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Can Political Institutions Commit Civil Disobedience?

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Abstract: A growing number of political activists and scholars defend the idea of state-based or political-institutional civil disobedience: they locate civil disobedience's agency in state rather than civil society–based actors. Diverging from older ideas of civil disobedience as directed against government, the concept of institutional disobedience raises tough questions its exponents have not yet fully answered. Civil disobedience has usually referred to politically motivated lawbreaking that is morally conscientious, nonviolent, and demonstrates basic respect for law. Because of the modern state's normatively ambivalent traits (e.g., its monopoly on legitimate coercion), political-institutional disobedience is incompatible with minimally acceptable interpretations of civil disobedience's core components. Political-institutional civil disobedience's advocates mischaracterize what they in fact are proposing, namely, disobedience to the law by individual state officials. Such offiical disobedience poses challenges distinct from and probably greater than civil society–based disobedience.

"Constructive disobedience," former Greek finance minister Yanis Varoufakis and the Democracy in Europe Movement (DiEM25) have announced, is the best way to challenge the top-down fashion in which "European elites do business."[1] Given the virtual impossibility of EU reform via ordinary legal

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[1]Yanis Varoufakis, "Europe's Left after Brexit" (2016), www.jacobinmag.com/2016/09/european-union-strategy-democracy-yanis-varoufakis-diem25, accessed July 30, 2018; Yanis Varoufakis, *Adults in the Room: My Battle with Europe's Deep Establishment* (New York: Vintage Books, 2017), 60.

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channels, transgressions of select EU laws and directives are "a Europeanist's duty" when accompanied by constructive proposals universalizable "in the Kantian sense" that they cohere with the EU's common good.[2] If controversial EU legal measures are to be publicly disobeyed, progressive pan-European political constituencies might be successfully mobilized, and the tottering EU not just saved but reconstructed along more democratic and socially just lines. DiEM25 is by no means alone in its call: signatories to the leftist "Plan B for Europe" advocate "civil European disobedience" against an "authoritarian Eurogroup" dominated by Germany, the European Central Bank, European Commission, and International Monetary Fund. Because of their disastrous austerity and financial measures, European citizens and political institutions have a "duty to disobey undemocratic dictates."[3]

For those versed in long-standing debates about civil disobedience, such calls probably seem familiar. Civil disobedience, after all, has been widely interpreted as a justifiable response to political scenarios in which elites pursue authoritarian acts that have badly clogged the ordinary channels of political contestation.[4] Some of civil disobedience's most prominent advocates—Mahatma Gandhi and Martin Luther King—have similarly interpreted politically motivated lawbreaking as resting on a moral duty. Its defenders typically view civil disobedience's legitimacy as premised on an illegal protest's consistency with the public interest, and some envision it as prospectively conducive not just to narrow reforms but to a radical overhaul of existing institutions.[5]

It would nonetheless be a mistake to ignore a major difference. While standard accounts of civil disobedience envision grassroots activists and social

[2]*A Guide to "Constructive Disobedience"* (Democracy in Europe, 2017), www.opendemocracy.net/can-europe-make-it/diem25/guide-to-constructive-disobedience, accessed July 30, 2018.

[3]*A Plan B in Europe* (Plan B, 2015), www.euro-planb.eu, accessed July 30, 2018. There may be parallels elsewhere, e.g., the emergence of "sanctuary cities" in the United States, in which local authorities promise to protect immigrants by refusing to cooperate with federal authorities. But the parallels only go so far: "Far from exemplars of civil disobedience, sanctuary cities … require employees to 'follow the law to a T.' When the federal government issues warrants, for example, city officials must cooperate or face criminal penalties. Despite the tough talk … no sanctuary city calls for summary noncooperation with ICE" (Joshua K. Leon, "Sanctuary Cities in an Age of Resistance," Feb. 27, 2017, https://progressive.org/magazine/sanctuary-cities-in-an-age-of-resistance/, accessed Sept. 19, 2018).

[4]Hannah Arendt, *Crises of the Republic* (New York: Harcourt, Brace & Jovanovich, 1972), 74–75, 101–2; William E. Scheuerman, "Crises and Extra-Legality from Above and from Below," in *Critical Theories of Crisis in Europe*, ed. Poul Kjaer and Niklas Olsen (London: Rowman & Littlefield, 2016), 197–212.

[5]William E. Scheuerman, *Civil Disobedience* (Cambridge: Polity, 2018), 11–31, 55–80. For a radical democratic approach, see Robin Celikates, "Rethinking Civil Disobedience as a Practice of Contestation: Beyond the Liberal Paradigm," *Constellations* 23, no. 1 (2016): 37–45.

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movements as its agents, with their illegal acts directed at governments whose policies they aim to change, DiEM25 calls for civil disobedience by "cities, regions, and nation-states."[6] Civil disobedience's agency is located in political-institutional, rather than the usual civil society–based, actors. In the same vein, Plan B proposes disobedience not just by social movements but also by sympathizers located "in government."[7] Diverging sharply from older ideas of civil disobedience as directed against government, state-based disobedience is now recommended: only politically motivated lawbreaking by key political institutions, so the argument goes, has a real chance of igniting far-reaching reform. Political-institutional disobedience, rather than its well-known civil society–based prototype, seems advantageous if EU policies are going to be successfully resisted.[8] Given that controversial policies and directives bind firstly governments and not citizens, governmental disobedience (by member-states, for example) might credibly proffer an effective device for disrupting "business as usual" and bringing possible alternatives to public attention.[9]

Present-day critics of the EU are only the latest converts to the idea of state-based civil disobedience. Writing in the aftermath of NATO's 1999 airstrikes against Serbia, Allen Buchanan portrayed humanitarian intervention as "illegal legal reform" analogous to (domestic) civil disobedience and thus potentially worthy of support if certain conditions, akin to those basic to civil disobedience's justification, could be met. Just as John Rawls and other liberal theorists accepted the moral viability of conscientious, reform-minded political illegalities resting on what Martin Luther King famously dubbed the "highest respect for law," so too should a liberal theory of international law provide space for illegal, state acts that deepen the international rule of law and buttress human rights.[10] Robert Goodin, struggling to delineate defensible international delicts from US unilateralism in the Second Gulf War, subsequently defended a sharp distinction in customary international law between illegal but reform-minded state "rule-making" and destructive,

[6]Varoufakis, "Europe's Left after Brexit"; *A Guide to "Constructive Disobedience."*

[7]*Declaration for a Democratic Rebellion in Europe* (Plan B, 2016), www.planbeuropa.es/declaration-for-ademocratic-rebellion-in-europe, accessed July 30, 2018.

[8]Critically on institutional disobedience within the EU, see Emmanuel Melissaris, "Constructive Disobedience: A Critique" (2017), www.opendemocracy.net/can-europe-make-it/emmanuel-melisaris/constructive-disobedience-critique, accessed July 30, 2018.

[9]Jonathan P. J. White, "Principled Disobedience in the EU," *Constellations* 24, no. 4 (2017): 1–13.

[10]Martin Luther King, "Letter from Birmingham City Jail" (1963), in *Civil Disobedience in Focus*, ed. Hugo Bedau (New York: Routledge, 1991), 74; Allen Buchanan, "From Nuremberg to Kosovo: The Morality of Illegal International Reform," *Ethics* 111, no. 4 (2001): 673–705; Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 204), 456–72.

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antilegal "rule-breaking," again by drawing parallels to civil disobedience.[11] States that acted illegally while meeting the usual conditions for justifiable civil disobedience (e.g., publicity, respect for law, accepting legal consequences) could be viewed as potentially contributing to international reform, Goodin claimed, whereas those that failed to do so deserve condemnation.

In the meantime, activists and scholars have turned to ideas of civil disobedience to countenance lawbreaking by developing countries (e.g., Argentina, Bolivia, Brazil, India, and South Africa) that have openly violated intellectual property laws, international investment rules, IMF rules on national debt, and other international economic legal regulations they consider rigged in favor of rich and powerful states. When doing so, countries have often acted publicly, respected norms of nonviolence, and justified their acts as part of a broader demand for global reform. So why not characterize them as state-based civil disobedience?[12] Their lawbreaking seems to mesh clearly with influential ideas about civil disobedience as a nonviolent tool of the weak and vulnerable.[13]

In short, within the last two decades, a wide-ranging debate has emerged, with a diverse variety of voices endorsing the idea that some political institutions can represent legitimate agents of civil disobedience. Some participants are inspired by Rawls's influential liberal approach to civil disobedience,[14] others by republicanism[15] or radical theories of destituent power,[16] and yet others by the "English School" of international relations.[17] However, they

[11]Robert Goodin, "Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers," *Journal of Ethics* 9, nos. 1–2 (2004): 225–46.

[12]Nancy Kokaz, "Theorizing International Fairness," *Metaphilosophy* 36, nos. 1–2 (2005): 68–92; Gerald Neubauer, "State Civil Disobedience: Morally Justified Violations of International Law Considered as Civil Disobedience" (TranState Working Papers 86, Bremen, 2009).

[13]Antonio Franceschet, "Theorizing State Civil Disobedience in International Politics," *Journal of International Political Theory* 11, no. 2 (2015): 239–56.

[14]Andreas Follesdal, "Law Making by Law Breaking? A Theory of Parliamentary Civil Disobedience against International Human Rights Courts?" (Multirights Workshop on International Human Rights Judiciary and National Parliaments, Oslo, 2015); Kokaz, "Theorizing International Fairness"; Nathan J. Miller, "International Civil Disobedience: Unauthorized Intervention and the Conscience of the International Community," *Maryland Law Review* 74 (2015): 314–75.

[15]Danny Michelsen, "State Civil Disobedience: A Republican Perspective," *Journal of International Political Theory* 14, no. 3 (2018): 331–48.

[16]Franceschet ("Theorizing State Civil Disobedience") relies, for example, on Giorgio Agamben, "What Is Destituent Power?," *Environment and Planning D: Society and Space*, no. 32 (2014): 65–74.

[17]Ronnie Hjorth, "State Civil Disobedience and International Society," *Review of International Studies* 43, no. 2 (2016): 330–44.

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generally support some version of the intuition that our present-day globalizing institutional constellation calls not just for civil society–based but also political-institutional civil disobedience. Some authors hope that states as a whole will play the requisite role; others suggest that national parliaments[18] or courts[19] offer appropriate sites for disobedience against unjust laws and measures.[20] In the context of complex, multilayered postnational decision-making systems (many lacking adequate democratic legitimacy), the idea of political-institutional disobedience seems increasingly appealing. It is easy to understand why so many theorists are turning to the veritable idea of civil disobedience to justify lawbreaking by political-institutional complexes: civil disobedience has long represented a singularly attractive approach to morally conscientious, nonviolent, politically motivated lawbreaking. It provides sizable moral and political capital that alternative ideas or concepts (e.g., "legal violation" or "delict") lack, and this capital has generated, in some jurisdictions, noteworthy capital gains. When politically inspired lawbreakers persuade a judge or jury that their actions represent civil disobedience, they can sometimes count on less severe treatment than those who fail to do so.

What should we make of this embrace of political-institutional civil disobedience? Though perhaps appealing, the move to embrace it raises difficult questions its exponents have not yet fully answered. Civil disobedience comes in different shapes and sizes. At a minimum, however, it has usually referred to politically motivated lawbreaking that is supposed to be morally conscientious, nonviolent, and show basic respect for law (section I). Downplaying the modern state's normatively ambivalent traits (most importantly, its monopoly on legitimate coercion), the idea of political-institutional

[18]Follesdal, "Law Making by Law Breaking?"

[19]Julio Bacquero Cruz, "Legal Pluralism and Institutional Disobedience in the European Union," in *Constitutional Pluralism in the European Union and Beyond*, ed. Matej Avbelj and Jan Komarek (Oxford: Hart, 2012), 249–68; N. Türküler Isiksel, "Fundamental Rights in the EU after *Kadi and Al Barakaat*," *European Law Journal* 16, no. 5 (2010): 551–77; Mattias Kumm, "Constitutionalism and the Moral Point of Constitutional Pluralism: Institutional Civil Disobedience and Conscientious Objection," in *Philosophical Foundations of EU Law*, ed. Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012), 216–46.

[20]The existing scholarly and political debate employs a variety of terms, including "governmental disobedience," "state disobedience," and "international civil disobedience" (Michael Allen, "Civil Disobedience, International," in *Encyclopedia of Global Justice*, ed. Deen K. Chatterjee [London: Springer, 2011], 133–35). I refer here to such proposals as calls for *state-based* or *political-institutional* disobedience, terms I generally employ interchangeably. However, when appropriate I distinguish between cases of state (i.e., by states) and political-institutional (i.e., by specific institutions) disobedience. Though there are some potential differences and complications we will need to explore, the fundamental problems raised by them remain the same.

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civil disobedience proves incongruent with minimally acceptable interpretations of civil disobedience's core components. Resting on an untenable notion of collective institutional agency, it cannot be plausibly interpreted as resting on moral conscientiousness, nonviolence, or fundamental respect for law. Consequently, political-institutional civil disobedience is confused and perhaps even conceptually incoherent. Its defenders downplay familiar reasons why identifiably liberal and democratic institutions are necessarily constituted by a public system of binding rules (section II). Advocates also tend to mischaracterize what they really seek, namely, disobedience to the law by specific government or state officials. When properly reinterpreted as a call for morally and politically motivated lawbreaking by individual officials, it offers a more fruitful conceptual starting point for debate. About such official disobedience there is already a significant literature; that literature suggests we should differentiate it from civil disobedience. Given the modern state's specific institutional contours, official disobedience's perils seem potentially more pronounced than its civil society–based cousins. Politically motivated rule-breaking by officials should sometimes be expected to pass tests more demanding than those usually associated with civil disobedience (section III).

I. What Is Civil Disobedience?

To evaluate its state or political-institutional rendition we need to consider how best to conceive civil disobedience. Unfortunately, this task is complicated by the fact that civil disobedience remains an object of contestation. There is no single classical or orthodox idea of civil disobedience: rival political traditions have developed overlapping yet diverging models of civil disobedience.[21] Accordingly, we can identify three main recent accounts of civil disobedience: competing *religious-spiritual*, *liberal*, and *radical-democratic* (or *republican*) renditions. The idea of civil disobedience has been articulated in conflicting ways: its presuppositions, normative justifications, and political aspirations are grasped best when situated in the context of rival political (and philosophical) traditions.

For religious exponents such as Gandhi and King, for example, civil disobedience has principally been a device to counter moral evil, a form of divine witness requiring of practitioners a strict spiritual comportment. Every element of this view, correspondingly, possesses a directly religious-spiritual significance. In contrast, the liberal model of civil disobedience, as fashioned by Rawls, Ronald Dworkin, and other Anglophone liberals in the 1960s and

[21]This section relies heavily on William Scheuerman, *Civil Disobedience* (Cambridge: Polity, 2018). The literature on civil disobedience is vast but see the important recent contributions by Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford: Oxford University Press, 2012); Tony Milligan, *Civil Disobedience: Protest, Justification, and the Law* (London: Bloomsbury, 2013).

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early '70s, frees civil disobedience from its initial religious bearings, recognizing that it can remain politically relevant only if it presupposes modern pluralism. Liberals interpret civil disobedience primarily as a corrective to overbearing political majorities that periodically threaten minority rights. The radical-democratic or republican model of civil disobedience, whose most significant defenders have included Hannah Arendt and Jürgen Habermas, challenges liberalism's relatively limited view of democracy and its insufficiently critical diagnosis of the liberal political status quo. Civil disobedience, in their view, potentially helps overcome far-reaching democratic deficits and opens the door to extensive political and social reform.

Civil disobedience's pluralistic conceptual parameters generate some difficulties for our inquiry here. At first glance, we might be forced to select a preferred rendition of civil disobedience as a critical measuring rod. By embracing a potentially sectarian version of civil disobedience, however, we risk "talking past" versions of state-based civil disobedience built on rival theoretical pillars. Rather than being able to identify the distinctive merits (and demerits) of political-institutional civil disobedience as a general political and theoretical genre, we might simply reproduce old divisions between liberal versions of civil disobedience and their religious-spiritual or radical-democratic rivals. We would then find ourselves refighting familiar theoretical battles and missing what is special about political-institutional disobedience.

Fortunately, we can follow another path. Despite striking differences between and among rival models of civil disobedience, they rest on shared components and aspirations. Religious-spiritual, liberal, and radical-democratic versions possess family resemblances.

Significantly, religious, liberal, and radical-democratic accounts all view civil disobedience as a distinctive mode of lawbreaking premised, however paradoxically, on a fundamental respect for law or legality. As King famously commented in "Letter from Birmingham City Jail": "an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for the law."[22] Though formulated in myriad ways, the notion of *lawbreaking for the sake of law*, or illegality in the name of legality, has long constituted an ideational mainstay of civil disobedience; without it, disobedients probably could not effectively counter critics who accuse them of irresponsible lawlessness or ordinary criminality. On this matter, as on others, rival versions of civil disobedience typically make use of a joint conceptual language, even as they employ that language for different goals. Most exponents also view civil disobedience's legitimacy as premised on *moral conscientiousness* and *nonviolence*, though they still conceive such components in strikingly dissimilar ways. Civil disobedience is not an empty pot into which rival political and

[22]King, "Letter from Birmingham City Jail," 74.

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theoretical traditions pour, willy-nilly, their own potions. Its exponents depend on a common ideational language. Even when employing that language's key concepts in ways that are so heavily accented that others may find them difficult to fathom, theirs remains a common tongue. As such, it provides minimal constraints on what can or cannot be meaningfully expressed by it.

Nonviolence, for example, has been the subject of heated controversies. For some, it has entailed nonviolence against persons but not objects (e.g., property); others have interpreted it strictly as prohibiting damage to both persons and property. Faced with such disagreements, some have dropped nonviolence altogether from their accounts of civil disobedience. When doing so, however, they tend to reproduce the very problems they hope to solve. Kimberley Brownlee, for example, worries about nonviolence's conceptual ambiguities, but her proposal to focus on "the more salient issue of harm" promises no more conceptual determinacy.[23] Not surprisingly, some version of the idea of nonviolence, despite its unavoidable ambiguities, has typically served to distinguish civil disobedience from other types of political lawbreaking (e.g., violent resistance or armed revolution).

II. Who Does Civil Disobedience?

Civil disobedience, as already noted, has generally been conceived as a type of grassroots or civil society–based political action, undertaken by groups of individuals or movements, and typically directed at state institutions. Political-institutional disobedience obviously abandons its prototype's grassroots political agency. But what about its relationship to other facets of its common language? As I hope to show in this section, institutional disobedience meshes poorly with some core elements.

1. The Problem of Collective Institutional Agency

Fundamentally, political-institutional civil disobedience probably has to presuppose that the state or its specific state institutions (parliaments, courts)

[23]Brownlee, *Conscience and Conviction*, 21–22, 98–99. Why the concept of "harm" is any less open to competing interpretations than "violence" is unclear. Joseph Raz rejects the nonviolence test because "the evil the disobedience is designed to rectify may be so great"; as an example, he refers to Soviet-era labor camps, where it would indeed seem strange to limit disobedience to nonviolent means (Raz, *The Authority of Law,* 2nd ed. [Oxford: Oxford University Press, 2009], 267). This criticism ignores the fact that nonviolent civil disobedience, at least for some liberals, is suited to more or less democratic (in Rawls's terminology, "nearly just") polities. They often concede, however, that in dictatorships violent resistance, a type of lawbreaking very different from civil disobedience, may be justified.

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can exercise agency akin to that of conventional civil disobedients. Although usually claiming that they merely aim to identify analogies between political-institutional and conventional modes of extrainstitutional civil disobedience, most theorists describe the alleged parallels as more or less clear-cut, that is, they fail to thematize major structural differences.[24] State institutions are not, in fact, strictly akin to grassroots activists or political movements coming together to engage in joint action, as Buchanan implicitly concedes when defining the state as possessing "a persisting [institutional] structure" in which the "wielding of political power" and "supremacy in the use of coercion" are crucial.[25] How best to define an "institution," political or otherwise, remains an object of wide-ranging debate; we say more about this below. At a minimum, the notion of political-institutional disobedience probably requires some notion of *collective or corporate institutional agency*, perhaps even that institutions "can deliberate and arrive at a unified course of action," and demonstrate "a capacity for reasoning and decision-making" akin to that of grassroots activists and the joint action they pursue. Nor should political institutions be viewed as "reducible to descriptions of the actions of its individual members,"[26] at least if we are to take them seriously as collective agents.

The potential problem here is not per se that the state or its institutional parts should be viewed as collective bodies with shared identities; this would arguably also apply to many civil society–based organizations. Rather, problems arise because the institutional collectivity "state" possesses privileged access to an imposing collection of power and coercive instruments typically denied other social organizations. The state and its institutions differ from other collective political actors (for example, political parties), and these differences matter. They help illuminate why it would be wrong to push the analogy between state-based or political-institutional and civil society–based disobedience too far.

Civil society or grassroots lawbreakers, to be sure, sometimes act with support from political or social organizations having a "persisting structure," yet such organizations typically lack direct access to the instruments of state power. When the state or one of its institutional elements (courts, parliaments) acts, it does so legally on behalf of people who may not in fact agree with its acts. If a left-wing majority in the Greek parliament were in fact publicly to disobey EU austerity directives, for example, it would speak as the binding, institutionalized, legal representative of the entire

[24]Among many other examples: Miller, "International Civil Disobedience," 316; Robert W. Hoag, "Violent Civil Disobedience: Defending Human Rights, Rethinking Just War," in *Rethinking the Just War Tradition*, ed. Michael W. Brough, John W. Lango, and Harry Van der Linden (Albany: State University of New York Press, 2007), 224.

[25]Buchanan, *Justice, Legitimacy, and Self-Determination*, 237.

[26]Toni Erskine, "Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States," *Ethics and International Affairs* 15, no. 2 (2001): 74–75.

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Greek populace, even if many Greeks disagreed with its approach. In contrast, in conventional civil disobedience activists and political organizations can always simply refuse to participate, and even when participants claim to speak "in their name" or "on their behalf," their assertion possesses symbolic political value but only limited legal significance.

To be sure, activist political organizations often possess an organized legal status, speak on behalf of members, and sometimes demand that members "toe the line" on issues. Yet major differences remain: knottier questions of binding authorization and political representation arise in the context of institutional modes of civil disobedience than in familiar extrainstitutional modes. Political institutions possess a binding, collective legal agency fundamentally dissimilar to the political agency at work in grassroots civil disobedience. Political-institutional disobedience, by its very nature, means that potentially those represented (e.g., conservative Greeks disagreeing with "their" left-wing government's refusal to enforce EU austerity measures) might want nothing to do with the acts in question. To the extent that legitimate civil disobedience is supposed to rest on consensual action and presupposes an implicit commitment to ideals of political freedom and equality, its state or institutional variant raises tough questions. This is not simply a matter of semantics: when governments act illegally but bindingly on behalf of citizens who disagree with their acts, it seems strange and perhaps even perverse to interpret those acts as somehow doing justice to some notion of free and equal citizens. On the contrary, they arguably represent a fundamental breach of trust by means of which political institutions and officials ignore appropriate legal limits on their actions.[27]

To their credit, some defenders of institutional dependence have acknowledged the underlying dilemmas. Rather than attributing a fictional cohesion to disobedient institutions, Jonathan White suggests in a recent discussion focused on the EU, we instead might focus on intermediary actors such as political parties and social movements, some of which can be defined by shared purposes and something along the lines of collective intentionality. If they were to gain majority control of political institutions it would perhaps make sense to view them as purposeful political agents, capable of exercising judgment and bearing the attendant risks, in a manner analogous to grassroots political activists and social movements.[28] The problem with this view, as White seems to concede, is that it presupposes an idealized view of political parties oftentimes unrelated to the realities of contemporary political life in the EU or elsewhere.[29] More fundamentally, it remains unclear how it solves

[27]If we were to revise the idea of civil disobedience so that coercive illegal actions by state officials fell under its rubric, something crucial would be lost from its shared conceptual language (see II.4 below).

[28]White, "Principled Disobedience in the EU," 6–7.

[29]Ibid., 11n5. On the crisis of European party democracy, see Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (London: Verso, 2013).

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the underlying structural problem. Of course, political parties regularly play a pivotal role in civil society–based civil disobedience; there are good reasons to assume they will continue to do so. Yet once those parties occupy positions of formal political authority and advocate institutional lawbreaking (by parliaments, for example), a fundamentally different scenario emerges: unlike political parties, political institutions represent collective "agents" having a special legal status backed up by coercive power. This familiar fact of contemporary political life necessarily limits the scope of any analogy we might draw between institutional and extrainstitutional civil disobedience.

Revealingly, others acknowledge the problem but move to resolve it by effectively abandoning the idea of distinctly institutional disobedience:

> Critics would argue … that institutions and individuals are in a very different position with regard to the political and legal systems. Individuals often find themselves in a position of weakness, of subjection: they are subjects. Disobedience may sometimes be their last desperate resort. Institutions, in contrast, are often in a privileged position: they are vested with special responsibilities and the power to decide. It is that power and those responsibilities that would bar the possibility of institutional disobedience. Against these objections, I should like to defend the idea that … institutions may also sometimes [engage in civil disobedience]…. Institutions are, after all, composed of human beings endowed with conscience. Those human beings should not necessarily be and in any event are not mechanical and blind executors of the law. Sometimes they may feel that for very important reasons they are bound to disobey.[30]

Notwithstanding its analytic virtues (about which I have more to say below), this position reduces the idea of disobedience by a corporate institutional agency to something akin to conscientious disobedience by *individual government officials* who feel obliged to break the law. But why then hold on to the idea of identifiably state-based or political-institutional disobedience? It makes sense to do so, I suspect, only under the controversial assumption that institutions can be viewed as nothing more than the collection or sum of some group of individuals and their acts. By day's end, we are left with a call for individual official disobedience, a scenario that has long interested many scholars, rather than a proposal for a basically novel variety of institutional obedience. References to collective types of state-based or institutional disobedience arguably confuse an already vexing topic.

Not surprisingly perhaps, Buchanan has occasionally admitted that there are dangers to overstating the analogy between institutional and conventional civil disobedience,[31] and even as he ignited the ensuing debate criticized any idea of government as a collective agent with an "independent moral status."[32] However, this concession may be more consequential than

[30]Cruz, "Legal Pluralism and Institutional Disobedience," 263.
[31]Buchanan, "From Nuremberg to Kosovo," 676–78.
[32]Buchanan, *Justice, Legitimacy, and Self-Determination*, 102.

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he seems to realize. To the extent that the idea of institutional disobedience presupposes not only collective agency, but also a shared institutional capacity for conscientious moral action, its misleading contours become even more evident.

2. Conscientious Moral Agency

If we are to characterize its actions as somehow analogous to extrainstitutional civil disobedience, institutional disobedience needs to be interpreted as potentially resting on some collective capacity for conscientious moral deliberation. To be sure, competing (religious-spiritual, liberal, radical-democratic, anarchist) activists and intellectuals have interpreted moral conscientiousness in different and sometimes opposing ways, with spiritual thinkers such as Gandhi and King, not surprisingly, envisioning it as the centerpiece of civil disobedience and offering demanding accounts of its basic requirements. Liberals and radical democrats, in contrast, have tended both to downplay moral conscientiousness's overall significance and provide looser readings of its demands, in part as a way of acknowledging the dictates of modern moral and religious pluralism.[33] With rare exceptions (e.g., Arendt), practitioners and theorists of civil disobedience have nonetheless described its possible legitimacy as resting on some evidence of more or less sustained conscientious moral reflection.

Does it make sense to transfer this idea to state and political institutions? Their efforts notwithstanding, theorists of institutional disobedience have failed to make a sufficiently persuasive case for doing so.

Moral agency might be robustly interpreted so as to entail the possession of consciousness, self-awareness of an "inner life," the ability to follow a moral law, a sense of remorse or empathy, rationality, and other demanding moral conditions we might identify.[34] Conscientiousness, presumably a key component of moral agency, has been conceived in a variety of ways, some of which have indeed entailed strict moral rigorism.[35] Revealingly, even theorists who have endorsed the idea that political institutions exhibit moral agency admit that they cannot realistically be viewed as possessing it in this strict sense: "Formal organizations are quite clearly not, for example, 'conscious.'"[36] In fact, it seems far-fetched to attribute to a statist collective agent (or any of

[33]Scheuerman, *Civil Disobedience*, 11–40.

[34]Toni Erskine, "Introduction: Making Sense of 'Responsibility' in International Relations —Key Questions and Concepts," in *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*, ed. T. Erskine (London: Palgrave, 2003), 6; Vinit Haksar, "Moral Agents," in *Routledge Encyclopedia of Philosophy* (1998), https://www.rep.routledge.com, accessed July 30, 2018.

[35]Richard Sorabji, *Moral Conscience through the Ages* (Chicago: University of Chicago Press, 2014).

[36]Erskine, "Making Sense of 'Responsibility,'" 6.

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its specific institutional parts) something like an "internal voice" or capacity for inner reflection associated with strict notions of moral conscience. If it is to hold water, the idea of state moral agency will have to be conceived more modestly.

In this alternative vein, Toni Erskine characterizes state moral agency in terms of a "deliberative capacity, discernible in the ability of some institutions to access and process information," in conjunction with an ability to pursue purposive action independently and autonomously.[37] The problem with this more restricted view, however, is that it remains unclear why we should describe the resulting form of collective agency as moral and not, perhaps, chiefly political (and legal). Even if we accept the (arguably controversial) thesis that political institutions engage in deliberation, access information, and act purposively and independently, why does it follow that they should be viewed as conscientious moral agents? It is true that we often talk about the *responsibility* of government or of specific institutional players. At least since Max Weber delineated the ethic of responsibility from the ethic of conviction, however, we have rightly acknowledged that political responsibility cannot simply be reduced to—or equated with—standard ideas of moral agency or responsibility.[38] The danger here is a misleading moralization of political institutions that ignores their distinctive attributes, including what Weber famously described as their monopoly over legitimate violence. This monopoly necessarily generates deep normative paradoxes: the use of (morally deplorable) coercive power or force may sometimes be necessary to advance politically sensible goals, while a failure to do so can produce politically (and perhaps also morally) undesirable consequences.[39] In the immediate context of state action, as in no other social arena, the prospect of force and violence means that gaps between intentions and real-life consequences can take on potentially explosive significance.

To be sure, in civil society–based civil disobedience, moral motives and aspirations get mixed with personal self-interest, the struggle for power, and so on. Even Gandhi was not just a spiritual leader but a hard-headed political animal.[40] All political actors, and not simply those exercising political authority, find themselves grappling with normative paradoxes linked to the special role played by force and violence. In the case of political

[37]Erskine, "Assigning Responsibilities to Institutional Moral Agents," 75–76; Erskine, "Making Sense of 'Responsibility,'" 6–7.

[38]Richard Beardsworth, "Moral Responsibility and the Problem of Representing the State," *Ethics and International Affairs* 29, no. 1 (2015): 71–92; David Runciman, "Moral Responsibility and the Problem of Representing the State," in Erskine, *Can Institutions Have Responsibilities?*, 41–50.

[39]Max Weber, "Politics as a Vocation," in *The Vocation Lectures*, ed. David Owen and Tracy Strong (Indianapolis, IN: Hackett, 2004), 32–94.

[40]Karuna Mantena, "Another Realism: The Politics of Gandhian Nonviolence," *American Political Science Review* 106, no. 2 (2012): 455–70.

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institutions, however, moral aims and motives are unavoidably intermingled with—and tainted by—the looming specter of force and coercion. The state is never just another moral "agent" but one fundamentally preoccupied with the successful employment of binding political power and the terrible exigencies of organized violence. This complicates any attempt to attribute moral conscientiousness to it.

The point here is not to defend a "realist" view of the state in which its relationship to coercion, force, and violence predominate. Rather, I commence from a descriptive claim about modern political institutions and their special relationship to organized violence; we need not endorse the standard political realist's account of such institutions as normatively desirable. An alternative political order in which organized coercion loomed less large might hypothetically prove normatively more desirable. But the fact remains: under existing political conditions, attributions of moral agency to political institutions risk neglecting modern state power's normatively ambivalent and sometimes unsettling coercive functions.[41]

Not surprisingly, advocates of state-based disobedience turn one of the more appealing features of traditional ideas of moral conscience on its head: the "call of conscience" has provided a powerful check or restraint on the political community and its employment of organized force, playing a pivotal justificatory role for defenders of conscientious lawbreaking (e.g., Henry David Thoreau) in challenging state acts they viewed as morally unacceptable. By instead viewing the state as potentially embodying conscientiousness, we lose conscience's restraining function: institutional disobedience effectively attributes to political institutions, not individuals, what has periodically been viewed as one of humanity's more admirable moral-deliberative capacities. The idea of institutional disobedience, by implication, may contain worrisome authoritarian overtones.

Not surprisingly, theorists of institutional disobedience have struggled to flesh out how the demand for moral conscientiousness can be satisfactorily met. Buchanan, for example, probably conflates his own theoretical and moral justification for political-institutional disobedience with state conscientiousness: he provides a detailed moral justification for "illegal legal reform" without sufficiently explaining how states (or state officials) might themselves in fact exhibit the requisite conscientious moral reflection.[42] The two tasks are related but remain distinct. Like Buchanan, Nathan Miller wants to build a

[41]Postnational orders "beyond the nation state" also exercise power and can be responsible for policies having dire consequences (extreme poverty, forced migration, etc.). But this hardly justifies ignoring the fact that state coercion generates difficulties for attempts to ascribe moral conscientiousness to political-institutional lawbreakers. Even in the EU, the globe's most developed postnational political order, member-states "retain their monopoly on the legitimate use of force" (Jürgen Habermas, *The Crisis of the European Union* [Cambridge: Polity, 2012], 13).

[42]Buchanan, *Justice, Legitimacy, and Self-Determination*, 456–72.

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theory of legitimate (and potentially military) humanitarian intervention on the basis of liberal models of civil disobedience. But his reconstruction of Rawls tends to conflate conscientiousness with other standard liberal tests of legitimate civil disobedience: lawbreaking states need to (1) have first exhausted existing legal channels, (2) be ready to accept legal consequences, and (3) act on the basis of principles of justice.[43] Only the requirement that states provide evidence of their sincerity, based on an "objectively defined good faith," can be described as properly evincing moral conscientiousness. Unfortunately, Miller fails to demonstrate that such a faith can be readily identified in our morally and politically divided universe.

Other theorists of institutional disobedience think that conscientiousness is demonstrated by moral unease in the face of laws that can be challenged on the basis of universal moral arguments or principles of global justice.[44] However appealing, this position still fails to show how moral deliberation can be attributed to the collective agency of state institutions rather than individual government officials. Though Gerald Neubauer, for example, defends the possibility of conscientious state civil disobedience, what he actually wants is "responsible state *representatives*" to justify lawbreaking on the basis of "universal moral arguments instead [of] … particular, national reasons."[45] Here again, state disobedience in fact means disobedience by *individual state officials*, an important—but by no means altogether novel—scenario about which we will need to say more. And once again, we might ask whether references to state or institutional (e.g., judicial, parliamentary) lawbreaking do not in fact unnecessarily confuse the messy issues at hand.

3. State Nonviolence?

It is hard to see how political-institutional disobedience could hold on to some sensible rendition of the old idea that civil disobedience requires nonviolence "especially against persons."[46] If we once again recall that state institutions should be characterized in part as resting on a monopoly on legitimate coercion, the idea of nonviolent institutional disobedience seems implausible. Can we reasonably posit a fundamental analogy between civil society–based lawbreaking and illegal acts by the modern state, tasked with the (potentially) coercive enforcement of law, and outfitted with awesome organized power and destructive instruments?[47] Predictably, those who have reinterpreted humanitarian intervention, including its military variants, as analogous to

[43]Miller, "International Civil Disobedience," 314.

[44]Neubauer, *State Civil Disobedience*, 8; Follesdal, *Law Making by Law Breaking?*, 16.

[45]Neubauer, *State Civil Disobedience*, 8, emphasis added.

[46]John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 366.

[47]On the nexus between law and coercion see Frederick Schauer, *The Force of Law* (Cambridge, MA: Harvard University Press, 2015).

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civil disobedience conveniently downplay the nonviolence requirement.[48] Others qualify or even abandon it by arguing that nonviolence can be trumped by more fundamental justificatory components of civil disobedience. Republican nondomination, Danny Michelsen argues, permits military intervention against oppressive governments that commit crimes against humanity.[49] Since an updated version of Rawlsian shared "principles of justice" should be interpreted as resting on an emerging global "right to protect" (R2P), Miller claims, Rawls's defense of civil disobedience can now be reinterpreted as congruent with R2P-based military intervention. Against Rawls's own views, nonviolence should generally be respected but in exceptional cases scrapped.[50] For others as well, violence can be justified as long as "extraordinary care to avoid collateral casualties" is taken and "strict conditions of proportionality" respected.[51]

The immediate flaw with this move is that it fails to pay sufficient attention to the myriad grounds theorists of civil disobedience have provided for nonviolence.[52] Gandhi and King, for example, would have worried that it occludes how civil disobedience is supposed to prefigure an improved, future social order: if one seeks a nonviolent future, violent lawbreaking seems more likely to impede than contribute to its realization. Liberal proponents of civil disobedience have widely condemned violence as inconsistent with the basic respect we owe political equals: violent acts are incompatible with the quest to convince or persuade them to alter their political position. Nonviolence is a prerequisite of an "ideal political discourse" in which rational exchange, tolerance, and patience with one's political foes are supposed to prevail.[53] By abandoning it, we revert to paternalistic and elitist lawbreaking that belies civil disobedience's core egalitarian normative premises.

To be sure, liberal accounts of civil disobedience have sometimes presupposed something along the lines of what Rawls famously described as "shared principles of justice" ensconced within a specific constitutional democracy. For him and others, civil disobedience, as a mode of redress available to political actors in constitutional orders based on ideals of freedom and equality, presupposed a viable nation-state-based liberal democracy.[54] Rawls conceded that if such shared principles could not be identified, or if the

[48]For example, Buchanan, *Justice, Legitimacy, and Self-Determination*, 456–72; Goodin, "Toward an International Rule of Law."

[49]Michelsen, "State Civil Disobedience," 11.

[50]Miller, "International Civil Disobedience," 315–17.

[51]Follesdal, *Law Making by Law Breaking?*, 14; Hoag, "Violent Civil Disobedience," 224.

[52]For a recent defense of nonviolence see Stellan Vinthagen, *A Theory of Nonviolent Action: How Civil Resistance Works* (London: Zed Books, 2015).

[53]Hugo Bedau, introduction to *Civil Disobedience in Focus*, 8.

[54]Scheuerman, *Civil Disobedience*, 101–21.

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preconditions of a "basically just" liberal democracy were missing, more militant—and potentially violent—forms of protest might prove justified.[55]

If we then interpret the existing global order as basically unjust and one that fails to meet minimal liberal and democratic standards, even on Rawlsian grounds we might identify grounds for militant and potentially violent resistance.[56] In the postnational and global institutional contexts where possible political-institutional disobedience is now being discussed, it perhaps makes some sense to relax the nonviolence requirement: many key political decisions are in fact being made "beyond the nation-state" in undemocratic and arguably illegitimate ways. If the WTO or so-called EU "troika," for example, fail to respect sufficiently just shared principles, or some modicum of liberal and democratic ideals, why limit politically motivated institutional lawbreaking there to its strictly nonviolent forms?[57]

When faced with this and related questions, theorists of political-institutional disobedience want to have their cake and eat it as well. On the one hand, they strive to show that the postnational and global political contexts they have in mind already rest on far-reaching shared principles of justice, that is, widely shared moral and legal commitments (e.g., R2P, some shared vision of core human rights, the rule of law). This is vital to their espousal of institutional disobedience because state conscientious lawbreaking is not supposed to embody "moral subjectivism," that is, narrowly partisan ideas of morality out of sync with those held by other key global players.[58] On the other hand, they condone violence, though doing so remains in tension with the shared respect and common principles of justice they find operative in the existing global order. As they move to endorse cosmopolitan views of justice and law, they undercut their allowance for violent lawbreaking, instead implicitly suggesting that institutional disobedience should preferably take nonviolent forms.

To avoid these pitfalls, some writers have sensibly purged their defense of any justification for militarily based humanitarian intervention. Nonetheless, the idea of nonviolent institutional disobedience remains paradoxical. What in fact can it conceivably amount to since the "state depends on latent or actual police violence"?[59] Admittedly, in the case of prospective lawbreaking by parliaments or courts, where the specter of state coercion seems to loom less large than in executive-based police or military action, the dilemmas appear to be somewhat mitigated. If a national court or parliament were to refuse to follow EU fiscal regulations, why equate its lawbreaking with

[55]Rawls, *Theory of Justice*, 365–68.

[56]See Simon Caney, "Responding to Global Injustice: On the Right of Resistance," *Social Philosophy and Policy* 32, no. 1 (2015): 51–73.

[57]We still might ask whether it makes sense to gloss the violent acts in question with the normatively appealing term "civil disobedience."

[58]Buchanan, *Justice, Legitimacy, and Self-Determination*, 466.

[59]Neubauer, *State Civil Disobedience*, 10.

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more overtly violent lawbreaking? Even though there are surely some important differences here, *all* political institutions remain entangled in the use of force and the resulting ethical paradoxes; the underlying dilemmas still obtain. When parliaments or courts act illegally their decisions are still supposed to be universally binding; there remains an expectation of systematic enforcement, in sharp contrast to cases of disobedience by political parties or social movements. Parliaments and courts generate binding decisions, meaning that any legal transgressions on their part (against supranational rules or agreements, for example) are still irrepressibly caught up in the modern state's web of enforcement mechanisms.

Others have tried to salvage the idea of nonviolent state disobedience by asserting that when the state abides by the rule of law, its power takes an essentially "civilian" form and the nonviolence criterion can be satisfied.[60] But if states are simply following the rule of law and refuse extralegal violence, it becomes unclear how they are acting illegally in the first place: the indispensable idea of civil disobedience as a "political act contrary to law" vanishes altogether.[61]

4. Respect for Law?

Civil disobedience has been widely depicted as politically motivated lawbreaking that simultaneously exhibits fundamental respect for or "fidelity to law."[62] Political-institutional disobedience also contradicts this core element.

Determining whether a state or one of its institutions has even committed an illegality can prove especially arduous at the postnational or global level, partly because of the underdeveloped contours of some features of law there, and partly because states—and especially powerful states—still disproportionately shape adjudication and enforcement "beyond the nation-state." Proponents of the idea of state civil disobedience have argued that for actions to fall under its rubric their illegality must be admitted and officials should submit them to an independent court (the International Court of Justice, for example) or a neutral arbitrator.[63] Unless officials concede illegality and willingly accept legal consequences, it would also be difficult to characterize their acts as public or open. But what institutional incentives do they have for doing so? As Buchanan concedes: "in the typical case illegal acts directed toward reform of the international legal system are perpetrated by actors who will not be subject to legal penalty, not simply because the international legal system is weak in enforcement capacity but because the

[60]Ibid.
[61]Rawls, *Theory of Justice*, 364.
[62]Ibid., 366.
[63]Goodin, "Toward an International Rule of Law," 236–38; Miller, "International Civil Disobedience," 369–73.

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lawbreaker will tend to be a powerful state or coalition against whom punitive action is not likely to be taken."[64] Relatively powerful states, after all, are generally better situated to pursue—and benefit from—politically motivated lawbreaking: "the real inequality of states makes SCD [state civil disobedience] selective and mainly a strategy for states that enjoy high status."[65] Such states are best positioned not only to circumvent legal penalties but also to get away with denying that their activities were illegal in the first place.[66] That their endeavors, even when their illegality has been conceded, deepens rather than discredits respect for basic rights or the rule of law also seems far more tenuous in their case than in the case of lawbreaking by extrainstitutional protestors. Even well-organized political and social movements lack the modern state's arsenal of power instruments, an arsenal that can prove decisive in warding off legal consequences for egregiously illegal acts. By contrast, it was politically and strategically unrealistic for Gandhi in colonial India, or King in the US South, to have tried to circumvent legal penalties, let alone deny that they had committed illegalities. For powerful state and institutional players, such a strategy may prove politically and legally tenable.

To be sure, in cases of disobedience by less powerful states, or by specific political institutions within multilayered postnational systems (for example, the EU), such perils seem somewhat reduced. Peripheral states, for example, are less capable of decisively shaping international law; the EU (and perhaps other postnational orders as well) possesses relatively developed legal systems. Yet, real problems remain. Defending political-institutional lawbreaking always risks obscuring that liberal-democratic political institutions are constituted by "a public system of rules which defines offices and positions with their rights and duties, powers, and immunities, and the like."[67] By definition, political institutions are supposed to pursue actions "regularly carried out in accordance with a public understanding that the system of rules defining the institution is to be followed."[68] There are many reasons for this, but the simplest one perhaps is that it would make no sense for any rational agent to outfit political institutions with "supremacy in the use of coercion" unless the rules governing them minimally exhibit a measure of formal justice, meaning that they are general, public, and clearly defined and treat similar cases similarly.[69] Such rules are not something to be willy-nilly ignored: they make up the core identity of liberal institutions, since without

[64]Buchanan, "From Nuremberg to Kosovo," 676.

[65]Hjorth, "State Civil Disobedience and International Society," 340.

[66]For example, think of how US president George W. Bush's administration claimed a legal veneer for (illegal) torture and never meaningfully faced any legal sanctions for doing so.

[67]Rawls, *Theory of Justice*, 55.

[68]Ibid.

[69]Ibid., 59, 238.

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them we would be ruled by lawless, potentially arbitrary individuals, rather than legally constituted officials acting in accordance with impersonal rules and legally defined official roles. Strictly speaking, it makes no sense, in a liberal democracy, to speak of *institutional* lawbreaking since legitimate institutions necessarily rest on some public system of general rules. We might still perhaps speak coherently of lawbreaking by government *officials* or *representatives*, who have decided that they can no longer abide duties as defined by the existing system of rules, and on the basis of conscience or political principles disobey them. Nonetheless, "we need to be careful not to provide [legally] constituted powers—against whose arbitrary interference we safeguard ourselves with the rule of law—with an easy justification for illegal action. Otherwise, the defense of democracy might become a pretext for measures that are in fact undermining the citizens' capacities for self-government."[70] When extra-institutional actors engage in lawbreaking their acts can pose risks to others; the nonviolence criterion, in part, aims to reduce them. Because of their ready access to a significant array of coercive instruments, however, state or official lawbreakers possibly generate far greater perils: state officials, like no other social actors, occupy an institutional universe where organized coercive power looms large. We may find this feature of modern politics normatively unappealing and perhaps hope for a day when the modern state, as we know it, vanishes. Until then, however, it would be irresponsible to sugarcoat its harsh implications for contemporary political existence.

III. Official Disobedience: Its Perils

I have suggested that the idea of state-based or political-institutional disobedience is misconceived. At best, it simply mischaracterizes legal disobedience by government officials (in the executive, parliament, and judiciary). Such official disobedience raises complex questions about which there has long been extensive debate; for my limited purposes I focus here on its most relevant lessons.

The standard position in the long-standing discussion has probably been that "rule departures by state officials, those of policemen who do not arrest lawbreakers, prosecutors who don't prosecute them, jurors who acquit obviously guilty defendants, judges who depart from judicial rules—in general, deliberate failures, often for conscientious reasons, to discharge the duties of one's office" are distinguishable from civil disobedience.[71] Official disobedience raises justificatory questions beyond those we normally

[70]Markus Patberg, "Destituent Power in the European Union: On the Limits of a Negativistic Logic of Constitutional Politics," *Journal of International Political Theory* 15, no. 1 (2019): 93.

[71]Joel Feinberg, "Civil Disobedience in the Modern World," *Humanities in Society* 2, no. 1 (1979): 37.

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associate with civil disobedience. Numerous reasons can be provided, but one derives from Rawls's intuition that public officials, having agreed to and benefited from a specific "scheme of social cooperation," should be viewed (in contrast to ordinary citizens) as having a strict general obligation to follow the law.[72] Unlike average citizens, who neither consistently gain from a particular system of social cooperation nor freely accept its benefits, anyone who has actively acquired public office is always "obligated to his fellow citizens whose trust and confidence he has sought and with whom he is cooperating in running a democratic society."[73] As Rawls correctly grasped, the modern state possesses a "comprehensive scope" and "substantial regulative powers with respect to other institutions," making it imperative that we subject it to the rule of law in the minimal yet indispensable sense of clear, general, prospective legal rules, as well as independent courts.[74] It is difficult to fathom how such a system of legal rules, for Rawls a sine qua non of any broader vision of justice, could flourish without officials rigorously following their legally defined duties and respecting legal norms, even when clashing with their own moral or political views. For the orthodox Rawlsian, in fact, the idea of collective political-institutional or even individual official disobedience as civil disobedience arguably makes no sense: civil disobedience is a political option for citizens but not the state and its officials because the latter are properly subject to a strict obligation to law.[75]

This conventional account has been subjected to astute criticism, most recently by Brownlee, who suggests that it neglects the sizable gap between "the formal codifiable dictates of normatively legitimate offices and positions, and the broadly non-codifiable moral responsibilities of the moral roles that underpin and legitimate those positions."[76] Given the ineliminable tension between codified official duties and our moral responsibilities, Brownlee posits, officials should be ready to override the former when these clash with the latter. The real danger, she believes, is not officials who ignore the law and follow private moral dictates but instead the "rigidifying and generalizing nature of formal institutions" which allegedly regularly threaten to lead officials to engage in morally problematic practices.[77] As a result, Brownlee endorses some acts of disobedience by government officials, viewing them as directly analogous to civil disobedience.

[72]Rawls, *Theory of Justice*, 72.

[73]Ibid., 113; see also Ken Greenawalt, *Conflicts of Law and Morality* (Oxford: Oxford University Press, 1979), 279.

[74]Rawls, *Theory of Justice*, 236.

[75]A point, I fear, usually missed by those who deploy Rawls to justify institutional disobedience.

[76]Brownlee, *Conscience and Conviction*, 86. For an earlier critique, see Arthur I. Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton: Princeton University Press, 1999), 72–73.

[77]Brownlee, *Conscience and Conviction*, 87.

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Brownlee identifies a real problem: situations can easily arise when dutifully complying with lawful official responsibilities produces grave inequities or harms. Nonetheless, the standard account should not simply be discarded. Rawls and others rightly grasped that political institutions, because of their "comprehensive scope" and impressive coercive instruments, posed specific dangers that could only be checked by the rule of law and officials who took their legally defined responsibilities seriously: the "power and prestige" of government officials, in conjunction with the oftentimes unmatched power instruments they control, require that they follow both the law and their official duties reliably and predictably.[78] For good reasons, Rawls and others could not have endorsed Brownlee's hostility to the standard view that "individual officials are routinely in a position to interfere in democratic processes in more serious ways than ordinary citizens," a denial that seems to downplay the harsher realities of the modern state and its coercive traits.[79] Nor are they likely to have accepted her discounting of formal justice and the rule of law, conceived in terms of "procedural norms of generality and predictability," which she now characterizes as "subordinate to the substantive, context-sensitive, non-codifiable" moral responsibilities to which state officials primarily owe fidelity.[80]

The key implication of the standard view is to suggest that justifiable official disobedience will have to meet a particularly stringent series of tests. Because the perils posed by lawless state officials tend to be greater than those posed by ordinary citizens (and nonviolent civil disobedients), officials who break the law should be required to clear high hurdles.[81] What this specifically entails will likely depend on a number of complicated factors—most important perhaps, the purpose or aim of the lawbreaking in question. Are officials simply cleansing themselves of a law they consider morally deplorable? If so, their actions might overlap to some extent with conscientious objection or refusal.[82] Is disclosing unethical or illegal practices by other

[78]Greenawalt, *Conflicts of Law and Morality*, 279.

[79]Brownlee, *Conscience and Conviction*, 110. Brownlee tends to downplay what is distinctive about state or government roles and responsibilities. Of course, those occupying nonstate positions or offices can also do harm (e.g., a negligent or incompetent physician, or a CEO who exploits his or her employees). But those involved directly in the exercise of state power have ready access to coercive and destructive instruments generally unmatched elsewhere.

[80]Brownlee, *Conscience and Conviction*, 96.

[81]In fairness, some defenders of state civil disobedience endorse stringent tests for analogous reasons. As Neubauer, for example, notes, "since state violations of international law pose a bigger threat to the whole legal system than individual law violations, a rather strict approach is needed" (*State Civil Disobedience*, 7).

[82]Will Smith and Kimberlee Brownlee, "Civil Disobedience and Conscientious Objection," in *Oxford Research Encyclopedia of Politics* (2017), www.politics.oxfordre.com, accessed July 30, 2018. Conscientious objection by institutional actors also raises questions distinct from those raised when committed by nonstate actors.

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officials their main goal? Then we need a proper theoretical analysis of official "whistleblowing."[83] Or are they instead hoping to raise political awareness of a policy's ills, seeking to bring about significant political change? Their acts then, to be sure, may recall some distinguishing features of civil disobedience, except for the crucial caveat that, as I have argued, official disobedience ultimately is a different creature generating some unique challenges. Any fully developed theory of legitimate official disobedience will need to take such differences seriously. Only by doing so can it properly weigh and evaluate the specific dangers at hand, distinguishing acceptable from unacceptable official disobedience. Despite its own possible ills, official whistleblowing aimed at increasing public awareness of legally suspect acts by officials, for example, arguably supports the rule of law and the legal accountability of officials. In contrast, official refusal to enforce legislation that emerged in a relatively freewheeling deliberative process, in which a full range of competing interests was properly represented, probably poses greater justificatory challenges.[84]

I cannot offer such a theory of official disobedience here. But perhaps something constructive, by way of a brief conclusion, can be modestly ascertained about the call for institutional disobedience by Varoufakis and other EU critics. The concept of political-institutional disobedience tends to confuse rather than clarify some of the complicated political issues at hand. What Varoufakis and others in fact desire is lawbreaking by individual officials, situated in a variety of institutions (in municipalities, provinces, and nation-states, and within the executive, legislature, and judiciary), who refuse to comply with certain EU laws and directives, as part of a broader effort at far-reaching political reform. Much can perhaps be said politically in favor of this strategy. Nonetheless, the fact that legal disobedience is apparently supposed to be committed not just by lower-level bureaucrats but also by powerful and influential political officials should give us pause. They, like no others, have access to the modern state's imposing arsenal of coercive instruments (the police, military, etc.). They enjoy great prestige and extensive possibilities for shaping mass opinion. By hurriedly endorsing political illegality on their part, we may end up paying too high a price: where the accountability of government officials to the electorate already seems badly frayed, official disobedience may simply exacerbate the serious political problems Europeans—and many others elsewhere today—now face.

[83]Candice Delmas, "The Ethics of Government Whistleblowing," *Social Theory and Practice* 41, no. 1 (2015): 77–105. See also David Fagelson and Douglas B. Klusmeyer, "Justifying Official Disobedience," *Law, Culture and the Humanities*, published online Aug. 22, 2017, doi:10.1177/1743872117721987.

[84]Or consider, for example, the active refusal by local and state officials in the segregated US South to enforce a range of US Supreme Court rulings, beginning with *Brown v. Board of Education*, to desegregate education.

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