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Civil Disobedience as a Practice of Civic Freedom

Robin Celikates

1. Introduction

The novel approach to the study of politics that James Tully has developed in recent years under the programmatic title of ‘Public Philosophy’ seeks to escape certain forms of narrowmindedness that have led the mainstream of political philosophy to pay insufficient attention to the perspectives of other disciplines as well as alternative approaches, new kinds of problems and the concerns of ‘ordinary’ agents.¹ To avoid these shortcomings, Tully’s aim is ‘not to provide foundations for, but to reflect critically *on* our well-trodden ways of thought and action, rendering them less indubitably foundational, and thereby disclosing possibilities of thinking and acting differently’.² This leads him to favour a dialogical and conflict-oriented approach over the dominant monological and consensus-oriented one. More specifically, his approach centres on the complex, contested and open-ended nature of struggles for recognition and self-determination and the temporary character of the institutional arrangements that aim at resolving these struggles and at creating stability. This methodological

¹ See J. Tully, *Public Philosophy in a New Key*, Two Volumes, Cambridge: Cambridge University Press, 2008. This section incorporates material from my review of these two volumes: R. Celikates, ‘Public Philosophy in a New Key: Volume I: Democracy and Civic Freedom/Volume II: Imperialism and Civic Freedom by James Tully’, *Constellations* 18 (2): 264–66, 2011.

² Tully, *Public Philosophy* I, p. 70.

shift has normative consequences as well: Since political theory cannot provide the normative foundations for the organization of political life and only citizens who can regard themselves as free are able to decide how to organize their lives together, freedom, not justice or equality, is the only candidate for the central value of democratically conceived political theory and practice.³

As Tully shows in 'The Agonistic Freedom of Citizens', what it means to be a citizen, and not a mere subject, under the conditions of political and cultural plurality can only be determined in the course of a dialogue – a conflictual exchange – that allows for those who are affected to actually have a say. Such a dialogue is at the same time an expression of and a struggle for political freedom. This dialogical orientation forbids any recourse to the 'legislative stance' and commits the theorist to being open to the experiences people make in the practices in which they engage, to listening to them and to learning from them, that is, entering into 'pedagogical relationships of reciprocal elucidation between academic research and the civic activities of fellow citizens.'⁴ The assumption, constitutive of the dominant paradigms of social and political theory, that the theorist's task is to construct and spell out universal norms and principles or to analyse causal processes operating behind the backs of ordinary agents, which elevates him or her above the *demos*, turns out to be deeply mistaken. Of course, political discourses and practices are governed by norms, but these norms and the (e.g. constitutional) framework they establish cannot be removed from political struggle and negotiation: 'Politics is the type of game in which the framework – the rules of the game – can come up for deliberation and amendment in the course of the game.'⁵ Tully calls the practices of resistance and transformation that citizens engage in by following the norms governing their practices in a variety of ways, by questioning and renegotiating them, and by challenging the

³ On the theoretical and normative implications of this 'exemplary' way of theorizing, see D. Owen, 'Political Philosophy in a Post-Imperial Voice: James Tully and the Politics of Cultural Recognition', *Economy and Society* 28 (4): 520–49, 1999.

⁴ Tully, *Public Philosophy* I, p. 3.

⁵ *Ibid.*, p. 146.

existing forms of domination, exclusion and assimilation 'practices of civic freedom'. Crucially, these struggles for more civic and democratic forms of governance go beyond the established and hegemonic forms of representative government and the corresponding 'official' understandings and practices of citizenship.

Existing notions of citizenship tend to conceive of the citizen as a private person equipped by the state with certain rights that protect his or her autonomy as, primarily, an economic actor. Tully sketches a different account of citizenship that defines citizens by referring not chiefly to their legal status or to their subjection to practices of governance but to their political agency and their effective participation in the practices of collective self-determination. Only such an active, even activist, conception of citizenship can do justice to the constitutive link between democracy and freedom.

As Tully insists in 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy', the incompatibility of the ideals underlying democratic constitutionalism with the current form of globalization triggers 'struggles *of* and *for* democratic freedom, practices of freedom in which democratic actors seek, by means of traditional and new forms of deliberation and negotiation, to challenge and modify the non-democratic ways they are governed.'⁶ In order to adequately understand these practices, a distinction has to be made between what Tully calls 'modern' citizenship, which is an institutional status inherently tied to the Western nation state and its 'liberal' self-understanding, and 'diverse' and 'cooperative' citizenship, which is conceived of as a set of negotiated and internally complex practices in which agents express and cultivate their 'freedom *of* and *in* participation, and *with* fellow citizens.'⁷ By 'exercising power *together as* citizens', they are 'doing democracy'.⁸

More recently, Tully has elaborated on this distinction between these two opposed modes of citizenship. For the purposes of this essay, the most important feature of modern citizenship is that it conceives

⁶ Tully, *Public Philosophy* II, p. 113.

⁷ Ibid., p. 272.

⁸ Ibid., p. 291.

of citizenship in terms of a status defined by the rights and duties of individuals, with negative liberties taking pride of place. As Tully points out, this 'right not to be interfered with in these [private economic] activities by the *demos*' corresponds almost exactly to what Benjamin Constant called 'the liberty of the moderns.' As Constant insists against what he seems to regard as a utopian longing for a return to the Greek *polis* and 'the liberty of the ancients,' 'the aim of the moderns is the enjoyment of security in private pleasures; and they call liberty the guarantees accorded by institutions to these pleasures.'⁹

This essentially liberal framework also has consequences for how the right to political participation is understood: It is limited to participation in elections, the official channels of the public sphere and the institutions of civil society, which are seen as instrumentally necessary to establish and maintain the 'security' Constant identifies as the core of the modern citizen's concern. Other forms and practices of citizenship that do not fit this dominant framework are removed or marginalized. Despite attempts at reform, for example, from the proponents of deliberative democracy, this results in a 'self-limiting' or 'low intensity form of democratic citizenship that reproduces a structural democratic deficit';¹⁰ 'If they wish to act as citizens and exercise their participatory freedom, they are constrained to do so only in the public sphere, only through the exercise of communicative capacities, only through official channels, and only in relation to representative parties and ministries.'¹¹ In addition, these institutions and channels are not only limited but often prove to be so in ways that make it impossible or at least difficult for citizens to address these limits – they themselves become obstacles to democratic action.

To address 'structural democratic deficits' of this kind, citizens therefore turn to a counter-model of cooperative citizenship, which is

⁹ B. Constant, 'The Liberty of the Ancients Compared with that of the Moderns,' in *Political Writings*, Cambridge: Cambridge University Press, 1988, p. 317; J. Tully, 'A Dilemma of Democratic Citizenship,' Paper delivered at the University of Victoria, 8 May 2010, p. 7.

¹⁰ Tully, 'A Dilemma of Democratic Citizenship,' p. 15.

¹¹ J. Tully, 'The Crisis of Global Citizenship,' Seminar in Political Thought and Intellectual History, University of Cambridge, 8 February 2010, p. 11. See also the exchange between Rainer Forst and James Tully in *Political Theory* 39 (1), 2011, pp. 118–23, 145–60.

already manifested in their multiple practices. Cooperative citizenship is not a status that citizens are granted by official institutions but a form of democratic agency that ‘comes into being when citizens *call into question* some aspect of a relationship that they bear (as subjects).’¹² This questioning takes place when citizens employ ‘arts of citizenship’ that include ‘protests, petitions, boycotts, non-cooperation, arguing and bargaining, alternative dispute resolution, and transformative justice.’¹³

In what follows I will examine the meaning, justification and role of civil disobedience as a related but distinctive ‘art of citizenship’, an ‘unofficial’ yet historically and politically prominent form of citizen participation that implicitly forms part of Tully’s arsenal of democratic practices. By showing how the most influential discussion of civil disobedience in contemporary political philosophy – the one offered by John Rawls – fails to take into account crucial features of this genuinely democratic form of political practice, I want not only to complement Tully’s inventory of the practices of cooperative citizenship but also to supplement his critique of the liberal mainstream of political philosophy with a prominent and striking example.¹⁴ My aim is to show how Rawls’s specific approach to the questions of political philosophy under the label ‘ideal theory’, while not strictly speaking irrelevant, can have a distorting and potentially even ideological effect on the discussion of what are from his perspective questions of non-ideal theory, such as, crucially, the definition, justification and role of civil disobedience.

2. Rethinking civil disobedience

As is well-known, Rawls took the principles established by an ideal theory of justice not only to define ‘a perfectly just society’ but also to tell us how, that is, according to which principles, we ought to act here

¹² Tully, ‘A Dilemma of Democratic Citizenship’, p. 20.

¹³ *Ibid.*, p. 24.

¹⁴ Tully at times seems to offer a less ‘liberal’ and more ‘democratic’ reading of Rawls, based on *Political Liberalism*, see Tully, *Public Philosophy* I, pp. 110–12.

and now, that is, ‘under less than favorable conditions’ and confronted with ‘instances of injustice.’¹⁵ In his view, ‘nonideal theory presupposes that ideal theory is already on hand. For until the ideal is identified, at least in outline – and that is all we should expect – nonideal theory lacks an objective, an aim, by reference to which its queries can be answered.’¹⁶ Rawls’s discussion of civil disobedience can be seen as a touchstone both for the critics and for the defenders of ideal theory. This is no gratuitous choice. Rawls himself singles it out as the only case of non-ideal theory which he discusses at some length in *A Theory of Justice* – a discussion that has proved to be highly influential. Furthermore, at least on a broadly Rawlsian understanding of the limits of the duty to obey the law, a theoretical account of civil disobedience is a necessary complement to any non-ideal theory which addresses forms of institutional injustice that are in principle avoidable.

According to Rawls, ideal theory is ‘the only basis for the systematic grasp of [the] more pressing problems’ of non-ideal theory: ‘The discussion of civil disobedience [. . .] depends upon it [. . .] a deeper understanding can be gained in no other way.’¹⁷ As I will try to show in expanding on Tully’s critique of constructivist theorizing, however, the opposite is the case: ideal theory, far from being the only available route to a deeper understanding, *undermines* the very attempt. Although Rawls gives us an illuminating account of the meaning, justification and role of civil disobedience, his account, in all of these three dimensions, is inherently limited and one-sided.¹⁸ My critique will focus on the definition and the justification, but it will also have implications for an adequate understanding of the political and social role of civil disobedience.

¹⁵ J. Rawls, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971, pp. 351, 245. It is worth noting that Rawls does not return to the topic in *Political Liberalism*.

¹⁶ Rawls, *A Theory of Justice*, pp. 89–90.

¹⁷ *Ibid.*, p. 9.

¹⁸ Although my critical remarks will be limited to Rawls’s discussion of civil disobedience, they can be generalized and, with some adjustments, directed against other discussions of civil disobedience that also proceed from the starting point of ideal theory, like the ones put forth by Ronald Dworkin and, to a lesser extent, Jürgen Habermas. See R. Celikates, ‘Ziviler Ungehorsam und radikale Demokratie – konstituierende vs. konstituierte Macht?’, in T. Bedorf and K. Röttgers, eds, *Das Politische und die Politik*, Berlin: Suhrkamp, 2010, pp. 274–300.

The definition of civil disobedience

Rawls begins his discussion by defining civil disobedience as ‘a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government [by which] one addresses the sense of justice of the majority of the community’, all ‘within the limits of fidelity to law’, that is while recognizing the fundamental legitimacy of the existing system.¹⁹ Given the ideal-theoretical framework of his theory of justice, this definition has some intuitive plausibility, although it is unclear in what exact relation it is supposed to stand to that framework. It does, however, run into serious problems.

Consider the first three elements of the definition to which counter-examples from what are usually considered paradigmatic cases of civil disobedience are easily found. The first element is that civil disobedience according to Rawls is a *public* act. As is well-known, Henry David Thoreau – who is usually credited with inventing the very expression – protested against slavery and the Mexican War by withholding his taxes, a decision he made public only several years later. To this example Rawls could respond – in my view correctly – that it is closer to conscientious refusal than to civil disobedience proper. It is, however, a further question of what ‘public’ is supposed to mean here. A second look shows that for Rawls civil disobedience is public insofar as ‘it is engaged in openly with fair notice; it is not covert or secretive.’²⁰ The exercise of some well-established forms of civil disobedience – blocking an intersection, occupying a port or obstructing the deportation of so-called illegal immigrants, to give just a few examples – depends on *not* giving the authorities fair notice in advance. It would be strange to exclude these forms of protest by definition, whatever else one may think of them.

According to the second element of the definition, civil disobedience is *non-violent*. The plausibility of this requirement – which is broadly

¹⁹ Rawls, *A Theory of Justice*, pp. 364 and 366.

²⁰ *Ibid.*, p. 366.

accepted, also, it seems, by Tully himself – obviously depends on how broad or narrow the concept of violence is taken to be. Does violence include only serious violations of the physical integrity of others? What about violence against property, violence against oneself or minimal violence in self-defence, and what about exerting psychological pressure? In a notorious series of cases, German courts have in the past ruled that it constitutes an act of violent coercion incompatible with peaceful protest to exert psychological pressure on others, for example, by blocking the road and thus forcing them to stop their cars in order to avoid an accident. Equally, the American Civil Rights Movement has often been criticized as violent on account of the violence its ‘non-violent’ protests have (intentionally and for strategic reasons) provoked on the part of the state’s security apparatus.²¹ Rawls does not take up these questions, and they are also sidestepped in Tully’s insistence on the non-violent character of democratic civic action.²² In the absence of further elaboration, making non-violence part of the definition of civil disobedience raises both theoretical and political worries. Furthermore we can ask whether defining civil disobedience as non-violent does not foreclose important normative and strategic questions about weighing the costs of different forms of disobedience (and of remaining inactive), especially in the face of severe (but still local) injustice.²³

According to the third element of Rawls’s definition, civil disobedience is a *conscientious* act. But why should only disobedience out of reasons of conscience count as civil disobedience? Putting the need to draw some distinction between civil disobedience and conscientious objection to one side, we may wonder whether one could not disobey for all sorts of at least *prima facie* legitimate reasons, for example, reasons of self-respect or political responsibility, that are not conscientious *at least* in a

²¹ See J. A. Colaiaco, ‘Martin Luther King, Jr. and the Paradox of Nonviolent Direct Action’, *Phylon* 47 (1): 16–28, 1986.

²² Tully, *Public Philosophy* II, pp. 294–5.

²³ See J. Raz, *The Authority of Law*, Oxford: Clarendon, 1979, pp. 262–75, where he argues (p. 267): ‘The evil the disobedience is designed to rectify may be so great, that it may be right to use violence to bring it to an end. [. . .] some lawful acts, may well have much more severe consequences than many an act of violence: consider the possible effects of a strike by ambulance drivers.’

narrow sense. There is, I would argue, something like advocacy civil disobedience (e.g. in the animal rights movement and, more broadly, in response to the pressing questions of ecological ethics focused on by Tully),²⁴ which is not necessarily conscience-based and could indeed be undertaken with a more or less strategic attitude.²⁵ Rawls seems to focus on conscientious civil disobedience in order to cope with what in the discussion about the allocation of social bads has come to be called the 'NIMBY' problem: the empirically widespread 'not in my backyard' variety of civil disobedience where people protest, for example, against a new highway or toxic waste dump being built in their quiet and peaceful neighbourhood.²⁶ But again Rawls's focus turns out to be too narrow in excluding these forms of civil disobedience – however difficult their justification might turn out to be – from the very definition.

The remaining two elements of Rawls's definition suffer from underdetermination. First, consider the *appeal to the majority's sense of justice*. In many cases, civil disobedience seems at odds with and indeed directed against the majority's moral sentiments; it is often failures of this sense of justice that make civil disobedience necessary in the first place. In fact it is difficult to see why one should appeal to it at all when the majority's sense of justice is taken to be systematically distorted or biased and has shown itself to be largely immune to critical challenges.²⁷ Of course, one could further qualify the sense of justice in a way that removes it from what people in a society take to be just and unjust as a matter of contingent fact. But turning it into a non-empirical court of appeal in this way raises the problem of relating the actual,

²⁴ Tully, *Public Philosophy* II, chapter 3.

²⁵ Gandhi speaks of 'vicarious' civil disobedience (which is, in his view, of course still conscientious in some broad sense), see M. K. Gandhi, *Non-Violent Resistance and Social Transformation. Moral and Political Writings*, Volume 3, Oxford: Clarendon, 1987, p. 93.

²⁶ See A. Sabl, 'Looking Forward to Justice. Rawlsian Civil Disobedience and its Non-Rawlsian Lessons', *The Journal of Political Philosophy* 9 (3): 328, 2001.

²⁷ Tully (*Public Philosophy* I, p. 315) notes 'the multiplicity of ways in which individuals and groups are excluded from calling into question the imposed norms through which they are recognised, governed and blocked from entering into a dialogue over their legitimacy, thereby rendering assimilation, silent oppression or the recourse to non-violent and violent resistance the only alternatives.'

radically deficient sense of justice to its idealized counterpart, which the practitioners of civil disobedience are supposed to ascribe to their fellow citizens in spite of their actual convictions and behaviour. Even on this understanding, it is unclear to whose sense of justice Martin Luther King Jr, for example, appealed – in cases such as this one, the determination of the addressee, the relevant majority, will not be an obvious matter.²⁸ Furthermore, there are cases of civil disobedience which cannot be construed as appealing to anyone's sense of justice but aim at increasing the political and economic costs for a certain political option (animal rights activists may again serve as an example, having often lost any hope that the majority can really be brought to care about the fate of animals²⁹).

The final element of Rawls's definition – that civil disobedience takes place within the limits of *fidelity to law* – is supposed to distinguish it from more radical and revolutionary forms of protest and resistance that put into question the political system itself. The line between these different forms of illegal protest, however, apart from being politically contested and subject to reasonable disagreement in practice, may be more difficult to draw in theory than Rawls's definition suggests. As Tully insists again and again, in law and elsewhere, the alternative is not between obeying a rule and breaking it or being loyal to the legal system and rejecting it.³⁰ Consider again the case of King and other participants in the US Civil Rights Movement. It is not clear that they were only aiming at more or less local corrections within the existing system or that their disobedience was an expression of their recognition of the system's general legitimacy. Again, this seems to depend on how 'the system' is defined here. Rawls's restriction stands in some tension with a much more radical attitude that is characteristically expressed

²⁸ Rawls discusses King in J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1996, pp. 250–1, in a somewhat laboured way, trying to make sense of the fact that King justified his actions not only by reasons that are, according to Rawls's standards, 'public' but also by reference to comprehensive moral and religious doctrines.

²⁹ For some of the problems involved see M. Humphrey and M. Stears, 'Animal Rights Protest and the Challenge to Deliberative Democracy', *Economy and Society* 35 (3): 400–22 2006.

³⁰ Especially Tully, *Public Philosophy* I, chapter 2.

in King's statement that 'The thing to do is get rid of the system.'³¹ Although the distinction between civil disobedience and more radical forms of dissent is not useless, the way Rawls builds it into his definition certainly obscures its gradual and politically contested character. As David Lyons points out with reference to Thoreau, Gandhi and King, 'none of these three regarded the prevailing system as "reasonably just" or accepted a moral presumption favoring obedience to law'.³² Under these circumstances, the condition that civil disobedience has to stay 'within the limits of fidelity to law' in order to count as civil disobedience at all ceases to be plausible.

These shortcomings of Rawls's definition of civil disobedience are no accident. They rather seem to follow, at least in part, from treating ideal theory as an independent starting point and working towards a definition of this decidedly non-ideal political practice from there. Taking this perspective obscures the fact, easily observable in recent political history, that civil disobedience can be, at least to a certain degree, non-public, violent, based on motives other than conscientious considerations, that it can forgo or refuse appealing to the majority's sense of justice and that it can be revolutionary in scope without ceasing to be civil disobedience. These features would have been revealed by any contemporary and historical survey of that practice, as Tully's approach recommends it as a starting point.³³ A more encompassing and pluralistic view of civil disobedience was of course already available in Rawls's day: During the time he was working on *A Theory of Justice*, which significantly overlaps with the Vietnam War (1959–75) and the protest against it, he must have had occasion to observe the so-called draft card burnings (which took place from 1965 onwards, provoking the government to quickly pass a law in the same year making the burning of draft cards a crime). This protest was justified by a mix of reasons

³¹ M. L. King, *A Testament of Hope: The Essential Writings and Speeches*, New York: Harper Collins, 1991, p. 47.

³² D. Lyons, 'Moral Judgment, Historical Reality, and Civil Disobedience', *Philosophy and Public Affairs* 27 (1): 1 and 33, 1998.

³³ Tully, *Public Philosophy* I, chapter 1.

that eludes the clear separation into civil disobedience, conscientious objection and selective refusal that Rawls was developing at that very moment in dissociating himself from available alternative accounts.³⁴

In the face of these problems and in order not to preclude effectively the practical deliberations of citizens themselves, it seems appropriate to define civil disobedience in a way that is less normatively demanding and therefore less restrictive, as an intentionally unlawful and principled collective act of protest (in contrast to both legal protest and 'ordinary' criminal offenses or 'unmotivated' rioting) that has the political aim of changing specific laws, policies or institutions (in contrast to conscientious objection, which is protected in some states as a fundamental right). This somewhat minimalist definition deliberately leaves open whether civil disobedience always has to be public, non-violent, only directed at state institutions, limited in its goals and restricted to transforming the system within its existing limits, as well as whether accepting punishment is a necessary criterion. Although civil disobedience has to be distinguished from both legal opposition and revolutionary revolt and other forms of resistance, as we saw, these boundaries are politically contested in practice and cannot be drawn as easily as Rawls's theory suggests. Not least for this reason, the question of definition should not be mixed up with the question of justification (and perhaps that of strategy as well).

The justification of civil disobedience

The limitations of the ideal-theory perspective on civil disobedience and the need for a more practice-based and pluralist perspective are even more evident when we turn to the second part of Rawls's discussion of

³⁴ These cases entered the discussion about civil disobedience via the writings of Howard Zinn; see especially H. Zinn, *Disobedience and Democracy. Nine Fallacies on Law and Order*, Cambridge, MA: South End, 2002, pp. 77–82. It is remarkable that Rawls even cites this work, which was first published in 1968, in TJ, p. 364, n. 19 and refers to Zinn as someone who 'defined civil disobedience more broadly' – without really addressing the problems this raises for his own approach. It bears mentioning that Rawls first published his thoughts on the topic in an article titled 'The Justification of Civil Disobedience' in 1969, a revised version of which then came to make up part of chapter 6 of *A Theory of Justice*.

civil disobedience, which focuses on its conditions of justification. In a nutshell, my argument will be that Rawls's conception imposes too many constraints on the justifiability of this kind of political practice, again foreclosing meaningful practical deliberation by the agents themselves.

According to Rawls, an act of civil disobedience (understood according to the definition just discussed) is justified when it opposes 'serious infringements of the first principle of justice, the principle of equal liberty, and [...] blatant violations of the second part of the second principle, the principle of fair equality of opportunity', when it is used as a 'last resort', and when it is coordinated with other protesting groups in order to avoid 'serious disorder'.³⁵ We can first note the striking fact that violations of the difference principle are explicitly excluded from the potential grounds of justification of civil disobedience. The reason for this is that according to Rawls civil disobedience should be restricted to easily detectable violations of clear demands of justice. Dworkin seems to have a similar point in mind in distinguishing between 'matters of principle' and 'matters of policy' and arguing that civil disobedience should be restricted to the former (thus, protesting against the infringement of civil liberties may count as justified civil disobedience while protesting against nuclear weapons may not – obviously this distinction is itself politically contested in a way that Dworkin's ideal theory is insufficiently attentive to).³⁶ In any case, there is a further condition which has to be in place for the question of the justification of civil disobedience to get off the ground: We have to be dealing with what Rawls calls a 'nearly just society',³⁷ or a 'state of near justice',³⁸ where 'this implies that it has some form of democratic government, although serious injustices may nevertheless exist'.³⁹

³⁵ Rawls, *A Theory of Justice*, pp. 372–4.

³⁶ See R. Dworkin, *A Matter of Principle*, Cambridge, MA: Harvard University Press, 1985, chapter 4. For a critical discussion, see R. E. Goodin, 'Civil Disobedience and Nuclear Protest', *Political Studies* 35 (3): 461–6, 1987.

³⁷ Rawls, *A Theory of Justice*, p. 363.

³⁸ *Ibid.*, p. 371.

³⁹ *Ibid.*, p. 382.

Rawls's discussion of the justification of civil disobedience also runs into several problems. Let me just point out two of them. First, Rawls's requirements of justification (although they do not seem to be intended as requirements in the strict sense⁴⁰) are *too narrow*. Some of the violations of the difference principle will be no less clear than violations of the other two principles, the principle of equal liberty and the principle of fair equality of opportunity (and obviously some violations of the principle of equal liberty might also turn out to be rather difficult to detect). Furthermore, violations of the difference principle will, if they exceed a certain measure, affect the fair value of the basic liberties (especially of political freedom) emphasized by Rawls himself, who acknowledges that 'the duty to comply is problematic for permanent minorities that have suffered from injustice for many years'.⁴¹ On this basis, Tommie Shelby has convincingly argued that the lack of justice in a basic structure and the legitimate need to uphold one's self-respect may alter the set of obligations, and thus the potential grounds for resistance, we may legitimately ascribe to those who are systematically disadvantaged.⁴² There are thus reasons for doubting that these grounds for resistance can all be reduced to 'serious infringements of [. . .] the principle of equal liberty, and [. . .] the principle of fair equality of opportunity'.⁴³

Perhaps more importantly, another justification of civil disobedience that has arguably become more and more important since the time of Rawls's writing and turns out to be a focus of Tully's concern is also excluded by the narrowness of Rawls's analysis. Protesters often claim that their civil disobedience is justified on account of procedural and

⁴⁰ See *ibid.*, p. 371: 'Of course, the conditions enumerated should be taken as presumptions; no doubt there will be situations when they do not hold, and other arguments could be given for civil disobedience.' Fair enough – but it remains somewhat obscure what follows from this caveat for the rest of his discussion.

⁴¹ *Ibid.*, p. 355.

⁴² See T. Shelby, 'Justice, Deviance, and the Dark Ghetto', *Philosophy and Public Affairs* 35 (2): 2, 126–60, 2007, especially p. 160: 'It is crucial, given the duty of justice and on grounds of self-respect, that the ghetto poor make manifest their principled dissatisfaction with the existing social order, either through politically motivated modes of deviance or in some other recognizable way.'

⁴³ Rawls, *A Theory of Justice*, p. 372.

institutional democratic deficits that may leave the principle of equal liberty intact while restricting the effective participation of citizens in democratic self-government (the development of semi-oligarchic party structures, the problem of agenda-setting and the pushing through of foreign policy decisions against public opinion may come to mind).⁴⁴ Similarly, the justifications provided by animal rights activists for their acts of civil disobedience cannot be justice-based in Rawls's sense.⁴⁵ In line with Tully's theoretical ethos, I see no reason why these justifications should be dismissed out of hand – indeed, I take it to be a serious deficit (with politically problematic effects) if a theory of civil disobedience does not account for them because it has *ex ante* limited the range of permissible justifications on the basis of ideal theory without any concern for the social and political reality of protest that a contemporary and historical survey would have uncovered.

Second, Rawls's analysis of the justification of civil disobedience seems to lead him into the following *dilemma* since he leaves it almost entirely open under which conditions a society should be regarded as 'nearly just' or 'reasonably just'⁴⁶ while at the same time exhibiting 'serious infringements' and 'blatant violations'⁴⁷ of the principles of justice: If, on the one hand, the society in question is 'nearly just', as Rawls presumes, one may well wonder why it is impossible to reach by legal means the transformations aimed at by the necessarily illegal means of civil disobedience; if, on the other hand, the society in question is marked by injustices of such a magnitude that the legal channels of political action are effectively blocked we seem to be faced with a systematic violation of equal political rights that makes it difficult to stick to the label of a 'nearly just' society and that according to Rawls

⁴⁴ See D. Markovits, 'Democratic Disobedience', *Yale Law Journal* 114: 1897–952, 2005. For a more global perspective see Tully, 'The Crisis of Global Citizenship'.

⁴⁵ See P. Singer, *Democracy and Disobedience*, Oxford: Clarendon, 1973, p. 90: 'It is, he [Rawls] says, wrong to be cruel to animals, although we do not owe them justice. If we combine this view with the idea that the justification of civil disobedience must be in terms of justice, we can see that Rawls is committed to holding that no amount of cruelty to animals can justify disobedience.'

⁴⁶ Rawls, *A Theory of Justice*, p. 365.

⁴⁷ *Ibid.*, p. 372.

himself might thus warrant more militant forms of resistance that cross the line to what Joseph Raz has called 'revolutionary disobedience'. Indeed, as I already pointed out, it seems something of a stretch to claim that what are usually considered to be paradigm cases of civil disobedience – Thoreau, Gandhi and King – took place in societies that should be regarded as 'reasonably' or 'nearly just' (at least one of these cases, King and the Civil Rights Movement, is regarded as a paradigm case by Rawls himself; indeed his discussion in *A Theory of Justice* seems largely motivated by a desire to account for the legitimacy of this movement and its strategy of civil disobedience).⁴⁸

The focus on fundamental rights that is characteristic for the discussion of civil disobedience within the liberal tradition of political philosophy tends to exclude from view certain forms of socio-economic inequality, as well as procedural and institutional democratic deficits that systematically prevent citizens from effectively engaging in collective self-determination and that will in many cases also qualify as potential grounds of justification.⁴⁹ As we will see, this goes hand in hand with underestimating the transformative potential of civil disobedience.

The role of civil disobedience

The third part of Rawls's discussion concerns the political and social role of civil disobedience. Here I will limit myself to pointing out a very general problem, namely the conservative tendency or status quo bias that seems inherent in the way Rawls understands civil disobedience, namely as a sort of warning signal to existing institutions and political leaders which they can then use to increase the stability of the existing

⁴⁸ See Sabl, *Looking Forward to Justice*, p. 311, for the interesting suggestion to understand the 'nearly just' society as 'a piecewise just society': 'one in which justice is prevalent [...] within a powerful "in group"' while being withheld from members of excluded groups. While this reinterpretation may cover the societies which Thoreau, Gandhi and King opposed, it is unclear to me whether it can preserve the normative force that Rawls intended his formulation to have.

⁴⁹ For a more general statement of this problem, see J. Tully, *An Approach to Political Philosophy: Locke in Contexts*, Cambridge: Cambridge University Press, 1993, chapter 7.

order. According to Rawls, 'A general disposition to engage in justified civil disobedience introduces stability into a well-ordered society, or one that is nearly just.'⁵⁰ This seems to underestimate the transformative quality civil disobedience has as a specifically extra-institutional form of political practice the democratic and democratizing potential of which has been stressed by theorists from Arendt to Tully. From such a more radically democratic perspective we can also describe the role of civil disobedience in more general terms as the illegal but 'legitimate dramatizing of the tension between the poles of positive law and existing democratic processes and institutions on the one hand, and the idea of democracy as self-government on the other, which is not exhausted by established law and the institutional status quo'⁵¹ – or, in a formulation also taken up by Tully, of the tension between 'constituent power' and 'constitutional form.'⁵²

While from a liberal perspective, civil disobedience mainly appears as a form of protest of individual rights bearers against governments and political majorities that transgress the limits established by constitutionally guaranteed moral principles and values, a radical democratic perspective does not view civil disobedience primarily in terms of limitation. It views it rather as the expression of a democratic practice of collective self-determination, as a dynamizing counterweight to the rigidifying tendencies of state institutions. From this viewpoint, this episodic, informal and extra- or anti-institutional form of political action also allows citizens to protest and participate, when – as is often the case in representative democracies – the official and regular institutional channels of action and communication are closed to them or are ineffective in getting their objections across. Rather than being viewed as the actions of individual rights bearers, civil disobedience thus emerges as an essentially collective and political practice of contestation – as one form the 'struggles of and for democratic

⁵⁰ Rawls, *A Theory of Justice*, p. 383.

⁵¹ U. Rödel, G. Frankenberg and H. Dubiel, *Die demokratische Frage*, Frankfurt am Main: Suhrkamp, 1989, p. 46.

⁵² Tully, *Public Philosophy II*, pp. 197–202.

freedom [. . .] to challenge and modify the non-democratic ways they are governed'⁵³ takes – in which the vertical form of state authority is confronted with the horizontal power of the association of citizens or the governed, the 'low-intensity representative democratic institutions and modern constitutional formations' with the 'participatory or high-intensity democratic forms of democracy and self-determination'.⁵⁴

Focusing on the role of civil disobedience also, once more, raises the question about the nature of 'nearly just' societies and the possible merit the stabilization of these societies (as opposed to their transformation into 'fully' or 'even more' just societies) might have. Throughout my discussion there has been a certain tension between Rawls's insistence on the 'nearly just' character of the society he assumes for the discussion of his most prominent example from non-ideal theory and the real-world counterexamples I have referred to. Maybe Rawls would not consider our societies to be 'nearly just' societies. However, his specification that 'nearly just' societies are characterized by 'some form of democratic government, although serious injustices may nevertheless exist' does not seem to be too distant from actually existing liberal democracies. More importantly, such a defence would raise the question of what use a *non-ideal* theory could possibly be if it did not apply to the circumstances of our non-ideal reality (but only to some sort of intermediate reality that is significantly more ideal than ours while at the same time being significantly less ideal than the ideal). As we have seen, the whole point of non-ideal theory is supposedly to address 'the pressing and urgent matters [. . .] we [and not some idealized distant relatives] are faced with in everyday life'.⁵⁵

As I hope my discussion has shown, starting from the perspective of ideal theory can be seen as having a seriously distorting effect on the non-ideal discussion of the question of civil disobedience. The distortions I

⁵³ Ibid., p. 113.

⁵⁴ Ibid., pp. 206 and 158: Also see H. Arendt, 'Civil Disobedience', in *Crises of the Republic*, New York: Harcourt, Brace and Company, 1972; E. Balibar, 'Sur la désobéissance civique', in *Droit de cité*, Paris: PUF, 2002; and for a more detailed discussion: Celikates, *Ziviler Ungehorsam*.

⁵⁵ Rawls, *A Theory of Justice*, p. 9.

have pointed out are not due to the fact that Rawls subscribed to the wrong ideal theory, so we should not try to avoid them by looking for a better ideal theory. Only a decidedly non-ideal (and, at the same time, more political) approach will lead to a more convincing analysis of the meaning, justification and role of civil disobedience (within this analysis elements of ideal theory may well play a certain role) and avoid what Elizabeth Anderson calls ‘the epistemic infirmity of ideal theory’.⁵⁶

3. Conclusion

Let me close with two final quotes from Rawls and some remarks on the merits of the alternative and resolutely non-ideal – ‘practical, critical and historical’⁵⁷ – approach that we find in the work of James Tully, as well as on two further challenges.

Here is the first quote:

Precise principles that straightway decide actual cases are clearly out of the question. Instead, a useful theory defines a perspective within which the problem of civil disobedience can be approached; it identifies the relevant considerations and helps us to assign them their correct weights in the more important instances. If a theory about these matters appears to us, on reflection, to have cleared our vision and to have made our considered judgments more coherent, then it has been worthwhile.⁵⁸

I hope to have shown that Rawls’s discussion of civil disobedience fails to meet these standards he himself sets for it. Here is the second quote: ‘political philosophy is always in danger of being used corruptly as a defense of an unjust and unworthy status quo, and thus of being ideological’.⁵⁹ I hope to have shown that Rawls’s discussion of civil

⁵⁶ E. Anderson, ‘Toward a Non-Ideal, Relational Methodology for Political Philosophy: Comments on Schwartzman’s *Challenging Liberalism*’, *Hypatia* 24 (4): 135, 2009.

⁵⁷ Tully, *Public Philosophy* I, p. 16.

⁵⁸ Rawls, *A Theory of Justice*, p. 364.

⁵⁹ J. Rawls, *Justice as Fairness*, Cambridge, MA: Harvard University Press, 2001, p. 4, n. 4.

disobedience by offering an overly restrictive account of the definition, justification and role of disobedience fails to take the necessary precautions in order to avoid this danger.

In order to avoid the methodological and epistemological deficits of ideal theory, and the potentially ideological effects that result from them, we should follow Tully's advice and start from a critical analysis of current political practices and struggles, the injustices and social pathologies they address, and the expectations and hopes they express, for example, from the different forms of actually existing civil disobedience and the different modes of its conceptualization and justification. This seems to be the best way to avoid the narrowness of Rawls's definition of civil disobedience, of his inventory of legitimate justifications and of the role he has scripted for it – a narrowness we can also describe as yet another effect in theory of the modern 'official' notion of citizenship as it has informed the political reality of liberal democracy:

Since these types of struggles are *for* new kinds of citizenship and by means of people who are not official citizens, or official citizens who often act beyond the official limits of citizenship of their generation, they cannot be called practices of citizenship in the modern tradition. They are classified as acts of civil disobedience or rebellion. If these illegal struggles are successful and the extensions institutionalised, then the extensions are redescribed retrospectively as stages in the development of modern citizenship and incorporated within its framework, as in the cases of working-class struggles giving rise to social and economic rights, women gaining recognition as citizens, civil rights movements and recognition of cultural minorities. Thus, what are seen as activities of citizenship by the civic tradition – struggles for new forms of recognition and extensions of citizenship – fall outside of modern citizenship with its institutional/status orientation.⁶⁰

Furthermore, and in the dialogical spirit Tully not only ethically advocates but methodologically justifies, it would also allow us to take

⁶⁰ Tully, *Public Philosophy* II, p. 256.

more seriously what those actually struggling understand themselves to be struggling for, which can be different from what philosophers – in a potentially paternalizing and anti-democratic attitude – think they are or should be struggling for from an ideal point of view. As the non-ideal theorizing in the tradition of critical theory, feminism and pragmatism that is also exemplified in Tully's work attests, this does not mean that one has to uncritically take as the last word the views of those involved. There still is a normative and critical role for theory to play. This role, however, is not a function of the purity of normative theory, it is not detached from political and social practice and it cannot be performed in isolation from more descriptive and explanatory forms of theorizing.

Apart from the theoretical and normative problems individual cases will raise, there are, however, two remaining challenges of a more fundamental nature for an approach that avoids the pitfalls of ideal theory. These challenges are raised both by Tully's recurrent reference to local struggles and forms of resistance and cooperative action in general and the preceding discussion of civil disobedience in particular. It is true that the emphasis on these alternative practices of civic freedom can save us from the twin danger of resigned adaptation to the status quo and its apocalyptic condemnation, from reformism as well as from a romantic longing for a total revolution that links its heroic politics to putting 'the system' as such into question. However, the question of how the diverse socio-economic and political conditions and the forms of structural violence to which people are differentially subjected on a global scale affect their political agency, their capacity to seize the always-existing possibility of transformation and resistance, still remains. Certainly, civil disobedience can be one way of making oneself heard: 'If the duty to listen and respond is ignored and dialogue suppressed, then civic freedom takes the many forms of civic dissent and disobedience to bring the powerful to the table.'⁶¹ However, *who* exactly is able to engage in effective practices

⁶¹ Tully, *Public Philosophy* I, p. 130.

of this kind under conditions of exclusion and marginalization and to what effect is a further question.

Moreover, it is unclear whether these largely local practices of resistance to global relations of economic and political domination really pose a challenge to the 'informal imperialism' of the global capitalist order that Tully so brilliantly analyses. Do these more or less local forms of cooperative citizenship really amount to alternative ways of living together, albeit in the interstices of the existing order, or are they merely defensive and ultimately necessarily local and limited forms of withdrawing as far as possible from the global market and its supporting structure of governance? The fact that the practices of civic freedom seem open mainly to what can be regarded as already recognized and thus to a certain extent privileged groups of citizens and the fact that the social and political conditions under which cooperative citizenship can be effectively exercised, for example, in the form of civil disobedience, do not always seem to obtain, pose a double challenge – the challenge of accessibility and of transformative efficacy, as we might call them – to political and social theory in the democratic spirit epitomized in Tully's writings. The gap between theory and practice thus might turn out to be a limit even for a theory that, as far as possible, conceives of itself as practice.