

What to do when Faced with an Unjust Law?*

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This paper considers an individual's response to laws which they in conscience consider unjust. Let us begin this journey by supposing that a man on a bus turned to you, pointed to an article in the paper he was reading and said: 'Friend, see this law here, well it's unjust. My question to you is what ought I to do about it? I'm in no mood to live in a society espousing unjust laws, let alone obey them.' This man's dilemma will now become our dilemma: what do you do when faced with an unjust law?

In these opening pages I shall set out how I intend to discuss the problem of the individual and unjust law. First, I will be drawing attention to the complexity of the problem. I would consider it a shame if the problem were to be dismissed out of hand as being simple and uninteresting. Following this attention will be drawn to one of my conclusions by suggesting that a series of principles can be drawn from Martin Luther King Jr's *Letter from Birmingham City Jail*.¹ These principles will help to clarify and justify what an individual is, first, justified in doing in the face of a law they consider unjust and, secondly, how they ought to do this. I will come to suggest that these principles ought to be adopted by any individual who wishes to act in defiance of an unjust law. Thus, by *inter alia* using King's *Letter* as a platform I intend to provide a way of answering the question: *what should we do when faced with an unjust law?*

I. The Complexity of the Problem

It might perhaps seem that the problem raised by the stranger's comment on the bus is rather simple. After all, is not the truth of the matter that you

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¹ Martin Luther King Jr, *Letter from Birmingham City Jail* (1963) ('*Letter*'). References throughout this paper will be from the *Letter* as reproduced in Timothy C Shiell (ed), *Legal Philosophy Selected Readings* (1993) 164.

either obey the law, or you do not and let that be that? I say no. To think this way is to be overly dismissive of the issue raised. Indeed, what the man is asking is *when can I be justified in defying a law?* Now, would it not be a shame (indeed a mistake) if such a question were considered ‘simple’? That is, if in a society such as ours, built as it is upon a great respect for law, the question ‘when can I justifiably act in defiance of a law?’ were considered simple, then I suggest that we would perhaps be missing something that this man on the bus obviously saw. It would be rather like siding with someone who chose to describe cricket as nothing more than wasting time by occasionally hitting a ball with a funny bit of wood. Just as to do this to cricket is to reduce what is both subtle and complex to a caricature, so we should not be overly dismissive of the issue of unjust law and the individual’s reaction to such law.²

Now, to draw out some of the complexity underlying the man’s question consider the following issues, for these shall have to be dealt with in one way or another. Do unjust laws deserve an individual’s allegiance? That is, am I in some way bound to obey unjust valid law, or am I free to defy it? Perhaps what really matters is how unjust a particular law is. In other words, if the injustice is negligible, then ought I to tolerate the injustice and obey? What ought I to do if my actions in defying the unjust law are likely to eventuate in a worse state of affairs than that which is created by the unjust law itself? Does it matter if the unjust law makes no positive demand upon me? That is, in such a case would I be justified in trying to find some way to defy the unjust law?

As a means to giving some order to issues such as these, let me break them down into two distinct questions that can then be targeted in the pages of this paper:

- (a) When is an individual justified in defying an unjust law?
- (b) What actions can an individual engage in once they have determined that they are justified in disobeying an unjust law?

² Indeed, also consider that the question of unjust law has intrigued thinkers for millennia. To wit: Plato, *Laws Book IV*; Aristotle, *Politics Book IV Ch 4*; Cicero, *De Legibus II v 11*; Augustine, *De Libero Arbitio I v 11*; Thomas Aquinas, *Summa Theologica Iallae* q.95ff; John Austin, *The Province of Jurisprudence Determined Lecture V* (1832); Henry Thoreau, *Civil Disobedience* (1849); Martin Luther King Jr, *Letter from Birmingham City Jail*. For an excellent survey of the longstanding debate surrounding this issue see Norman Kretzman, ‘Lex Iniusta Non Est Les: Laws on Trial in Aquinas’ Court of Conscience’ (1998) 99 *American Journal of Jurisprudence* 112.

The proposed way forward: King's *Letter*

In short these pages will state and examine when an individual is justified in regarding themselves as unbound by laws that they consider unjust and how the individual ought to act once they have reached this conclusion.

Now, much of the argument, and indeed the inspiration, in the following pages will, as suggested, come from King's *Letter*. The *Letter* itself has been with us now for several decades and much use has been made of it. Accordingly, acknowledgment of this fact may spark an objection: could anything new be drawn from the *Letter*, especially in relation to unjust law? To this I answer 'yes'.

Traditionally, the *Letter* has been used for three purposes. First, as a mouthpiece, indeed almost a 'mission statement', for the American civil rights movement. That is, the *Letter* in the most beautiful language highlights the vice in suppressing another's civil rights and the virtue involved in causes dedicated to both recognising and protecting such rights.³ Secondly, the *Letter* is commonly used as a means of showing the virtue and loving nature of specifically and exclusively engaging in non-violent protest.⁴ Finally, the *Letter* often serves as a useful, and easily accessible, introduction to the general issue of civil disobedience.⁵

³ See, for an example of King (and his *Letter*) being used for civil rights purposes Henry Adam Bedau (ed), *Civil Disobedience: Theory and Practice* (1969). Here King's *Letter* is reproduced in the section dealing with (often State sanctioned) racism and the *Letter* is not referred to in the section titled 'Theory and Justification'. Thus, it would seem that the *Letter* is not considered as a source for the justification of such things as civil disobedience. Further, all references to King in the preface and introduction (see 8, 9, 56) refer, in effect, to King as an activist in a civil rights context. To reiterate my argument here, I am not saying that King ought not to be cited in this regard. Of course he should. Rather, I am suggesting that from King's *Letter* some principles can be extracted which help to *justify* defiance in the face of unjust law.

⁴ For a fitting example of this see the homepage of the King Institute in Atlanta: <<http://www.thekingcenter.com>>.

⁵ For example, in Robert T Hall, *The Morality of Civil Disobedience* (1971) various references are made to King (see especially 34 and 110–13). However, King is treated more as an example of an activist engaged in civil disobedience rather than as a thinker who has something to say about the topic. For example consider the following sentence (33–4, emphasis added): 'Those who object to this type of civil disobedience include ... philosophers such as Professor Sidney Hook, and *activists* such as Dr Martin Luther King Jr.' See also Shiell, above n 1. Here King's *Letter* is reproduced as an introductory text.

I intend to make use of the *Letter* for none of the reasons given above. Instead, what I shall take and interpret from the *Letter* will have to do with two specific issues. First, I will make some use of King's arguments (which incidentally draw heavily upon, or are at least inspired by, the thought of Thomas Aquinas and Augustine) regarding the individual's ability to feel justified in defying unjust law.⁶ Secondly, I will extract from various sections of the *Letter* a definition of civil disobedience.⁷ Following this I will then argue that this definition is, in turn, built upon five principles to which every act of civil disobedience must comply so as to be a truly justified act. I shall extract these principles both expressly and implicitly from the *Letter*. Thus, in this regard, I take this part of the paper as being a somewhat original reflection on the *Letter* and how it speaks to the issue of unjust law.

Before moving on to consider the first issue raised above — 'when is an individual justified in defying an unjust law?' — I will provide a brief description of both law and justice to assist in facilitating later discussion.

Law

I will make it clear at the outset that it will simply be assumed that all the laws that we shall be dealing with are valid laws. That is, that they are in every sense laws. However, such an assumption does not make the giving of a definition of law a worthless exercise. In fact the definition will be very useful in clearing up what I see as a recurring problem whenever a discussion of unjust law is undertaken. That is, defining law will be useful in making clear why the validity of a law should not be seen to be contingent upon a law being just. That is, the question *Is a law just?* is a different question from *Is a law valid?*. The failure to distinguish between these two questions has led to little more than fruitless debate, a point that shall be returned to below.

A law is a statement that satisfies the formal requirements of validity in a given legal system. So long as these non-evaluative and contingent requirements are satisfied, then a given law is a valid law and that is that. Further, if the individual law also happens to be just, then we shall have a just valid law. Equally, if the individual law is unjust, then what we shall be dealing with is an unjust valid law.⁸ We need not here worry about the formal conditions of validity inside a given legal system suffice to say that whatever they are they must be sufficiently satisfied to make a law valid.

⁶ See King, above n 1, 170 for his reference to Augustine.

⁷ The *Letter* does not give a complete definition of civil disobedience in any one place.

⁸ For what I take to be a good discussion of this point see Kretzman, above n 2, 112-114.

Thus, let us call the set of conditions which need to be sufficiently satisfied to make a law valid (Y). Wherever (Y) is satisfied in the making of a law (X), then (X) will be a valid law.

Thus, we can define a law as follows:

X is a law if Y is sufficiently satisfied.

Now, let's return to the issue surrounding the confusion between the two questions '*Is a law just?*' and '*Is a law valid?*'. The point I wish to make is that the definition of law given above is consistent with both of the following 'slogans', the first brought to the world's attention by Thomas Aquinas and the second given by John Austin:

- (a) An unjust law is not a law;⁹ and
- (b) The existence of law is one thing; its merit or demerit another.¹⁰

It is often assumed that these two statements stand at opposite ends of the jurisprudential spectrum; that the 'unjust laws' slogan means that any law, even if validly created, is not a law due to its inherent injustice whereas, on the other hand, Austin's slogan means the exact opposite such that injustice could never be a reason to question a law's validity.

However, the truth of the matter is far less exciting. Aquinas holds validly passed law to be nothing less than valid law. Even a sloppy reading of Aquinas shows as much. This is not to say that no issue arises where a valid law is found to be unjust. The issue, however, is not whether the law is valid. That much is obvious, both to Aquinas and Austin (and indeed to Hart who in some places in the *Concept of Law* seems intent on reigniting the intellectually non-existent debate¹¹). Rather, what must be determined is whether the unjust valid law binds in conscience: ought you to obey an unjust valid law?

This issue will concern us below when we consider our first question: *What is an individual to do when faced with an unjust law?* Detailed discussion of the point must wait until then. However, it is worth noting at this early stage that there seems little debate among the philosophers cited above that if a law demands that you act immorally, then you ought not to obey the law.¹² Who, in their right mind, would simply follow, without a second thought, a law that demanded you kill your neighbour?

⁹ Aquinas, *Illae* q.95a.4, above n 2. Note that here Aquinas both quotes and paraphrases Augustine's work *De Libero Arbitrio*.

¹⁰ Austin, above n 2.

¹¹ See, eg, H L A Hart, *The Concept of Law* (1st ed, 1961) 8.

¹² Austin, above n 2; Aquinas, *Summa Theologica Illae* q.96a.4; H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

Justice

Moving through the pages of this paper we shall come to consider five examples of individuals acting in defiance of laws. In each case the justification of the disobedience will be the perceived injustice of the law.

Now, quite rightly, when confronted by each example we may ask 'how is this law unjust?' As will become apparent any agreement that might exist between both the reader and the individual in the example to the effect that the law is unjust will not be as important as the defiant individual's *belief* that the law is unjust. However, the point remains that the defiant act has been undertaken due to some perceived injustice attaching to the law. Accordingly, I wish to offer a definition of justice by which we will be able to say why the law is unjust. This definition is not designed to be an all-encompassing definition of justice. Rather, its purpose is to serve as a tool in the context of the examples used which allows the reader to have but one reason for thinking that the law in the examples ought to be characterised as unjust.¹³

The definition of justice will be based upon the notion of equality. I will begin by simply stating the definition and then give some justifications for it so that it can be seen to be a reasonable means of concluding that the laws used as examples in this paper can be characterised as unjust.

A law is just where it treats like alike and unlike differently; but a law is unjust where it treats like differently. However, the grounds for the differentiation must themselves be reasonable in the circumstances.

The idea of legal equality is this: a law should only treat individuals differently where the individuals are in fact different in some respect. If the individuals are not different (thus equal) then they should be treated similarly. Aristotle made this point with typical terseness:¹⁴

Thus it appears that the just is equal, and so it is, but not for all persons, only for those who are equal. The unequal also appears to be just; and so it is, but not for all persons, only for the unequal.

Now, the idea of justice based upon equality gains its attractiveness insofar as it seems eminently reasonable: if two individuals are the same, then it is only fair to treat them equally save the introduction of an

¹³ For a good and accessible essay showing the complexity involved in defining what 'justice' means see Josef Pieper, *The Four Cardinal Virtues* (Lawrence Lynch trans, first published 1955, 1966 ed) [trans of: *Über die Gerechtigkeit*].

¹⁴ *Politics* Bk III Ch 9. In *The Concept of Law* Hart, in one place, also defines justice in terms of equality: Hart, above n 11, 155–6.

obviously unfair double standard. However if the individuals are different, then it is fair to treat them differently since no double standard could be said to be applying.

To illustrate, a person who steals a car can be said to be different (or unequal) from one who has not stolen a car. Thus, since the two are different, to treat them unequally insofar as the car theft law will only apply to the thief will be to act justly. The car thief cannot be heard to say ‘this singling me out is unjust since I am the same as the man who did not steal a car’. Plainly the reason for the different treatment of the thief is the fact that he is not the same as the non-thief. Thus we have the principle of equality: *A law is just where it treats like alike and unlike differently; but a law is unjust where it treats like differently.*

However, it is also quite obvious that there are many grounds upon which the same individuals can be said to be both alike and different. For instance, returning to the car thief, he will be alike to the non-thief in some ways: perhaps they both have red hair. Equally, the two will be unlike in some ways, for starters one stole a car and the other did not.

Now, it is apparent that a law could pick on any similarity and difference. For instance, a law could have been enacted to confine red-haired individuals to their homes. Equally, a law could have been created to jail car thieves. Both these laws in themselves do not offend our equality principle: equal is treated alike and different differently.

However, it would seem, at least prima facie, that the ‘red-haired’ law is unreasonable and that the ‘car theft’ law is reasonable. Thus, the notion of reasonableness must be added to the notion of equality. That is, the point of differentiation made by a law must itself be reasonable. Moreover, the point of differentiation must not simply be reasonable, but it must be ‘reasonable in the circumstances’. That is, in some circumstances it might be just to confine all red haired people to their homes. Imagine that a certain disease was only carried by red haired people. Equally, there will be some circumstances where it would be unjust to differentiate a person who stole a car from a person who did not. For instance, if a person stole a car to get a critically injured person to a hospital. Thus we add the idea of reasonableness to our definition: *The grounds for the differentiation must themselves be reasonable in the circumstances.*¹⁵

Accordingly, we reach our definition:

A law is just where it treats like alike and unlike differently; but a law is unjust where it treats like differently. However, the grounds for the differentiation must themselves be

¹⁵ Situations where a law is reasonable from one perspective but unreasonable from another will be considered below.

reasonable in the circumstances.

As suggested above, the laws considered in this paper can be considered unjust in the sense that they fail to conform to this definition of justice. That is, something or someone is treated as different where there are no reasonable grounds for the differentiation.

II. An Individual and Unjust Law

In this section reflection on King's *Letter* will be used to structure an argument to the effect that an individual need not consider themselves bound to obey a law that they *in conscience* consider unjust. Following this there will be a discussion of one problem that seems to arise from King's grounding of his justification in conscience. This I refer to as 'the problem of pluralism' whereby the same law may appear just to one person and unjust to another. Finally, there will be an examination, by way of example, of the action that an individual is entitled to take when they have determined a law to be unjust. That is, it will be seen that the conclusion that an individual *in conscience* finds a law to be unjust does not create a state of *carte blanche*. Rather, I shall argue that an individual's reaction to an unjust law ought to be in accordance with five principles that I extract from King's *Letter*.

***Letter from Birmingham City Jail* and the Central Role of Conscience**

It was after being jailed in Birmingham for parading without a permit that King wrote his famous letter. The illegal parade was staged in protest to Birmingham's racial segregation laws which King considered unjust. That is, while in Birmingham King was faced with the following problem. A valid law of the state had been enacted which made claims upon King's allegiance as any other valid law did. However, in this case King considered the law to be unjust. His solution was to refuse to be bound by the unjust law. Thus he paraded without a permit. In the pages of the *Letter* he sought to justify his refusal to obey the unjust law.

Now, in one sense, especially to our sanitised eyes, it perhaps seems odd that King ever bothered himself with giving a justification at all: is it not simply *obvious* that racial segregation laws are unjust? However, King's justification is critically important due to the fact that the justification does not and rationally could not simply stem from or appeal to *nothing more* than a common agreement that racial segregation is unjust: injustice is not democratic; nor is injustice a matter of popular opinion. To argue this way would be akin to saying that I think Nazi law is unjust merely due to the fact that there is a societal agreement that such law is unjust, irrespective of

whether I personally believe such law to be unjust. That is, before you absolve yourself from the need to obey a valid law of the state you had better sincerely believe that the law is unjust, otherwise on what ground would you be seeking to absolve yourself from obedience?¹⁶

Accordingly, King's justification rides upon the fact that the law he was protesting was itself a law that King found *in his conscience* to be unjust.¹⁷ That is, his justification is a (albeit, as we shall see, qualified) justification for *any person* not to obey a law that they in good conscience consider unjust so that, conversely, if you do not, in conscience, consider the law to be unjust, then you have no ground upon which to refuse allegiance. Therefore this argument in favour of conscience potentially applies to both a humble person unable to freely practice their religion in China as much as it applies to a bigoted member of the Ku Klux Klan lamenting the fact that lynching is no longer tolerated by the authorities.

Hence, King's conclusion can be seen not to deny the validity of the law. That is, as discussed above in the definition of law, an unjust law is a valid law, only an unjust valid law. Rather, King's conclusion is that where you in good conscience consider a law to be unjust, then the 'moral pull' of your conscience, as it were, negates the obligation to be bound to the unjust valid law.¹⁸ As noted earlier, such a response is not out of step with such thinkers as Aquinas, Austin and Hart.¹⁹

¹⁶ For an example of such a position see: *United States v Lynch* (1997) 95 Civ. 9223 (JES).

¹⁷ See King, above n 1, 170. Here he goes to lengths to explain why the law, to him, is unjust. True, he is also trying to convince others of the law's injustice, but importantly, it is first and foremost unjust to him personally.

¹⁸ See King, above n 1, 170–1.

¹⁹ Hart, 'Positivism and the Separation of Law and Morals', above n 12, in s IV when considering unjust Nazi laws, notes that both Austin and Bentham vehemently espoused the fact that unjust law was positive and valid law. Hart, paraphrasing Austin and Bentham, says that 'if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience ... [T]his simple presentation ... has much to be said for it.' Thus, I suggest, King's position is in no sense controversial or radical (or no more controversial and radical than is Hart's, or Austin's, or Bentham's). For Aquinas on this point see *Summa Theologica I-II* q. 94–6. Note also that the facts of King's case are analogous to the case of *United States v Lynch* (1997) 95 Civ. 9223 (JES). There an elderly bishop was engaged in peaceful prayer outside a New York abortion clinic. His prayer/protest was aimed at what he took to be an unjust law: legal abortion on demand. A law was passed which made such prayer/protest illegal. The bishop continued to pray in the belief that the law prohibiting prayer/protest was merely a law aimed at stopping pro-life protest. In King's case he wished to protest laws permitting segregation. However, a law was passed

Letter from Birmingham City Jail and the Problem of Pluralism²⁰

A problem may be seen to arise from the above conclusion. That is, if a law's being unjust is a matter of one's conscience, then *the same law* may be shiningly just to one person and cruelly unjust to another. Thus, for example one person may consider a law taxing income to be just while another considers it to be unjust. That is, they may think such laws amount to theft. As such, this latter person may not consider him or herself morally bound to adhere to such laws. However, I suggest, by reflecting on King's *Letter*, that such a conclusion ought not to be considered as either unsatisfactory or particularly problematic. Indeed, the same conclusion would follow even if a madman thought murder laws to be unjust. There are two reasons for this.

First, King argues for the importance in fully informing one's conscience before making a moral decision.²¹ That is, before a decision is made that a law is unjust all the relevant facts should be considered. Thus, if the facts show that the conclusion that a law is unjust is an unreasonable conclusion, then the individual ought not to consider the law unjust. Accordingly, the adoption of this process of considering all the relevant facts, so as to reach an informed conclusion, is designed to prevent an unreasonable conclusion that a given law, say taxing income (or, of course more obviously, prohibiting murder), is unjust.

Secondly, even if an individual does conclude (even unreasonably) that a law is unjust this conclusion will not in itself be problematic. Problems will only arise in relation to the *action* taken in response to the conclusion that the law is unjust. This point will be considered in the next section.

effectively stopping such protest. King protested nonetheless in the belief that the law prohibiting protest was a law aimed at stopping protest against racial segregation.

²⁰ This is not the place to consider the very interesting question of a law that could have been made another way, but was not simply because it had to be made one way or the other, but could not be made both ways. For example, in New South Wales if you park in a 'no parking' zone you get a flat fee for a fine. The law could have been made such that the driver lost a percentage of their income. In one sense this is more just: \$60 means more to a single mum on welfare than to Kerry Packer. However, it also seems unjust to charge Packer hundreds of thousands of dollars simply for parking a car in a no parking zone for a few minutes. In respect of such laws, I will simply say that these types of laws are such that the law has to be made one way even though there are alternative (and perhaps equally just ways) to craft the law. So long as that way is reasonably just, then enough said.

²¹ King, above n 1, 160 and 170.

With regard to the consideration of all the facts I wish to make two further points. The first has to do with the burden of having to consider all the relevant facts. The second is a comment upon the fact that even when all the relevant facts at hand have been considered, that two generally reasonable people may come to different conclusions about a given law's justice.

First, it is quite obvious that in a given situation the facts at hand may not be all the relevant facts existing. Indeed, and more strongly, it could be argued that no decision will ever be influenced by a consideration of every relevant fact. However, this situation ought not to be considered as being overly problematic. The issue of the relationship between facts and conscience is simply to say that before you reach a decision binding you in conscience all the reasonably available facts should be considered and that to do any less is not to act with, as it were, moral *bona fides*. It may well be that you have to look into the matter somewhat so as to come to grips with the issues. That is, to do justice to your decision-making you may have to go further a field than a tabloid-styled media report asserting that a law is unjust.²² But so be it. The point is that, unless the available facts are so few as to prevent a reasonable conclusion at all, you have to make your decision based upon all the facts reasonably available. Indeed, what else could you do?

Secondly, and so as to discuss the ability of people who have considered all the relevant facts to still disagree about a law's justice, I shall have regard to the foundation upon which King stood his decision that the segregation laws of Birmingham were unjust. The point here is to show that two reasonable people may come to different conclusions about a law's justice.

King, after considering all the relevant facts at hand, concluded that the segregation law was unjust insofar as it did not 'square with the moral law of God.'²³ Now, in essence King's appeal to God is nothing more than an appeal to conscience where King's conscience was informed by *inter alia* what King took to be a tenet of God's law; namely that humans were equal. Thus, after considering all the relevant facts, King *in conscience* concluded that the law of segregation was unjust by not squaring with God's law.

²² For instance, there was much media hype generated over the decision which was overturned by the New South Wales Court of Appeal in *Swain v Waverley Municipal Council* [2003] NSWCA 61 where a young man was awarded substantial damages by a jury after breaking his back while diving into in the surf. The point here is that a media report alone, especially a sensationalist tabloid-styled report, would hardly constitute a consideration of all the facts reasonably at hand.

²³ See King, above n 1, 170. Also see 166.

However, while a consideration of all the relevant facts can be seen to be important insofar as it acts as a safeguard against an individual rashly concluding that a given law is unjust, such reflection will not stop disagreement over what is and is not unjust. That is, two different, but generally reasonable, individuals having considered all the facts may reach a different conclusion about the law's justice. The reason for this is that consciences may be informed by different criteria. For instance, King's conscience was informed by the Christian faith whereas another's may not be. Indeed, such divergence of opinion is not uncommon.

One current example bringing this point to light is the embryonic stem cell debate. Assume that a law was passed allowing embryonic stem cells to be used for scientific research into spinal injury. Obviously, a person in good conscience who considered all the available facts could find such a law to be unjust: a human embryo is a human life and human life, by, say, the principle of equality considered in the definition of justice, ought to be treated alike. Thus, human embryos ought not to be killed for the same reason that any human ought not to be killed. That is, the killing of such an embryo is akin to murder. However, another person, equally in good conscience, could find the same law just, perhaps upon the basis that no different treatment of equals is involved: a human embryo is not, for legal purposes, to be considered a human. Thus the killing of a human embryo, so as to farm stem cells, is very different thing from the killing of a human (not in embryo form). In other words, there is no analogy with murder involved in the farming of embryonic stem cells.

Now the point I wish to make here is that this possibility — that a law may be just and unjust to two reasonable people — does not create a problematic state of affairs; not for us and not for King. The point is this: if you in good conscience, having perused all the available facts, consider the law unjust then you *in conscience* are not bound to obey the law. Why not? Because to be bound by the law, and indeed to obey the law, would be to cause yourself to act immorally, and you in good conscience ought not to act immorally.²⁴

The problem of pluralism will mean no more than that different people may find different things right and wrong *in conscience*. This, of course, does not mean that the fact that a person finds a law in conscience to be unjust means that the law in actuality is unjust. The person might be wrong. Indeed, what informs their conscience might be wrong, based, for example, on philosophical error. The point to be made is simply that all that follows from an individual's conclusion that a law is unjust means that the person is not morally bound to obey the law. As noted, this conclusion is, in

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On this point see n 18 above.

itself, quite unproblematic to the issue of unjust law. It would not even matter if a person found the law of murder, in good conscience, to be unjust. A problem could only arise in relation to what *action* follows from the conclusion that a law is unjust and thus does not require my moral allegiance. It is to this issue that we shall now turn.

What to do When an Individual Law is Unjust? — Civil Disobedience

Having determined, in conscience following a careful examination of the facts, that a given law is unjust we next have to decide what is to be done about it. That is, having realized that an unjust law cannot be said to bind in conscience we must determine what *action* an individual is justified (and for that matter not justified) in taking in the face of a law that they, in conscience, consider to be unjust.

I propose to determine what action an individual is justified in taking by extracting five points, or principles, that King makes in his *Letter*. That is, if one of the principles is not honoured, then the action that an individual has taken will not be able to be justified such that it will be seen to be lacking in a crucial respect. ‘Yes’, we will be able to say, regarding King’s principles, to a person who has acted in defiance of an unjust law, ‘I realize that you in conscience found the law unjust. I further realize that this means that the law does not bind you in conscience. However, this does not mean that you can do what you want in the face of an unjust law, and, in this case, what you have done cannot be justified. You should not have acted as you did.’

This section will proceed by way of an application of these principles to four possible reactions to unjust law. These examples are, for the most part, based on recent reactions to what the individuals involved in the examples perceived to be unjust law. What’s more, I consider them as very typical (perhaps classical) responses to unjust law. However, before proceeding to consider King’s principles, and then to apply them to the examples, some qualifications as to the scope of this section shall be made.

The first qualification is that I am only interested in considering acts of civil disobedience. This means that I shall not consider the other ‘classical’ reaction to unjust law: conscientious objection. The reason for this is simple: I find the questions raised by acts of civil disobedience more interesting. Let me explain.

A conscientious objector is a person who refuses to obey a law which first, they in conscience consider unjust and secondly, which makes an *actual demand* upon them.²⁵ That is, the unjust law, as it were, pays them a visit and demands something from them: ‘you must go to war’; ‘you must

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I take this definition of ‘conscientious objection’ to be rather standard.

execute all members of a racial minority'; 'you must vote'. Accordingly, the person is then faced with a choice: they either reject the counsel of their conscience and obey or they do not obey. That is that.²⁶

This, however, is not the case with an act of civil disobedience. The civilly disobedient aims to highlight the injustice of a law which, in general, makes no direct demands upon them.²⁷ That is, there may not even be a choice of 'obey' or 'do not obey' as the law may not call for action from the individual. Martin Luther King Jr's experience in Birmingham provides a case in point.

King did not live in Birmingham, thus Birmingham's segregation laws did not directly affect him. Further, even had King lived in Birmingham the law in any case would have made no positive demand upon him. Instead it simply limited what he could do. The point being made here is not to say that the laws were not intrusive or of no significance; obviously they were. Rather, the point is that King could not have committed an act of conscientious objection by doing nothing. The law did not demand that King act in a given way such that if he did nothing he would have been in contravention of the law. Rather, King was prohibited from doing certain things, in the same way a person is prohibited from stealing a car. That is, he was not faced with a positive choice: 'either obey or do not obey'.

Thus, the issue of civil disobedience seeks to provide an answer to the question: 'What can I do when I find a law unjust but where the law makes no positive demand upon me?'

At this point it is timely to define what I meant by civil disobedience. Civil disobedience is an illegal act done publicly by an individual to protest a law (the Major Law) which they, in conscience, consider unjust, but where the aim of the protest is to appeal to the lawmakers to change the law so as to remove the injustice.²⁸

²⁶ We have seen that thinkers as diverse as Aquinas, Austin, Hart and King all agree on this point.

²⁷ Of course, there is nothing stopping an act of civil disobedience in the face of a law that does make a demand upon an individual. For example, demonstrations about conscription laws can be participated in by those who will be conscripted. However, part of the uniqueness of civil disobedience is that it caters for laws that make no demand upon an individual.

²⁸ There are many definitions of civil disobedience in the literature all along similar lines to these. See, for example, John Rawls 'The Justification of Civil Disobedience' in Bedau, above n 3, 240.

A definition of civil disobedience can also be extracted by considering passages from King's *Letter*.²⁹ However, I consider his definition to be more narrow and refined than my own.

This difference between the two is intentional. Below I shall argue that King's definition is a definition of 'justified' civil disobedience, while my definition merely defines, as it were, 'raw' civil disobedience which may or may not be justified in a given case. In fact, the civilly disobedient act will be seen to only be justified insofar as the action squares with the definition given by King.

King defines civil disobedience as a non-violent but illegal public *demonstration* or other minor but peaceful violation (the contravention of the 'Minor Law') undertaken to highlight the injustice of *another law* (the 'Major Law') where the illegal activity is only undertaken after all legal measures of changing the law have been reasonably exhausted. That is, the illegal act is, in effect, an attempt to *persuade* the lawmakers to change the unjust law. Further, the illegal act is not undertaken due, as it were, to its illegal nature. That is, it is not some type of publicity stunt. Rather, the illegal activity must be *connected* to the injustice of the Major Law, since it is the injustice of the Major Law that lies at the heart of the protest. Finally, and this point is implicit in the peaceful and loving nature of King's protest, the injustice (if any) created by the act of civil disobedience, must be a lesser injustice than that which the Major Law creates.

Thus, to provide an example, in King's case he was protesting segregation laws (the Major Law). At first he engaged in lawful means of protest as an attempt to persuade the lawmakers to change the law. One of the lawful means available was to hold a parade. However, to parade a permit was needed (the Minor Law). The authorities refused to issue a permit. King considered this refusal to be an unjust act designed to stop any opposition to the Major Law. Thus there was a connection between the Major Law and the Minor Law which King broke. Had the authorities allowed the parade, King would not have refused their offer simply because the parade would have become lawful.³⁰

The second qualification to the scope of this section is that there is a certain spirit or attitude that commonly infects those individuals who engage in civil disobedience.³¹ That is, the individuals respect (and indeed love) the worth of a lawful society and are seeking to remove the unjust law so as to make the system more just. Thus, the act of civil disobedience is not about destabilisation or undermining society. Accordingly, it is the actions of such individuals that I am interested in.

²⁹ King, above n 1, especially 166 and 171.

³⁰ Ibid 170–1.

³¹ King makes this point: *ibid* 171.

Finally, I am only interested in acts of civil disobedience in societies where laws are able to be changed by way of protest. That is, in short, societies in which an act of civil disobedience can have some useful effect. Typically, this state of affairs can be expected to exist in a Western democracy such as Australia. Under such conditions there is hope that the protest against the unjust laws could persuade the lawmakers (typically elected members of Parliament) to change the law in question. Alternatively or equally, the protest could persuade members of their own society to side with the protesters. This in turn could in turn lead to a change in law either through the protest swelling to bring more pressure on the lawmakers or a by change of government in an election due to the majority of voters siding with the protesters against the elected government.³²

Four Examples: Possible Reactions to Unjust Law

Consider the following examples of civil disobedience.

- (1) A law is passed by the Birmingham City Legislature creating a regime of racial segregation (the Major Law). An individual who considers the law unjust lobbies and attempts to negotiate with the Legislature to change the law. However, this action proves fruitless. Finally, the individual decides to organize a non-violent protest march to bring the injustice to the attention of the citizens of the city. He then applies for the necessary permit. However, the permit is refused making the parade illegal (the Minor Law). The individual considers that the permit was only refused to stop any unfavorable light from being shone upon the unjust law. The individual breaks the permit law (the Minor Law) and carries out the protest march illegally.³³
- (2) The Commonwealth government elects to send troops to fight a war (the Major Law). An individual considers that the law allowing the

³² I take much of this third qualification from Rawls, above n 28.

³³ This example is, of course, a restatement of the facts in King's case. One interesting point hovering over the case is whether King had exhausted all reasonable legal avenues. In particular, it would seem that King could have sought some judicial review of the refusal to have a permit issued. This matter was considered in *Walker v Birmingham* 388 US 307 (1967). There the majority stated that judicial review ought to have been sought if, following the arrest of the protesters, the protesters wished to rely upon the invalidity of the authority's decision to refuse the permit. The minority queried whether there was any point in seeking judicial review as the process may take so long as to make the eventual parade ineffective. The opinion of the minority seems to have been the reason that King did not seek judicial review.

war is unjust since it may result in the loss of innocent life. There is much lobbying and negotiating with the government, but to no avail. Further, massive but peaceful public demonstrations are held, again to no effect. An individual then illegally but publicly defaces the side of the Sydney Opera House (the Minor Law), painting 'No War' on one of the sails as an attempt to highlight the injustice.³⁴

- (3) Government censorship laws permit the exhibiting of a (so-called) work of art that depicts a religious sculpture of central importance to one of the society's religions submerged in what appears to be urine (the Major Law). Members of the religion, and other concerned members of the society, attempt to negotiate with the government and also protest seeking to have the work banned on grounds of religious vilification due to the inherently blasphemous nature of the work. However, the exhibition goes ahead. An individual illegally, but publicly, vandalizes the work as a means of protesting the injustice.³⁵
- (4) The Commonwealth government elects to send troops to fight a war (the Major Law). An individual decides that the law allowing the war is an unjust law since it may result in the loss of innocent life. There is much lobbying and negotiating with the Government, but to no avail. Further, massive public demonstrations are held, again to no effect. An individual illegally but publicly attempts to sabotage a navy vessel by laying a chain in the path of the ship as it leaves Sydney Harbour as a means of protesting the law.³⁶

As stated above the argument being made here is that an act of civil disobedience will only be justifiable where it squares with the five principles that I suggest can be extracted by the definition offered by King

³⁴ This event occurred in Sydney on 18 March 2003. For a media report of the story see the *Sydney Morning Herald*, 19 March 2003.

³⁵ This example refers to the exhibition of Andrew Serrano's controversial work. See articles in *The Age*, 8 and 9 October 1997. Note also that the motivations of the person who smashed the work may not have been to engage in civil disobedience. The work may have been smashed through outrage at the exhibition of such a sacrilegious work. However, for the purposes of this example I shall assume that the destruction of the work was an act of civil disobedience.

³⁶ There were media reports on April 8 2003 that Greenpeace had attempted to sabotage HMAS Sydney as it left Sydney Harbour by placing a submerged barrier across the channel the ship was navigating. However, on 16 April 2003 Greenpeace released a statement saying that the barrier was merely a nylon rope marked by buoys which could not have damaged the ship. See <<http://www.greenpeace.org.au/nowar/news>>

in his *Letter*, which, it will be recalled, was a much narrower definition of civil disobedience than that offered by myself. That is, I offered a definition of ‘raw’ (but not necessarily justified) civil disobedience whereas King offered a definition of ‘justified’ civil disobedience.

What will now be argued will be that only example (1) will be seen to be a justified act of civil disobedience. Example (2) will go quite close, but nonetheless fall short, while (3) and (4) will be quite wide of the mark. That is, (2), (3) and (4) while being acts of raw civil disobedience, in so far as they square with my definition, are to be criticized as being unjustifiable insofar as they lack certain elements contained in King’s definition. To begin, let me restate King’s definition with some precision and then extract the five principles required to justify an act of civil disobedience.

King’s definition of what I term ‘justified civil disobedience’ can be stated as follows:

An illegal but peaceful public act (typically a demonstration) engaged in after all legal attempts to change a law that the individual considers unjust (the Major Law) have been reasonably exhausted where:

- (a) the illegal act is undertaken as a further means of persuading the lawmakers to change the law;*
- (b) where the illegal act is not a violation in any way of the Major Law itself, but a violation of another law (the Minor Law);*
- (c) where the act is not undertaken for its own illegality, but where the illegality in the Minor Law arises out of, or is connected with, the injustice in the Major Law; and*
- (d) where the illegality involved in the contravention of the Minor Law creates a lesser injustice than the injustice created by the Major Law.³⁷*

I argue that King’s definition rests upon the following five principles. That is, King seeks to justify an act of civil disobedience by reference to these principles. The principles can be gathered, expressly or implicitly, from King’s *Letter*. I will simply state the principles as follows:

- (1) The act of civil disobedience must be aimed at persuading the lawmakers to change the law, after all that is the point of civil

³⁷ The definition of ‘raw’ civil disobedience is: *An illegal act done by an individual to protest a law (the Major Law) which they, in conscience, consider unjust, but where the protest is an attempt to persuade the lawmakers (or the majority of citizens) to change the law so as to remove the injustice.*

disobedience.³⁸

- (2) The act must never be able to be said to be more unjust than the injustice permitted by the unjust law itself. If the act were more unjust, then undertaking the act would seem pointless.³⁹
- (3) It is more prudent to break a Minor Law than a Major Law. Accordingly, where there is the opportunity to break a Minor Law this path must be followed.⁴⁰
- (4) The protest must in accordance with what is commonly known as the 'free-rider principle'. That is, the type of protest must not be such that if every civilly disobedient action adopted the same method, then there would be major social disruption.⁴¹
- (5) There must be a connection between the broken Minor Law and the unjust Major Law, otherwise there would be no moral basis upon which the civilly disobedient could claim to break the Minor Law.⁴²

I shall now consider these principles in turn, with regard to the examples given above, so as to show that if one principle is lacking then the

³⁸ King, above n 1, 170, speaks of the act of disobedience being aimed at 'arousing the conscience of the community over the injustice'. He also says, at 167, that the act of civil disobedience is 'a means of laying down our case before the conscience of the local and national community'. That is, the act seeks to persuade the community, and I add the lawmakers, that a law that they may have hitherto thought just (or not thought of at all) is in fact unjust.

³⁹ This point is implicit in King's *Letter*. For instance, he speaks of the fact that the civilly disobedient should not be involved in a hateful act. I suggest that to act more unjustly than the law you are protesting is to act with this hatred.

⁴⁰ This point flows from King's argument, above n 1, 171, where King says that he is not advocating 'evading or defying the law'. That is, he does not aim to create major disruption as 'the rabid segregationists would do'. Thus, I suggest that the Minor Law is the only law that should be targeted where possible.

⁴¹ This point follows from what has been said above. Further, King makes the point that he is against action that could lead to anarchy (*ibid*). Thus I suggest that if the action was used as a precedent and this would lead to unrest, or injustice, then it should be avoided.

⁴² This follows as a matter of reason from his definition. The act must be an act against an unjust law. Thus, the Minor Law needs to be unjust. This argument is implicit in King's statement, *ibid*: 'Now there is nothing wrong with an ordinance which requires a permit for a parade, but when the ordinance is used to preserve segregation ... it becomes unjust.'

act of civil disobedience, which might satisfy my own definition of raw civil disobedience, will not be able to be justified.

(1) Persuasion

At heart, an act of civil disobedience is nothing more than an act of persuasion. The individual, in an effort to have the unjust law changed, is attempting to persuade either the lawmaker directly or to persuade the majority of the members of the society to side with the individual. The locus of the persuasion is in the individual's character and moral fiber. That is, they claim to love and respect both justice and lawful society. This is one of the reasons why illegal activity can only be justified as a matter of last resort: a civilly disobedient individual, who gets persuasive leverage from their claim to love and foster a lawful society, and who is only attempting to make their society more just, ought not resort to illegal activity unless it is a genuine last resort, save being found to behave inconsistently with their commitment to justice and lawful society.⁴³

Accordingly, when (indeed if) the illegal act is finally resorted to, it would seem that the 'least' illegal act consistent with bringing the injustice to light, should be selected. To overstep this mark would potentially make the act of civil disobedience less persuasive to both the lawmakers and the majority of citizens: it shows a disrespect for law to go further into illegal activity than one need. Another way of describing this is to say that the civilly disobedient gains persuasive leverage by taking, as it were, the moral high ground. Accordingly, if the individual who resorts to illegal activity takes a 'more' illegal path when a lesser illegal path was on offer, then the action may fairly be seen to be little more than illegal activity per se and thus mitigate their persuasive leverage.

An exemplar example of a contravention of the persuasion principle (assuming, perhaps quite fancifully, that it was an act of civil disobedience) would be the 9/11 attacks in New York. How could the perpetrators of such an act reasonably claim to have any respect for lawful society so as to persuade the lawmakers to change unjust laws?

Well, to a much lesser extent examples (3) and (4) overstep the same mark. An attempt to destroy, or at least disable a navy boat on a crowded public harbour, and to smash a work of (so-called) art seem to be extreme behaviours when much lesser acts could have been undertaken to make the same point. Thus, any appeal by the civilly disobedient to the effect that they love and respect the law seems undermined. That is, they could have undertaken acts akin to (1) and (2).

⁴³

This point will be considered again when principle 5 is considered below.

It might be objected that, for instance, the smashing of the (so-called) work of art in (3) could have more persuasive influence (or be a greater force for change) than if a peaceful demonstration akin to (1) was organised due to media exposure. That is, the media may be more willing to publicise a story involving the destruction of art than a passive protest march and in so doing generate more support for the cause. There is some truth in this objection: the message would no doubt reach the masses. However, the trouble with the argument is that the civilly disobedient is not acting in contravention of the law merely as a means to generate media publicity. To do so would be to potentially act inconsistently with the idea of a lawful society which the civilly disobedient claims to love and respect.⁴⁴ Instead the plight of the civilly disobedient can be likened to a person caught between a rock and a hard place. That is, they do not want to break the law, but to make their protest, which they consider they are entitled to do, they have no other choice.

Further, and again with respect to media exposure, it can be said that some persuasive leverage also flows from the fact that the civilly disobedient does not simply engage in a media stunt as a means to have the media audience, as it were, manipulated by the ensuing media hype. This evinces an element of respect for the observers of the act which can also be said to be consistent with the civilly disobedient individual's love and respect for the law. That is, the persuasive force of their act is geared to come from their moral integrity and sincerity, and not merely from being given a platform by the media.

Accordingly, an act of civil disobedience, such as (3) and (4), can be criticized insofar as it is more illegal than it needs be. Such an act would seem less capable of persuading the lawmakers than, say (1) and (2) insofar as the locus of the persuasion is intended to be in the civilly disobedient individuals' claim that they love and respect the law. It seems odd for someone who loves and respects the law to go further into illegal activity than is necessary and then to seek persuasive leverage from their claim to love and respect the law.

(2) The Injustice of the Act must be less than the Law being Protested

The point here is that if the act of civil disobedience is more unjust than the law being protested, then it seems quite pointless to protest at all. Again, 9/11 would be a case in point. King offers examples of such behaviours

⁴⁴ This point will be considered again when the issue of 'connection to the law' is considered below.

when he mentions ‘various black nationalist groups’ who violated this principle.⁴⁵

Now, in many instances it may seem that the act of civil disobedience and the unjust law are somewhat incommensurable. Is the law allowing religious vilification more or less unjust than the destruction of a photograph that the law permits to be displayed? I would suggest that the approach here would be to always err on the side of caution for two reasons. First, and foremost, so as not to so much as risk creating a greater injustice than that which the law creates. Secondly, so as to remain persuasive (ie not to violate the first principle) insofar as the civilly disobedient can still seem to be acting as a person who loves and respects the law. Of our four examples, (3) and (4) go closest to creating a greater injustice than that which the unjust law permits. However, there is arguably no clear violation of this principle in any of our examples.

At this point it is worth reflecting upon two interesting questions raised earlier in the paper.

First, it may be that the injustice contained in a law is so slight that *any* act of civil disobedience would create greater injustice than the unjust law itself creates. Thus, no act of civil disobedience is justifiable. For example, an illegal demonstration blocking city streets for extended lengths of time may create greater injustice than an unjust but obscure tax law regarding imported spinning tops, hidden deep in some tax regulation, which in all probability will never come to affect any one. That is, the blocking of the city streets would disrupt commuters and keep customers from businesses. Thus, there is a measurable cost in holding a parade that is capable of creating a greater level of injustice than the law being protested.

Indeed, it might seem that in some cases of more evident injustice than the ‘spinning tops’ case the protest should be aborted save contravention of this principle. Say, for example, a law was passed that cut school funding for some unpopular extracurricular sports and as a result an illegal demonstration was held. It could be argued that the loss to business was a greater injustice than the anti-sports law. In response to this I wish to say that the act of protesting by street demonstration seems to be part and parcel of life in Western democracy. This, I suggest, is why King thought of it as the exemplar method of protesting unjust law. That is, the possibility of demonstration is something that a city business ought to be aware of, in the same way that they are aware of the effect of footpath upgrades and train strikes on their business. Indeed, the fact that such protesting is, as a rule, legal shows as much. Thus, I suggest that it would be quite rare for an

⁴⁵

King, above n 1, 172.

illegal demonstration in protest of a substantial unjust law (ie not a 'spinning top' unjust law) to create a greater injustice than the law itself.

However, wherever it can be shown that the injustice caused by the act of civil disobedience is greater than the law being protested, no act of civil disobedience ought to be embarked upon.

Secondly, above the scenario of a person who (albeit unreasonably) in conscience thought the law against murder was unjust and then embarked upon a killing spree was raised. However, this principle would suggest that such killing could not be undertaken and be justified. Further, and in any event, such acts of killing would have no persuasive value in violation of the first principle.

(3) It is More Prudent to Break a Minor Law than a Major Law

The idea here is that, as a general rule, one should not break the Major Law, or indeed what that law allows. Rather, the civilly disobedient individual ought to only ever break the Minor Law. The reason for this is that if it were permissible to break the Major Law, then, this would seem to justify, in many cases, great acts of injustice. Further, and in any case, it shows a prima facie disrespect for law to act illegally toward a more substantial law (the Major Law) when the same point could have been made by action directed at a less substantial law (the Minor Law) if any illegal activity had to be taken at all.

Consider examples (3) and (4). In both these examples the act of civil disobedience concerns what the unjust Major Law allows to occur. In (3) a piece of religious vilification is destroyed whereas in (4) a navy vessel is attempted to be destroyed/disabled. Indeed, if this behaviour were justifiable, then it seems that it would have been justifiable for King to attack the shopkeepers who abided by the policy of segregation and then destroy their shops. Indeed, it would be justifiable as an act of civil disobedience to shoot a security guard at an abortion clinic. Now, while these examples have an extreme element about them (as does example (4)) the point remains that a reaction directly against the Major Law prima facie creates a much greater level of injustice than a contravention of the Minor Law.

Indeed, to give a fuller example of this principle consider examples (2) and (4). These actions are in protest to the same unjust law. However, (4) attacks the Major Law while (2) attacks the Minor Law. The results are markedly different. Example (4) creates a potentially dangerous situation: first, sailors on board the ship could have been injured; secondly, if the ship was disabled it could have collided with another vessel on the harbour causing damage and perhaps death. Example (2), on the other hand, comparatively causes a trivial amount of (potential) injustice: the side of the Opera House is defaced.

Examples (3) and (4) are not Justified Acts of Civil Disobedience

Based upon consideration of the above three principles I suggest that (3) and (4) cannot be justified as acts of civil disobedience. That is, even though the Major Law may be unjust, the chosen methods of civil disobedience are unjustifiable: King's definition is not satisfied. The central reasons are as follows. First, by breaking the Major Law when such protest could have been effected by breaking a Minor Law (or no law at all) the individuals cannot claim to be acting as those who love and respect the law. In this respect they lose part of their persuasive ability. Secondly, the activity risks (at least potentially) causing a greater level of injustice than that which would be caused by the law being protested. Thirdly, the acts lacked prudence insofar as the Major Law was targeted. If the targeting of the Major Law is tolerated (especially when there exists a viable alternative) then, as argued above, this is justification for great acts of injustice.

Now, it seems we are only left with examples (1) and (2). I suggest that of these only (1) is truly justifiable. To see why this is the case the remaining two principles need to be considered.

(4) The free-rider principle

The idea here is simple: if every person acted in the same way toward an unjust law as yourself, then would the result be desirable? With regard to (1) and (2), only (1) seems to survive this principle.

In (2) the protesters have taken the liberty of defacing property to make their point. Now, quite obviously, if every act of civil disobedience defaced property, then a considerable level of injustice would result: why single out someone's property (indeed even public property) in the face of an unjust law? Not only would this state of affairs be unacceptable due to such injustice, but it would also show disrespect for the laws of property, and thus undermine that other characteristic of the civilly disobedient: fidelity to law insofar as the act of civil disobedience is an act to strengthen the laws of the society by seeking the removal of unjust law.⁴⁶ While it might be argued that the act of defacing public property is a lesser offence than that of defacing private property, the overarching point remains.

On the other hand, example (1) is (merely) a non-violent street protest which I suggest is perhaps as minimal a level of disruption as is possible in our society. If all acts of civil disobedience amounted to street marches, then (so long as the other principles are revered) the free-rider principle would not be offended. That is, no great societal damage would

⁴⁶ By the same reasoning (3) and (4) are in contravention of this principle.

result. This would not be the case if, for instance, the defacing of public property were the standard reaction to unjust law.

However, an objection may be made along the lines that the free-rider principle can be used to demonstrate that *any* illegal activity is undesirable. Thus, illegal street marches are undesirable. I reject such an argument. Indeed, as argued above, the street protest is, if you like, the preferred choice of demonstration in our society. Indeed, I have already suggested that King thought the same.⁴⁷ Thus, such activity, when undertaken in accordance with the other principles is relatively unproblematic.⁴⁸ This, no doubt, is why King proposes that acts of civil disobedience ought to generally be by way of non-violent demonstration.

(5) The Need for a Connection between the Contravention of the Minor Law and the Major Law

There are two points to be made.

First, an act of civil disobedience is not simply about breaking a law. Rather, as stated above, the character of the civilly disobedient is of one who loves the law, and only breaks a law when there is no other choice. Thus, all legal avenues must first be reasonably exhausted. Further, once all such avenues are exhausted, a state of *carte blanche* does not develop such that an individual can select any Minor Law that they wish to break, and then proceed to break it in the name of justice. Again, this would not demonstrate the fidelity to law characteristic of an act of civil disobedience, not to mention the possibility of the creation of further and unnecessary injustice. Rather, a Minor Law can only be broken where the Minor Law is itself being used as an unjust means of fortifying the unjust Major Law.

Secondly, and this links into the first point, it has above been argued that the civilly disobedient is only morally empowered to break a valid law where they, in conscience, find the law unjust. Now, if the Minor Law has no connection to the Major Law, then there would be no conscientious basis upon which to refuse allegiance to the Minor Law. But, if there is a connection to the injustice between the Minor Law and the Major Law, such that the Minor Law is a furtherance of the injustice in the Major Law, then one is not morally bound to the Minor Law.

Thus in King's case (example (1)) the parade permit was refused (in King's reasonable opinion) *simply to stop the exposing of the injustice in*

⁴⁷ King, above n 1, 170-1.

⁴⁸ Note that principle (2) removes the possibility of acts of civil disobedience for unjust laws where the injustice is so slight that it must be borne save a greater level of injustice being created by the act of civil disobedience. Note further that street marches are, in fact, most often legal and thus not a form of disobedience at all.

the Major Law. Accordingly, there was a connection between the Major Law and the Minor Law so as to justify the act of civil disobedience. Note, however, that this is not the case in (2). Laws against defacing property were not enacted (so far as I know) to fortify unjust laws about Australia going to war. Further, these laws were not used by the government as a shield to stop the publicizing of the injustice in the Major Law. Thus, there is no connection between the Major Law and the Minor Law. Indeed, in the case of (2) the pathway of peaceful (and lawful) protest was not closed off as it was in King's case.

Accordingly, based on the above five principles only (1) can be said to be a justified act of civil disobedience.

III. Conclusion

This paper, by making use of King's *Letter* which I suggested had been underutilised on this point, has addressed the issue of the individual and the unjust law.

The first argument was that an individual need not be bound to a law that they *in conscience* consider unjust. However, I also emphasised the fact that before an individual reaches such a conclusion they ought to consider all the relevant facts. The point of this consideration was to provide a safeguard against an individual concluding unreasonably that a law was unjust. However, as emphasised above, even an unreasonable conclusion would be justified if the individual *in conscience* (ie with sincerity) held the law to be unjust.

However, the point was also made that it is still possible for two reasonable individuals to reach different conclusions about the same law. One could find it just and the other unjust. The example given was that of stem cell laws.

The point was then made that no trouble would necessarily flow from the fact that a reasonable or unreasonable individual found a law to be unjust. Trouble would only arise from the *action* that an individual took in the face of their conclusion that the law was unjust.

The discussion of the actions that an individual is justified in taking focused upon the actions of the civilly disobedient. It was argued that such action could only be justified where it was not in contravention of the five principles which I extracted from King's *Letter*. In total four examples were considered. I suggested that these examples were quite typical reactions to unjust law. Indeed, in every case they were undertaken by people acting in good conscience. However, of these only example (1) (King's own demonstration, but also see the footnote referring to Bishop Lynch's prayer

outside the abortion clinic⁴⁹) was able to be justified. This finding suggests that people must be very careful in the reaction they make to unjust law if they desire to act from a principled position.

Thus, in answer to the stranger on the bus' question I say that, first, an individual ought only to consider a law to be unjust when they consider the law to be unjust *in conscience*, and secondly, the individual ought only to respond to the unjust law in accordance with the five principles that I have extracted from King's *Letter*. To do any less would be to make the action unjustifiable for the reasons given above.

⁴⁹ Above n 19.