democrats and deep-state operatives to rig the election, bribe the courts, and seek to overthrow the proper democratic system of the USA, there can be little doubt that violent protest against an ascendant tyranny would be *more* reasonable, given the principles and perceived facts outlined in the previous paragraph. The point is that the protesters were mistaken on material facts relating to those perceived illegitimacies, and therefore were mistaken as to the necessity and justifiability of taking violent actions as a form of legitimacy counterclaim.

We can also see that the method chosen seems to have contravened a number of the limitations on justifiable violent protest discussed in the preceding Chapters. For example, the instrumentality limitation was contravened not simply because the protest was ineffective, but because it alienated the wider public and drew widespread condemnation for the movement.<sup>990</sup> The limitations that protest violence should be balanced against the interests of liberty, the rule of law, and democracy, also seem to have been breached in this case.<sup>991</sup> In short, it seems clear that specific and nonspecific limitations to justifiable protest were transgressed by Trump supporters, who acted in a manner which is difficult to reconcile with principles of liberal democratic constitutional morality.

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<sup>989</sup> Associated Press, 'Records show fervent Trump fans fueled US Capitol takeover' (11/01/2021) <<https://apnews.com/article/us-capitol-trump-supporters-1806ea8dc15a2c04f2a68acd6b55cace>> accessed 10/02/2021

<sup>990</sup> Walker, P. 'UK political leaders condemn violence at US Capitol' *The Guardian* (06/01/2022) <<https://www.theguardian.com/us-news/2021/jan/06/uk-political-leaders-condemn-violence-at-us-capitol>> accessed 14/04/2022

<sup>991</sup> Kittay, D. 'Defending the rule of law: Bars respond to Capitol riot' *American Bar Association* (03/2021) <[https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2020\\_21/march-april/defending-the-rule-of-law-bars-respond-to-capitol-riot/](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2020_21/march-april/defending-the-rule-of-law-bars-respond-to-capitol-riot/)> accessed 14/04/2022

From this example, we can therefore see how this research can be used to *reduce the risk* unjustifiable violent protest from emerging. In the first instance, addressing channels of misinformation and introducing better quality critical reasoning skills in public education can help to reduce the risk of the widespread and unchecked communication of incendiary falsehoods upon which these counterclaims are based.<sup>992</sup> Fostering critical and moral reasoning skills at school level can also allow members of the public to have greater awareness of their moral autonomy, along with the rights and responsibilities this brings.<sup>993</sup> Again, the moral autonomy of the individual is primary in liberal theory's justificatory rationale, and it is therefore ultimately up to the individual conscience of the protester to make moral decisions, including weighing moral arguments and determining their course of action.<sup>994</sup> As such, the best that the state can do is to provide individuals with the best skills and resources possible to make use of that moral autonomy, in pursuit of morally rational outcomes.

Second, fostering trust in robust institutional means of redress can help to let citizens, as reasonable moral agents, make their own *independent and rational* decision to prefer institutional means of address over unlawful (and particularly, violent) alternatives. Schwarzmantel has observed that a greater sense of inclusivity and trust among citizens for institutions and sites of political discourse can help prevent the perceived need, desire and justifiability of political violence among protesters.<sup>995</sup> If the Capitol protesters had had greater faith in the courts, the government, and the legislature, they would have had more reason to respect the findings of the electoral officials *notwithstanding* that the election result was not one they wanted.<sup>996</sup>

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<sup>992</sup> Felbab-Brown, R. 'How to counter right-wing groups in the United States' *Brookings* (21/01/2021) <<https://www.brookings.edu/blog/order-from-chaos/2021/01/21/how-to-counter-right-wing-armed-groups-in-the-united-states/>> accessed 10/02/2021

<sup>993</sup> Cummings, R., Maddux, C., Cladianos, A. and Richmond, A.S. 'Moral Reasoning of Education Students: The Effects of Direct Instruction in Moral Development Theory and Participation in Moral Dilemma Discussion' (2010) 112 (3) *Teachers College Record* 621

<sup>994</sup> Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 38-69; Rousseau, J.-J. 'The Social Contract' in Gourevitch, V. (ed) *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge 1997); Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton N.J. 1979), 3; Raz, J. 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 (4) *Minnesota Law Review* 1003, 1012; Wall, S. 'Political Morality and the Authority of Tradition' (2016) 24 (2) *Journal of Political Philosophy* 167

<sup>995</sup> Schwarzmantel, J. *Democracy and Political Violence* (Edinburgh University Press, Edinburgh 2001), 165

<sup>996</sup> Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004), 281

Finally, it is necessary to address the reasons why *violent* protest was so readily adopted by those at the Capitol. There are a number of potential overlapping reasons and rationales behind this: incitement by Trump, a cultural republican belief in violent self-defence against perceived tyranny, and so forth.<sup>997</sup> To counterbalance such incentives to violence, it is necessary either to provide more attractive peaceful routes of dispute resolution, or to render violence more unattractive. By presenting violence instead as an unattractive means of redress, or rendering it less possible, the appeal and the possibility of violence can be diminished accordingly.<sup>998</sup>

This research therefore could provide not only greater theoretical grounding for our understanding of violence, protest, democratic dialogue, and the like. It can also help to show how, by seeing how citizens can *choose violence*, laws and policies can be enacted to address how this choice comes to be formed. By tackling the misinformation that can fuel such protests, and the perceived necessity for violence, and by providing robust and trustworthy means of addressing social grievances, liberal democratic governments can render violence a much less rationally attractive option for morally autonomous citizens.

The constitutional morality and legitimacy counterclaim framework of this research can be used therefore not merely in the past tense, in order to determine the justification of a historical protest. It can be used by protesters to plan for more morally coherent and justifiable activism in future. This includes making reference to the specific and nonspecific limitations on violence. For example, these heuristics demand that protesters cannot treat others *merely* as means to an end, if they are to frame their counterclaims in light of the principles of equality, dignity, and justice which they seek

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<sup>997</sup> Paine, T. *Common Sense* (Penguin, London 2004); Politico, ‘Americans Increasingly Believe Violence is Justified if the Other Side Wins’ (09/10/2020) <<https://www.politico.com/news/magazine/2020/10/01/political-violence-424157>> accessed 10/02/2021; The Conversation ‘Is violent political protest ever justified?’ (28/03/2017) <<https://theconversation.com/is-violent-political-protest-ever-justified-72630>> accessed 20/02/2021

<sup>998</sup> Dudouet, V., Cunningham, K.G. and Chenoweth, E. ‘Dynamics and Factors of Transition from Armed Struggle to Nonviolent Resistance’ (2013) 50 (3) *Journal of Peace Research* 401

to vindicate.<sup>999</sup> Protesters can incorporate this analysis of moral justifiability systematically into their proposed actions.<sup>1000</sup> By reflecting on these moral principles at the onset of a decision to protest, the framework of this research systematically guides the protester towards considering the rights of others, the moral and practical effects of their planned actions, and its justifiability in accordance with stated moral principles. Protesters must ask themselves, *inter alia*: what is my principled disagreement with the state? Have other avenues for resolution been pursued? Am I treating others not merely as means to my ends; and am I using violence that is necessary, proportionate, effective, and justifiable in principle?

These heuristics are also premised on the notion of democratic dialogue, and the willingness of protesters and targets alike to be capable of this moral dialogue.<sup>1001</sup> The framework asks the protester to consider the message they intend to send, and how it can be interpreted by a wider public.<sup>1002</sup> There are various guides which currently provide protesters with “toolkits” for practical protest guidance, based on consolidated research into protest and activism. CIVICUS provides an online resource for fostering solidarity and considering tactics for activism, and Chenoweth herself has written about the effectiveness of using research-led approaches to protest tactics.<sup>1003</sup> This thesis, in a similar vein, could be used to inform justifiable and effective protest action for future activist movements.

### Future research opportunities

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<sup>999</sup> See the foregoing Chapters on limitations of protest violence for further elaboration on this point.

<sup>1000</sup> Hill, Thomas E. (Jr.) ‘A Kantian Perspective on Political Violence’ (1997) 1 (2) *The Journal of Ethics* 105, 126

<sup>1001</sup> Guhathakurta, M. ‘Democratic Dialogue’ in Coghlan, D. and Brydon-Miller, M. *The SAGE Encyclopedia of Action Research* (2014) <<http://0-methods.sagepub.com.wam.leeds.ac.uk/reference/encyclopedia-of-action-research/n92.xml>> accessed 30/05/2019; Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 (2) *Criminal Law and Philosophy* 179

<sup>1002</sup> Spens, C. *Shooting Hipsters: Rethinking Dissent in the Age of Public Relations* (Repeater, London 2016), 19-23

<sup>1003</sup> CIVICUS ‘Protest Resilience Toolkit’ (2019) <<https://civicus.org/protest-resilience-toolkit/>> accessed 22/02/2022; Chenoweth, E. ‘The Dissident’s Toolkit’ *Foreign Policy* <<https://foreignpolicy.com/2013/10/25/the-dissidents-toolkit/>> accessed 02/02/2022

The scope of this thesis has been ambitiously broad. Nonetheless there are a number of areas that could not be covered within its limitations, which could be important, or at least interesting, to explore further in future research. For example, taking a discourse analysis of protest dialogue could help to demonstrate the extent to which the legitimacy claims heuristic reflects lived experience of grievances and protest in democratic dialogue. It could be interesting to undertake fieldwork – whether by ethnography within, or by subsequent interviews of, protest groups – to investigate precisely why protesters choose the tactics that they do, and to see the extent to which this practical approach by activists relates to the more theoretical underpinnings of justifiability that the legitimacy claims heuristic provides. Similar empirical research was conducted to establish narratives of participation in the Hong Kong pro-democracy protests, and for motivations behind engagement in the London riots.<sup>1004</sup> Taking a similar methodology, while focusing particularly on moral arguments and communications as part of democratic dialogue in protest, could help to demonstrate empirically the prevalence of legitimacy counterclaim argumentation among protest movements.

It could also be of interest to explore specific constitutional moral principles in greater detail: for example, to see how the rule of law is used in the UK by government in claims to authority. I am currently co-authoring a paper with Alex Powell on the collective challenges to the rule of law seen in the COVID regulations, the Overseas Operations Act 2021, Brexit legislation, and the flagrant breaches of law performed by ministers in the Johnson government.<sup>1005</sup> Framing the rule of law as a principle of constitutional morality, and seeing how the government continually fails to make

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<sup>1004</sup> Ho, P.S.Y., Jackson, S. and Kong, S.S-T. ‘Speaking against Silence: Finding a Voice in Hong Kong Chinese Families through the Umbrella Movement’ (2018) 52 (5) *Sociology* 966; Lejano, R., Chui, E., Lam, T. and Wong, J. ‘Collective Action as Narrativity and Praxis: Theory and Application of Hong Kong’s Urban Protest Movements’ (2018) 33 (3) *Public Policy and Administration* 260; Lewis, P., Newburn, T., Taylor, M., McGillivray, C., Greenhill, A., Frayman, H. and Proctor, R. ‘Reading the riots: investigating England’s summer of disorder’ *Reading the riots. The London School of Economics and Political Science and The Guardian, London, UK* (2011) <<http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots%28published%29.pdf>> accessed 27/01/2020

<sup>1005</sup> For a similar discussion, see Wallace, S. ‘A triple threat to the rule of law’ *UK Constitutional Law Association* (27/10/2020) <<https://ukconstitutionallaw.org/2020/10/27/stuart-wallace-a-triple-threat-to-the-rule-of-law/>> accessed 28/10/2020



coherent claims to this principle by writing incoherent and problematic legislation, is very illuminating. It poses a number of problems about whether rational citizens have good reason to respect ever-changing and unpopular regulations, under a government that has explicitly advocated breaches of domestic and international law for the purpose of its own expedience.

The research has already proven useful, as the groundwork for investigations into protests in Hong Kong in 2019. Midway through writing my thesis, I was able to apply the theory of constitutional morality and legitimacy claims in my article, ‘The Democracy Dichotomy: Framing the Hong Kong 2019 Street Protests as Legitimacy Counterclaims against an Incoherent Constitutional Morality’.<sup>1006</sup> In that research it was possible firstly to identify constitutional moral principles that were in conflict in the Hong Kong constitutional settlement, and secondly to show how the apparent failure to adhere to these principles by the administration caused justifiable protest on the part of aggrieved Hong Kong residents. It is of course only one example of how the legitimacy claim heuristic can be applied to practical scenarios arising in political life. It is hoped that other scholars will be also able to use this framework in analysing the justifications and justifiability for other protests, across numerous different jurisdictions, in future.

The scope for future research into violent protest, and the arguments for violent protest, is, regrettably, ensured by current trends in liberal democratic states’ increasingly authoritarian responses to activism. To take but one example, at the time of writing the Police, Crime, Sentencing and Courts Bill is due to be made law in the UK – a response to BLM, Extinction Rebellion, and similar social justice movement protests across the country in recent years.<sup>1007</sup> Its many draft provisions have included Serious Disruption Prevention Orders, which would act as injunctions against veteran protesters to criminalise their involvement in future activism. The draft Bill has also included a statutory offence of public nuisance, which carries a 10-year maximum

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<sup>1006</sup> Greenwood-Reeves, J. ‘The Democracy Dichotomy: Framing the Hong Kong 2019 Street Protests as Legitimacy Counterclaims against an Incoherent Constitutional Morality’ (2020) 21 (1) *Asia-Pacific Journal on Human Rights and the Law* 35

<sup>1007</sup> UK Parliament, ‘Police Crime Sentencing and Courts Bill’ (2022) <<https://bills.parliament.uk/bills/2839/publications>> accessed 22/02/2022

custodial sentence, and a new offence for “locking on” using adhesives, foam, or other equipment which makes removal and arrest of activists difficult for the police. The Bill provides police with powers to set additional conditions on protests which cause “serious disruption,” including through making noise, and powers to disband protests if the police consider serious disruption to be caused by the protest in question. The Bill further provides that the Secretary of State may add to the definition of what constitutes “serious disruption” through statutory instruments – that is, without primary legislation through the legislature.

What is notable about these provisions in particular is that they do not target violent protest. It is *peaceful* protest that will be the chief target of these provisions. These provisions will make significant incursions into protest rights, including rights to free expression and peaceful assembly protected under the European Convention on Human Rights.<sup>1008</sup> In practical terms, the cumulative effect of these provisions will go one of two ways. Either it will have a “chilling effect” on participation in protests, and the pacification and taming of protesters nationally; or, more likely, it will cause the criminalisation of protesters and their ongoing activities, leading to more police use of force and arrests. With an increase in police use of force against protesters comes an increased risk of violent protest, either through resisting arrest, collective responses to oppressive state force, or through activists finding alternative means of communicating their dissent outside of the march or the assembly.<sup>1009</sup> As this thesis has demonstrated time and again, where effective peaceful means of redress are closed, protesters may feel it is both a moral and practical necessity to find alternative – possibly violent – methods of seeking justice. While it is not yet possible to determine what the overall effect of this legislation will be – and of similar provisions aimed at cracking down on protest rights, in other liberal democratic states – and whether they will paradoxically lead to an increase in violent protesting, such

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<sup>1008</sup> Liberty, ‘Liberty's Briefing on the Police Crime Sentencing and Courts Bill’ (2021) <<https://www.libertyhumanrights.org.uk/wp-content/uploads/2021/03/Libertys-Briefing-on-the-Police-Crime-Sentencing-and-Courts-Bill-HoC-2nd-reading-March-2021-1.pdf>> accessed 22/02/2022

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legislation will pose difficult and important questions for lawyers, philosophers, and activists, for years to come.

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