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# CIVIL DISOBEDIENCE: A DISPUTE OF CONCEPTS

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## Abstract

Adopting a genealogical methodology, this paper aims to unveil the historical intricacies of civil disobedience's many conceptualizations, particularly the ones related to the Thoreauvian concept and the liberal model of civil disobedience. As suggested by Hanson, there has been a long process of selective appropriation of Thoreau's *Resistance to civil government* – later republished as *Civil disobedience* – that goes from its editors until Gandhi. By the same token, there has been a second process, not of selective appropriation per se, but of colonization in which authors of the liberal model of civil disobedience impose a series of theoretical constraints in the form of constitutive elements that ought to be fulfilled in order for a political movement to be considered a legitimate case of civil disobedience. This has resulted in civil disobedients being required to recognize the legitimacy of legal and political systems and to demand changes only within the boundaries of the rule of law. Conversely, we suggest a different – and radical – approach to civil disobedience, one that acknowledges that civil disobedience's conceptualization should be practical-base, *i.e.*, determined from real political actions and not necessarily centered on legal foundations or normative status.

## Keywords

Civil disobedience; Henry David Thoreau; liberal model of civil disobedience; radical civil disobedience, political action.

## DESOBEDIÊNCIA CIVIL: UMA DISPUTA DE CONCEITOS

## Resumo

Adotando uma metodologia genealógica, o presente trabalho tem como objetivo revelar as complexidades históricas das muitas conceitualizações da desobediência civil, particularmente aquelas relacionadas ao conceito Thoreauviano e ao modelo liberal de desobediência civil. Conforme sugerido por Hanson, houve um longo processo de apropriação seletiva do texto *Resistência ao governo civil* de Thoreau – trabalho posteriormente republicado sob o nome de *Desobediência civil* – que vai desde seus editores até Gandhi. Da mesma forma, houve um segundo processo, não de apropriação seletiva em si, mas de colonização, no qual os autores do modelo liberal de desobediência civil impuseram uma série de restrições teóricas na forma de elementos constitutivos que devem ser cumpridos para que um movimento político seja considerado um caso legítimo de desobediência civil. Isso resultou na exigência de que os desobedientes civis reconheçam a legitimidade dos sistemas jurídico e político e exijam mudanças apenas dentro dos limites do Estado de Direito. Em contrapartida, propomos uma abordagem diferente – e radical – à desobediência civil, que reconheça que a conceituação da desobediência civil deve ser baseada na prática, ou seja, determinada a partir de ações políticas reais e não necessariamente centrada em fundamentos legais ou status normativo.

## Palavras-chave

Desobediência civil; Henry David Thoreau; modelo liberal de desobediência civil; desobediência civil radical, ação política.

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## Introduction

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The primary objective of this paper is to deconstruct the notion that civil disobedience has a definitive conceptualization. In the first section, adopting a genealogical approach, we undertake a critical examination of the concept of civil disobedience as proposed by Thoreau, which was originally described as “resistance to civil government”. Through this analysis, we aim to demonstrate how Thoreau's ideas were subverted as a result of a long process of selective appropriation – a term coined by Hanson<sup>1</sup> to refer to the modifications made to Thoreau's text from the second edition of *Resistance to civil government*, republished as *Civil disobedience*, to Gandhi's republication of *On the duty of civil disobedience*. In this process of selective appropriation, each modification was made to suit the editor's particular point of view, usually with the purpose of diminishing the radicalism present in the original text written by Thoreau, especially concerning the matter of violence.

In a similar vein, in the second section we attempt to establish that, while the liberal model holds undeniable significance, it also constitutes a secondary process of selective appropriation – or *colonization*. Due to its canonical appeal that still lingers in popular discourse, this second instance of selective appropriation can be better characterized as a process of colonization in which prominent figures such as Rawls, Bedau, Walzer, and others have endeavored to formulate a quintessential concept of civil disobedience, thereby imposing a set of prerequisites that civil disobedients must adhere to in order for their political movement to be deemed legitimate. With a view to demonstrating the historical intricacies of the liberal approach to civil disobedience and, consequently, its obviously non-ontological status, we use two different paths. While the first path criticizes how the liberal model imposes theoretical requirements that act as constitutive elements at the same time it disregards contemporary political movements and the particularities of our time, the second highlights that there is a romanticized perspective surrounding the civil rights movement narrative, allowing us to contest some of its suppositions. Within this section, we also provide a critique of two of these constituent elements, which arise as a result of their connection to the rule of law: the voluntary acceptance of legal sanctions and the limited requirements that civil disobedients are obligated to adhere to within the liberal framework of civil disobedience.

In the third section we offer a somewhat rudimentary radical perspective of civil disobedience. This attempt to reformulate civil disobedience's concept aims primarily to consider actual political movements, such as *Black Lives Matter*, instead of trying to conjecture a theoretical set of constituent elements that could eventually result in the creation of a more definitive concept. Furthermore, this practical-based approach is constructed beyond the legal framework claimed by the liberal model, resulting in a perspective of civil disobedience that presents itself as the expression of a collective political practice that rejects any normative status or legal foundation. Employing Agamben's definition of paradigm, we also present a contrast between the civil rights movement and *Black Lives Matter*, albeit their allegedly unbridgeable gaps.

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<sup>1</sup> HANSON, *The domestication of Henry David Thoreau*.

## 1. Civil disobedience and its original meaning

The idea of civil disobedience gained relevance in 1849 when Henry David Thoreau, criticizing the war against Mexico and demonstrating his anti-slavery sentiment, wrote his famous essay, commonly known as *Civil disobedience*. From a theoretical point of view, civil disobedience is defined as such based on the figure of Thoreau. Although the author did not coin the expression *civil disobedience* (nor did he originally attribute it to his work), it is his writings that inspired, from a conceptual perspective, the most varied civil disobedience movements carried out during the 20th century, among which the most famous<sup>2</sup> are the Salt March led by Mohandas Karamchand Gandhi<sup>3</sup> and the civil rights movement led by Martin Luther King Jr.<sup>4</sup>

Since the publication of that work, disobedience, which is no longer simply apolitical, having become, above all, *civil*, had its contours defined with more clarity and theoretical precision, starting to be considered a form of legitimate and organized resistance whose foundation is located in the dissent of individuals in relation to the government and constituted authorities. As such, civil disobedience may be defined as a form of nonviolent<sup>5</sup> struggle based on the withdrawal of consent in which an individual or a group of individuals can withdraw support from the government. Thoreau<sup>6</sup> suggests, thus, the possibility of resisting the government and its institutions through disobedience. Returning to the theme of consent proposed by Lá Boétie<sup>7</sup> in the 16th century, he perceived the passivity of citizens as a form of agreeing with the iniquities promoted by governments and rulers.

It is interesting to notice, however, that the already mentioned essay (usually known as *Civil disobedience*) was originally published under the name of *Resistance to civil government* as a result of a lecture delivered in 1848 entitled *The rights and duties of the individual in relation to government*.<sup>8</sup> *Resistance to civil government* was originally published in the Transcendentalist journal *Aesthetic Papers* by invitation of the editor, Elizabeth Peabody.<sup>9</sup> Ticknor and Fields, who posthumously edited Thoreau's work, changed the original title in 1866, when the essay was republished and considerably modified<sup>10</sup> in

<sup>2</sup> As posed by Delmas (*A duty to resist*), Thoreau, Gandhi, and King constitute a form of "holy trinity of civil disobedience".

<sup>3</sup> GANDHI, *Autobiografia*; GANDHI, *Cartas ao Ashram*; GANDHI, *Somos todos irmãos*.

<sup>4</sup> KING Jr., *Grito da consciência*; KING Jr., *Letter from Birmingham Jail*.

<sup>5</sup> Most authors tend to describe civil disobedience as a nonviolent form of political action, even though the vast majority of them fail to describe precisely what nonviolence and/or violence is, especially when it comes to specify if nonviolence should apply both for people and property. As will be further discussed, the very idea of nonviolence in Thoreau's work is highly questionable.

<sup>6</sup> THOREAU, *Resistance to civil government*.

<sup>7</sup> LA BOÉTIE, *Discurso sobre a servidão voluntária*.

<sup>8</sup> GLICK, *Textual introduction*.

<sup>9</sup> GLICK, *Textual introduction*.

<sup>10</sup> "The second print of the essay was in the posthumous *A Yankee in Canada, with anti-slavery and reform papers* [...]. Collation of the 1849 text with that of the second printing discloses thirteen substantive variants, four of them very pronounced: the deletion of a portion of a sentence [...]; the addition of six inexactly rendered lines from George Peele's *The Battle of Alcazar* [...]; the addition of a sentence on Confucius [...]; and the altering of the title *Resistance to civil government* to *Civil disobedience*. The text at scattered points in 1866 retained what were apparently signs of haste: several awkward senses [...] could profitably have been reworked". (GLICK, *Textual introduction*, p. 314).

a volume called *A Yankee in Canada, with anti-slavery and reform papers*, which contained a variety of Thoreau's political writings. Nevertheless, notwithstanding the fact that "firm evidence of the circumstances of the revision and publication of the 1866 version is scant",<sup>11</sup> Thoreau, in his wish to reissue the essay shortly before his death, did not make any attempt whatsoever to change the title.

Changing the title was a deliberate choice of the editors, conceivably because the idea of civil disobedience in vogue at that time had a much less radical connotation than the idea of civil resistance – which meant direct opposition to the government. As stated by Hanson, the term 'civil disobedience' had a very specific meaning, usually used in a religious context and related to an anti-slavery sentiment. According to the author,

Ironically, the 1866 substitution of 'Civil Disobedience' for 'Resistance to Civil Government' placed Thoreau's argument squarely within a context of nonviolence. Before Thoreau's death in 1862 the term 'civil disobedience' had acquired a specific meaning, thanks to a bevy of sermons protesting the Fugitive Slave Law and its enforcement. The earliest was Nathaniel P. Hall's sermon, *The Limits of Civil Obedience: A Sermon Preached in the First Church, Dorchester, January 12, 1851*. Running a close second was Charles Beecher's *Duty of Disobedience to Wicked Laws: A Sermon on the Fugitive Slave Law*, published later in 1851. In 1853 Samuel Colcord Bartlett published *The Duty and Limitations of Civil Obedience: A Discourse Preached at Manchester, N.H. on the Day of Public Thanksgiving, November 24, 1853*.<sup>12</sup>

The notion of civil disobedience being related to a religious context before Thoreau's essay is confirmed by Johnson, to whom

Although the prominence of Thoreau's essay has led many to assume that he was the father of civil disobedience, that form of dissent was deeply rooted in Protestant tradition and the ethos of Transcendentalism. As David R. Weber has observed, the advocates of civil disobedience in our history have been numerous, influential, and extraordinarily varied and reach back to Quakers, Baptists, and other dissenters against limitations on religious liberty in the Massachusetts Bay Colony, especially the legal requirement that they pay taxes to support ministers of orthodox (Congregational) Standing Order. The concept of civil disobedience, broadly defined as the violation of unjust laws in the name of conscience or religious principle, was more fully developed and widely applied by antislavery activists during the decades leading up to the Civil War.<sup>13</sup>

Additionally, "the word 'resistance' in the original title belied an unequivocal commitment to nonviolence, as Thoreau made clear in his 1854 speech on *Slavery in Massachusetts* and his staunch defense of John Brown's bloody raid on Harpers Ferry".<sup>14</sup> Nowadays, nonviolence is a characteristic *almost* inextricably intertwined with civil disobedience, a perspective that derives both from the false assumption that Thoreau himself was an unconditional pacifist and from the liberal conceptualization of civil disobedience conducted by John Rawls's writings and Martin Luther King Jr. actions.

The new volume edited by Ticknor and Fields in 1866 did not indicate that the title had been changed nor did it mention that the essay had been already published. Furthermore, the content of the essay was altered and new materials were incorporated

<sup>11</sup> GLICK, *Textual introduction*, p. 316.

<sup>12</sup> HANSON, *The domestication of Henry David Thoreau*, p. 36

<sup>13</sup> JOHNSON, *The life and legacy of 'civil disobedience'*, p. 2.

<sup>14</sup> HANSON, *The domestication of Henry David Thoreau*, p. 30.

without reference or explanation in a process that can only be explained as *selective appropriation*.<sup>15</sup> Such a change was not unintentional. On the contrary, “from a marketing standpoint, Ticknor and Fields might have preferred the non-rebellious sounding “civil disobedience” as more palatable in the wake of civil war”.<sup>16</sup> Besides, the 1866 reprint of Thoreau’s 1849 essay presented changes that reinforced the connotation of Thoreau’s alleged appeal to nonviolence.<sup>17</sup>

This process of selective appropriation of Thoreau’s work, usually undergone accordingly to the editors preferences and political views and which took place soon after Thoreau’s death, in 1862,<sup>18</sup> did not stop at the second edition. Gandhi, for instance, had access to Thoreau’s work through a copy edited in 1903<sup>19</sup> by Arthur C. Fifield, who “[...] edited Thoreau’s essay with a very heavy hand, and gave it a new title, *On the duty of civil disobedience*, which suited his own pacifist views”.<sup>20</sup> In his attempt to create his own selective appropriation, Fifield’s modifications of Thoreau’s work was “breathtakingly bold”, differentiating it from the 1866 version and, of course, putting even more distance from the original essay in an attempt to “further pacifying Thoreau’s original argument” according to Fifield Christian anarchism views.<sup>21</sup>

Taken together, Fifield’s alterations obscure Thoreau’s willingness to consider violent forms of resistance to unjust laws. That process was begun in 1866, but Fifield carried it much further, taking passages in the essay out of context and ignoring the relevance of Thoreau’s defense of John Brown to the issues raised in “Civil Disobedience.” That defense was impossible to square with a Tolstoyan message of nonresistance, so Fifield led readers to assume that “Civil Disobedience” was Thoreau’s last word.<sup>22</sup>

Gandhi himself contributed intensely to this process of selective appropriation during his fight in South Africa to end both legal and racial discrimination against British Indians. Gandhi translated and published Thoreau’s work with a view to promoting his campaign in the journal *Indian Opinion*. With regard Thoreau’s work, Gandhi first published an editorial with the title *On the duty of civil disobedience*<sup>23</sup> on September 9, 1907, in which the author widely used Thoreau’s essay with supresions and amendments. For instance, for the purpose of converting civil disobedience into an obligation, Gandhi wrote a summary of Thoreau’s ideas using part of the original text while adding his own thoughts: “But, I do not ask for no government at once, but at once for a better government. *This is the duty of every citizen*”.<sup>24</sup> This is an extract of one of Thoreau’s famous passages with the addition of ‘*this is the duty of every citizen*’ as we can see from the original and from the 1903 edition: “But, to speak practically and as a citizen, unlike those who call themselves non-government men, I ask for, not at once no government, but at once a

<sup>15</sup> HANSON, *The domestication of Henry David Thoreau*.

<sup>16</sup> HANSON, *The domestication of Henry David Thoreau*, p. 35.

<sup>17</sup> HANSON, *The domestication of Henry David Thoreau*, p. 29.

<sup>18</sup> HANSON, *The domestication of Henry David Thoreau*, p. 35.

<sup>19</sup> Even though both Hanson (*The domestication of Henry David Thoreau*) and Johnson (*The life and legacy of ‘civil disobedience’*) mention a 1905 publication edited by Arthur C. Fifield and printed by The Simple Life Press, I was able to find one with the same specifications dated from 1903. Cf.: THOREAU, *On the duty of civil disobedience*.

<sup>20</sup> HANSON, *The domestication of Henry David Thoreau*, p. 29.

<sup>21</sup> HANSON, *The domestication of Henry David Thoreau*.

<sup>22</sup> HANSON, *The domestication of Henry David Thoreau*, p. 40.

<sup>23</sup> GANDHI, *The collected works of Mahatma Gandhi*, v. 7, pp. 187–189.

<sup>24</sup> GANDHI, *The collected works of Mahatma Gandhi*, v. 7, p. 188, emphasis added.

better government"<sup>25</sup>; "But, to speak practically and as a citizen, unlike those who call themselves no-government men, I ask for, not at once no government, but at once a better government".<sup>26</sup>

In the same issue of the *Indian Opinion*, when translating the 1903 version *On the duty of civil disobedience* into Gujarati, Gandhi created a new title: *Duty of disobeying laws*,<sup>27</sup> which perfectly suited his needs to convey law breaking as an obligation (especially when it came to unjust laws that discriminate against British Indians). Similarly, using Thoreau's own words, Gandhi transformed this obligation to disobey unjust laws into a *divine duty* and introduced an religious aspect until then inexistent in Thoreau's work:

Many years ago, there lived in America a great man named Henry David Thoreau. His writings are read and pondered over by millions of people. Some of them put his ideas into practice. Much importance is attached to his writings because Thoreau himself was a man who practiced what he preached. Impelled by a sense of duty, he wrote much against his own country, America. He considered it a *great sin* that the Americans held many persons in the bonds of slavery.<sup>28</sup>

The most curious aspect of Gandhi's appropriation, however, is the fact that he portrayed Thoreau and his actions as the reason why slavery came to an end in the USA: "Historians say that the chief cause of the abolition of slavery in America was Thoreau's imprisonment and the publication by him of the above mentioned book after his release. Both his example and writings are at present exactly applicable to the Indians in the Transvaal".<sup>29</sup> This explicit exaggeration was used in order to create a narrative in which the impact of Thoreau's protest was unquestionable, even though "Gandhi almost certainly knew that Thoreau's actions and essay had done nothing to end slavery in the United States".<sup>30</sup> To put it mildly, Thoreau spent one night in jail and, although his action was indeed brave, he can hardly be considered a martyr or the main reason why slavery came to an end in the USA.

Nevertheless, to be fair with Gandhi, Arthur C. Fifield, the editor of the 1903 edition, did question if Thoreau's action had hastened the end of war and slavery:

Thoreau wrote his famous essay, *On the duty of civil disobedience*, as a protest against an unjust but popular war and the immoral but popular institution of slave-owning. He did more than write – he declined to pay his taxes, and was hauled off to gaol in consequence. Who can say how much this refusal of his hastened the end of the war and of slavery?<sup>31</sup>

After the The Salt March and the subsequent popularization of Thoreau's writings through Gandhi, civil disobedience started to gain different interpretations that cannot always be connected to *Resistance to civil government* and which modifications can no longer be traced in a linear tradition.

<sup>25</sup> THOREAU, *Resistance to civil government*, p. 64.

<sup>26</sup> THOREAU, *On the duty of civil disobedience*, pp. 8-9.

<sup>27</sup> JOHNSON, *The life and legacy of 'civil disobedience'*.

<sup>28</sup> GANDHI, *The collected works of Mahatma Gandhi*, v. 7, pp. 187-188, emphasis added.

<sup>29</sup> GANDHI, *The collected works of Mahatma Gandhi*, v. 7, p. 188.

<sup>30</sup> OHNSON, *The life and legacy of 'civil disobedience'*, p. 6.

<sup>31</sup> FIFIELD, *Note to this edition*, p. 6.

Taking into perspective the alterations of Thoreau's work, the intention of this essay is not to discover nor to reveal Thoreau's authentic, precise meaning of civil disobedience in order to impose a definitive conceptualization of the subject, considering that, as demonstrated, Thoreau himself was not the one responsible for introducing the expression *civil disobedience* in the political debate and since such a task would be, at the very least, futile. Even now, more than 175 years after the first publication of *Resistance to civil government*, there is no consensus regarding Thoreau's conceptualizations and countless are the Thoreauvian perspectives that overlap and even contradict themselves.<sup>32</sup> On this account, this paper aims to demonstrate that the concept of civil disobedience has been and still is in constant dispute.

Similarly, just as it is not possible to define, once and for all, the concept of civil disobedience for Thoreau, neither is it possible to present an ultimate definition of civil disobedience that encompasses the myriad of real political movements that have taken place in recent decades. Even if authors strive to establish limits or constraints such as 'the highest respect for the law', or 'the mandatory use of nonviolence', or 'the acceptance of the State's punishment', there will always be a conceptual opening, which will be fulfilled by dissidents who put their bodies and lives at risk in order to live a political life (it is, indeed, very dangerous to impose an abstract definition when the police and the law enforcement tend to be lenient or aggressive to protesters according to what the movement is classified).

As a matter of fact, instead – or against – any search for an origin, it is more relevant to reject “[...] the metahistorical deployment of ideal significations and indefinite teleologies”<sup>33</sup> in order to follow “[...] the threads back to something like the moment when knowledge, discourses, and spheres of subjects are constituted”,<sup>34</sup> which means that, adopting a genealogical approach, we are able to understand the political and historical context of the many conceptualizations of civil disobedience. This model, that Foucault reconstructs from Nietzsche, allows us to find the historical beginning of things not as a way of defining an “inviolable identity of their origin”, but as a means to understand what lays behind the many concepts of civil disobedience.

Therefore, the genealogical method is particularly helpful to demonstrate how Thoreau's ideas were indeed more radical than some authors claim and, especially, to show how the liberal model of civil disobedience tends to constrain political movements from a theoretical point of view. A genealogical approach to the changes made in *Resistance to civil government* over time demonstrates that nonviolence is not inextricably intertwined with Thoreau's 'original' visualization of civil disobedience, denoting that contemporary movements should not be necessary nonviolent in order to be considered legitimate actions of civil disobedience. By the same token, these *rules* imposed by the mainstream traditions<sup>35</sup> should be viewed as indicators of what civil disobedience *can be* and not as canons that *ought* to be followed.<sup>36</sup> As a matter of fact,

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<sup>32</sup> For an anarchist perspective of Thoreau's ideas, cf.: INGRAM, *Anarchism*. For interpretation that perceives Thoreau's work as an expression of North-American political radicalism, cf.: LAUDANI, *Disobedience*.

<sup>33</sup> FOUCAULT, *Genealogy, Nietzsche, history*, p. 77.

<sup>34</sup> AGAMBEN, *The signature of all things*, p. 84.

<sup>35</sup> For a better understanding of civil disobedience's main traditions, cf.: SCHEUERMAN, *Civil disobedience*.

<sup>36</sup> This, of course, imposes an extremely difficult task, which is to develop a theoretical idea of civil disobedience without creating a conceptualization that defines it in a limiting way. What is more,



this plurality of views can provide a better understanding of the term if both researchers and civil disobedients are willing to comprehend different points of view. As stated by Scheuerman,

unfortunately, far too many participants in debates about civil disobedience continue to interpret its conceptual contestability as a weakness rather than political strength. They view discord as a sign of theoretical immaturity, an unfortunate scenario to be overcome when we (finally) get the concept (and single correct theory) of civil disobedience 'right'.<sup>37</sup>

This plurality is particularly interesting when those participating in the debate take into consideration the political reality of our time. For instance, one should question the necessity of sustaining Thoreau's or even Rawls' perspective when the demands of contemporary movements are immensely different from those that took place in the last century, not only in terms of how to act, *i.e.*, if violent or nonviolent, but also in terms of what they aim to achieve. There is a blatant dissimilarity between the civil rights movement<sup>38</sup> and *Black Lives Matter*, for example. While the latter aimed to change the law hoping that such transformation would substantially diminish the effects of discrimination and end segregation, the former aims to eradicate racism and discrimination beyond the juridical realm, recognizing that both law and state are embedded in structural racism.<sup>39</sup> In fact, they seem "[...] uninterested in cutting deals or finding pathways to power. Rather, they are creating a new model of assertive and empowered citizenship for a generation that has witnessed a sharp rollback of civil and human rights".<sup>40</sup> In light of this, it would be insufficient to use King's or Rawls' perspective to theorize about what happened after Trayvon Martin's, George Floyd's, Breonna Taylor's and so many other deaths.

## 2. The liberal appropriation

It is well known that, despite the fact that the idea behind the expression 'civil disobedience' was created by Thoreau, its theoretical approach was defined and established by John Rawls in 1971 when a brief chapter named *Duty and obligation* was published in his famous book, *A theory of justice*. In the 42 pages that built the aforementioned chapter, Rawls sets the tone to the concept of civil disobedience that has been prevailing for almost fifty years, notwithstanding its obvious limitations. This tone is presented in an unequivocal liberal context that still lingers in contemporaneous conceptualizations of civil disobedience, especially in those concepts that tend to exclude

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this radical approach implicates in a series of consequences, such as: how to differentiate, then, civil disobedience from direct actions, sabotage, riots, boycotts, resurrections or even revolutions or other models of political movements?; or: if until now civil disobedience has gained its legitimacy and acceptance because of its alleged organization and absence of violence, how will its positive perception be sustained if protesters start to use aggressive tactics? I try to answer these and other questions in my PhD thesis that is currently under development.

<sup>37</sup> SCHEUERMAN, *Why, once again, civil disobedience?*, p. 9.

<sup>38</sup> For an excellent analysis of how the civil right movements shaped and established a consensus regarding civil disobedience's concept, cf. PINEDA, *Seeing like an activist*.

<sup>39</sup> BIONDI, *The radicalism of Black Lives Matter*.

<sup>40</sup> BIONDI, *The radicalism of Black Lives Matter*, s/p.

*radical* forms of protests to the detriment of a romantic historical narrative of the civil rights movement.

Even though there is a conceptual opening concerning the term "liberalism", here, we can understand it as a tradition, both in a political and in an intellectual sense, that is focused on the individual freedom in relation to a constitutional government, a representative democracy, and the rule of law,<sup>41</sup> which means that the authors of the liberal perspective of civil disobedience are influenced by the "[...] shadows of the mid twentieth-century reconfiguration of liberalism as the ideological 'other' of totalitarianism [...]"<sup>42</sup> These authors admitted the existence of a variety of moral, ethical and religious points of view, *i.e.*, they recognized that pluralism is an undeniable feature of any society that claims to be free. Given this recognition of pluralism, one of the most important achievements of the liberal tradition is the surpassing of a sectarian perspective of civil disobedience, namely the religious one led by Gandhi and King. As stated by Scheuerman,

Recasting civil disobedience within the contours of modern pluralism, liberalism highlights its core persuasive and communicative functions. It also thoughtfully restates the intuition that some types of political illegality, when properly conducted, can successfully express an underlying attachment to law.<sup>43</sup>

In this instance, according to Rawls, for a rule breaking to be considered an act of civil disobedience it has to be a public, nonviolent and conscientious breach of law realized with political purpose, *i.e.*, with the intention to change a specific law or a government's policy. Additionally, such act must also be committed with the respect and fidelity to the law itself, meaning that the demonstrators should be willing to accept any legal punishments for lawbreaking, since civil disobedience should not be considered a revolutionary path, but simply, instead, a form of protest that can be available when all others – institutional – possibilities fail.

What is most remarkable in Rawls' work is that his idea of civil disobedience is proposed in the framework of a "nearly just democratic regime" and, being that the case, for a demonstrator to be considered a responsible citizen they must act in accordance to the political principles "[...] that underline and guide the interpretation of the constitution".<sup>44</sup> As a consequence, the concept proposed by Rawls disregards any attempt to change law's structure itself, being confined to the sole purpose of reformists alterations in a reality that, otherwise, functions 'nearly' perfectly. Furthermore, the liberal approach prescribes that an act of civil disobedience must take action so disobedients can negotiate their demands with states' authority, claiming their attention to an issue that should be changed not by the people – or the multitude, perhaps – but solely by those who are entitled by their hierarchical position to make political decisions.

Notwithstanding the fact that the liberal model is consolidated by Rawls' work,<sup>45</sup> its roots can be found in the two decades that precede the said author's book *A theory of*

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<sup>41</sup> SCHEUERMAN, *Civil disobedience*.

<sup>42</sup> SCHEUERMAN, *Civil disobedience*, p. 33.

<sup>43</sup> SCHEUERMAN, *Civil disobedience*, p. 35.

<sup>44</sup> RAWLS. *A theory of justice*, p. 341.

<sup>45</sup> As pointed out by Scheuerman (*Recent theories of civil disobedience*), contemporary critics, more often than not, reduce the liberal account of civil disobedience to the Rawlsian perspective, neglecting other influences such as the works of King. I agree with his point of view. Albeit setting the tone of the liberal perspective due to the scope of his work, Rawls is not the

*justice*, mainly in the theoretical and practical achievements of Martin Luther King Jr.,<sup>46</sup> both leader and demonstrator of the civil rights movement.<sup>47</sup> What is more, regardless of its problems, the liberal model is responsible for bringing the subject of civil disobedience to the legal debate, unveiling its theoretical and practical features and, in a very dangerous move, validating some acts of political disobedience to the detriment of others.

Before the analysis of the liberal approach and the subsequent description of its predictable critics, it is important to clarify the significance of King's work in the context of civil disobedience, for, in general, it is a romanticized narrative of the civil rights movement associated with Rawls' writings that constitute the notion of civil disobedience in popular North-American discourse – and worldwide as well. If, on the one hand, Rawls's work sets the tone of the academic concept of civil disobedience, on the other hand, King is the one who prepared the ground and laid the foundations of the political struggle that inspired many lives in a way that congregated both a theoretical and, more important, a practical application of civil disobedience. Therefore, not only was King an outstanding strategist, but also an acute demonstrator who was able to persuade and convince through his nonviolent actions. Essentially, in his attempt to eliminate the unjustness present in law, he experienced a life that was undeniably politically lived.

King insisted that lawbreaking with a political purpose should be accomplished in an appropriate manner that demanded discipline and moral commitment from demonstrators. Of course, such a suggestion has in itself the idealization that civil disobedients should, invariably, accept any punishment the state considers fit. Regardless, it also has implied the use of one's body as a tool in a political struggle, which demands great courage and commitment to a cause. In fact, this is precisely what King desired: to demonstrate the moral grounds of a cause by showing commitment and responsibility toward a political action for, in doing so, a demonstrator could distinguish themselves from a criminal, someone who breaks the law with no political purpose. In his own words

We had no alternative except to prepare for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and the national community. Mindful of the difficulties involved, we decided to undertake a process of self-purification. We began a series of workshops on nonviolence, and we repeatedly asked ourselves: "Are you able to accept blows without retaliating?" "Are you able to endure the ordeal of jail?"<sup>48</sup>

Moreover, it is also important to notice that King's work was developed within the limits of his Cristian beliefs, a specific feature that more than once dislodged his proposal from a liberal comprehension of civil disobedience to a religious one. As stated before, the liberal model tried to distance itself from some of the religious features presented in King's

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sole influence to the liberal model of civil disobedience, an account that is constituted by a variety of standpoints that usually converges to a legalistic approach to civil disobedience.

<sup>46</sup> Although the civil rights movement is perceived as the cornerstone of the liberal tradition of civil disobedience (mainly because of its nonviolent, law abiding features), the theoretical work of Martin Luther King Jr. can be better understood in a religious perspective that perceives civil disobedience as a sacred duty. Like Ghandi, King believed that motivated lawbreaking should be spiritually based, an idea that liberal authors, such as Rawls, rejected in order to pursue a more democratic approach. To better understand this classification of civil disobedience's models, cf.: SCHEUERMAN, *Civil disobedience*; LIMA, *Por uma desobediência não-civil*.

<sup>47</sup> KING JR. *Why we can't wait*; KING JR. *Where do we go from here*.

<sup>48</sup> KING JR, *Letter from Birmingham Jail*, p. 70.

ideas (and in Gandhi's propositions as well), and, in doing so, it surpasses the justification that civil disobedience must be taken into action in accordance to a higher – spiritual or natural – law. Michael Walzer,<sup>49</sup> a leading representative of the liberal approach along John Rawls, fathoms a concept of civil disobedience that is very similar to Rawls', debating, in his theory, about the dispute that commonly takes place between majorities and minorities. Both authors consider political pluralism in regard to a democratic stand, valuing dissent as a legitim form of political action, especially when performed through civil disobedience. Supplementary, the pair regards civil disobedience as the last resource to be considered given that it should only be employed when institutional methods are no longer able to correct cases of unjusticeness. As attested by Rawls, civil disobedience is

[...] a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected. A preliminary gloss on this definition is that it does not require that the civilly disobedient act breach the same law that is being protested. It allows for what some have called indirect as well as direct civil disobedience. And this a definition should do, as there are sometimes strong reasons for not infringing on the law or policy held to be unjust. Instead, one may disobey traffic ordinances or laws of trespass as a way of presenting one's case.<sup>50</sup>

The liberal model of civil disobedience can be considered as a set of principles that outlines the proper way for demonstrators to engage in civil disobedience. These principles demand that protesters act in accordance with certain requirements in order for their movement to be considered valid. The first requirement is civility, which means that protesters must act in a respectful and peaceful manner at all times. The second requirement is openness or publicity, which means that protesters must be transparent about their actions and motivations with the aim of communicating their objectives and justifications. The third requirement is nonviolence, which means that protesters must not use physical force or aggression against people and/or property.<sup>51</sup> The fourth requirement is conscientiousness, which means that protesters must have a sincere and principled objection to the law or policy they are protesting against. The fifth requirement is respect for the law, which means that protesters must recognize the legitimacy of the legal system and its processes. Finally, the sixth requirement is acceptance of legal penalties, which means that protesters must be willing to face the consequences of their actions in a court of law. By adhering to these requirements, the liberal model of civil disobedience seeks to ensure that protests are conducted in a peaceful and moral manner, and that they have the greatest possible impact on the society they seek to change. These elements can be found in Rawls' proposal, but also in the works of Walzer and Bedau. Based on Bedau's point of view:

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<sup>49</sup> WALZER, *Obligations*.

<sup>50</sup> RAWLS, *A theory of justice*, p. 320.

<sup>51</sup> There is a relentless debate about the subject of violence and nonviolence in the context of civil disobedience, particularly if violence can be employed against property without mischaracterizing nonviolence. I address this question in depth and detail in my doctoral thesis, which is currently being developed. Unfortunately, there is no time to engage in this topic on this essay.

At the outset, let me declare that the central or paradigm cases of civil disobedience I take to be acts which are illegal (or presumed to be so by those committing them, or by those coping with them, at the time), committed openly (not evasively or covertly), nonviolently (not intentionally or negligently destructive of property or harmful of persons), and conscientiously (not impulsively, unwillingly, thoughtlessly, etc.) within the framework of the rule of law (and thus with a willingness on the part of the disobedient to accept the legal consequences of his act, save in the special case where his act is intended to overthrow the government) and with the intention of frustrating or protesting some law, policy, or decision (or the absence thereof) of the government (or of some of its officers). It is sufficient for present purposes to report that all of the parties to the argument about to be examined seem to accept essentially such a conception of civil disobedience (especially that it is illegal, not violent, conscientious, not covert), and do so without thinking they have prejudged any issue as to the justifiability of particular acts of civil disobedience (or, for that matter, of other sorts of acts, e.g., of violent protest, including rebellion).<sup>52</sup>

It's curious to observe that, albeit his unequivocally liberal features, Walzer does question – at least up to a certain degree – the constraints imposed by the liberal model concerning the element of civility, which usually "requires first the adoption of methods that do not directly coerce or oppress other members of society, and second, it requires nonresistance to state officials enforcing the law".<sup>53</sup> For Walzer, there is a different type of disobedience that does not necessarily fit these requirements and yet can still be described within the limits of civility. The author argues that a narrow definition of civil disobedience can be disingenuous in the sense that it disregards the impact coercion has on innocent bystanders and the violence it provokes, for there are times when it is politically impossible to abide to nonviolence and to the absence of coercion and when it is actually morally required to use coercion and violence, even if such occasions should be carefully described and delimited.<sup>54</sup> As stated by the author, "by setting rigid limits to civil conduct, it virtually invites militants of various sorts to move beyond the bounds of civility altogether, and it invites the police to respond always as if they were confronting criminals [...]".<sup>55</sup>

The construct created by the liberal model is, thus, a collection of elements or *requirements* that ought to be met for a movement to be considered a legitimate form of civil disobedience. These requirements, perceived by Greenwalt as guidelines, "concern the reason people disobey, the conditions in which they do so, and the tactics they employ".<sup>56</sup> Though they may vary according to the author that describes them, each of these elements, understood as a condition of existence, imposes restraints, representing a shift in the way in which civil disobedience is comprehended. Additionally, each of these elements deserves a carefully executed analysis, a task that I undertake in my thesis but that cannot be employed here due to the risk of turning this essay into an overly long text. As a consequence, one feature of civil disobedience, in particular, will be better explored: the association to the rule of law enforced by the liberal tradition, predominantly expressed by the idea of *fidelity and respect to the law*. This feature, as will be demonstrated, presents two major entanglements that can be perceived as consequences.

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<sup>52</sup> BEDAU, *Civil disobedience in focus*, p. 51.

<sup>53</sup> WALZER, *Obligations*, p. 24.

<sup>54</sup> WALZER, *Obligations*.

<sup>55</sup> WALZER, *Obligations*, p. 25.

<sup>56</sup> GREENWALT, *Justifying nonviolent disobedience*, p. 175.

As stated by Scheuerman, who openly recognizes the liberal model as the starting point for “any fruitful analysis of civil disobedience”, “although in decisive ways less restrictive than its religious predecessor, liberals tend to tether civil disobedience to a circumscribed and overly complacent brand of political reformism”,<sup>57</sup> which means that protestors not only have to “expresses disobedience to law within the limits of fidelity to law”,<sup>58</sup> as they also have to willingly accept any legal punishment the state considers adequate, for “only by demonstrating respect for the law can disobedients expect to persuade peers of their civic-minded intentions”.<sup>59</sup>

“For the liberals, as for Gandhi and King, politically motivated illegality needs to be sharply delineated from ordinary criminality”,<sup>60</sup> a task accomplished by demonstrating fidelity to the law, which means recognizing the legitimacy of the current legal order through accepting the legal consequences and through refraining from revolutionary goals. For the liberal account, there is, thus, an inextricably intertwined relation between civil disobedience and the rule of law; a correlation imposed by Rawls<sup>61</sup> through his *fidelity* to the law and by King<sup>62</sup> through his *highest respect* for the law. This mandatory connection between the rule of law and civil disobedience is possibly the most relevant feature inflicted by the liberal model given that it both (i) restrains the goals civil disobedients can achieve and, at the same time, (ii) requires that protestors suffer the burden of an unequal, biased criminal law. In other words, the liberal model's requirement that civil disobedience must necessarily be linked to the law generates two main consequences.

The first one is that the scope of protestors' demands is deeply curtailed as disobedients cannot challenge the legitimacy of the legal system and the institutions linked to it. As a result, disobedients can only fight for specific changes rather than structural changes. This means that civil disobedience is limited to challenging specific laws or policies, instead of questioning the broader legal and political system itself, restraining the effectiveness of civil disobedience as a tool for bringing about social change, as it restricts the scope of the demands that can be made.

The second consequence is that, in order to assert respect and loyalty/fidelity to the law, protestors must willingly accept the legal consequences of their violations of the law carried out for political purposes. This means that they must voluntarily submit to the punishment prescribed by the legal system, even though they may believe that their actions were morally justified. This can be seen as a form of coercion, as it forces protestors to accept the legitimacy of a legal system that they may fundamentally disagree with, and to accept the punishment that it imposes on them. This can also be seen as a way of limiting the potential impact of civil disobedience, as protestors may be less willing to engage in actions that could result in legal penalties. Accepting legal penalties represents, in this instance, what Rawls defines as fidelity to the law:

The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct. This fidelity to law helps to establish to the majority that the act is indeed politically conscientious and sincere, and that it is intended to address the public's sense of

<sup>57</sup> SCHEUERMAN, *Civil disobedience*, p. 35.

<sup>58</sup> RAWLS, *A theory of justice*, p. 322.

<sup>59</sup> SCHEUERMAN, *Civil disobedience*, p. 49.

<sup>60</sup> SCHEUERMAN, *Civil disobedience*, p. 49.

<sup>61</sup> RAWLS, *A theory of justice*.

<sup>62</sup> KING, Letter from Birmingham City Jail.

justice. To be completely open and nonviolent is to give bond of one's sincerity, for it is not easy to convince another that one's acts are conscientious, or even to be sure of this before oneself.<sup>63</sup>

To Rawls, civil disobedience is located between legal protest on the one hand, and a myriad of forms of protests and conscientious refusal, on the other. As a consequence, civil disobedience is perceived by him as a form of dissent "at the boundary of fidelity to the law".<sup>64</sup> In order to illustrate his point of view, Rawls opposes civil disobedience to both militant actions and obstruction, which, as claimed by him, are not organized forms of protest or resistance. Contrary to civil disobedience, militant forms of action are "much more deeply opposed to the existing political system",<sup>65</sup> meaning that a militant does not consider their political system as a near just one (according to Rawls, civil disobedience is only possible in a near just society). At the same time, a militant does not appeal to the sense of justice of the majority and their actions are acts of disruption and resistance,

Thus the militant may try to evade the penalty, since he is not prepared to accept the legal consequences of his violation of the law; this would not only be to play into the hands of forces that he believes cannot be trusted, but also to express a recognition of the legitimacy of the constitution to which he is opposed. In this sense militant action is not within the bounds of fidelity to law, but represents a more profound opposition to the legal order.<sup>66</sup>

The idea that the punishment for the lawbreaking committed as a form of civil disobedience must be accepted is widely acknowledged by liberal authors. As a matter of fact, this notion was recognized even before Rawls' *A theory of justice*, being openly used during the civil rights movement as a strategy to appeal to the conscience of others and to demonstrate respect for the law and for the legal system. As attested by King:

I hope you can see the distinction I am trying to point out. In no sense do I advocate evading or defying the law as the rabid segregationist would do. This would lead to anarchy. One who breaks an unjust law must do it openly, lovingly (not hatefully as the white mothers did in New Orleans when they were seen on television screaming 'nigger, nigger, nigger'), and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.<sup>67</sup>

For King, the "acceptance of punishment was not exclusively or even mainly strategic".<sup>68</sup> On the contrary,

King accepted a complex version of the idea that citizens, even in unjust societies like his own, typically stand under some general obligation to show respect for the law, even if in some instances such fidelity paradoxically demands disobedience: precisely because of this (general) obligation, disobedients are obliged to meet a demanding panoply of tests in order to legitimize their (exceptional) illegal acts.<sup>69</sup>

<sup>63</sup> RAWLS, *A theory of justice*, p. 322.

<sup>64</sup> RAWLS, *A theory of justice*, p. 322.

<sup>65</sup> RAWLS, *A theory of justice*, p. 322.

<sup>66</sup> RAWLS, *A theory of justice*, p. 323.

<sup>67</sup> KING, *Letter from Birmingham City Jail*, p. 74.

<sup>68</sup> SCHEUERMAN, *Recent theories of civil disobedience*, p. 432.

<sup>69</sup> SCHEUERMAN, *Recent theories of civil disobedience*, p. 432.

For Peter Singer,<sup>70</sup> to whom civil disobedience aims at “prodding the majority into reconsidering a decision it has taken”,<sup>71</sup> disobedience followed by acceptance of punishment may lead the majority to the realization that an unjust decision took place. At the same time, Singer<sup>72</sup> recognizes that there are situations in which evasion is justifiable: when, for example, there is no possibility of using punishment for publicity purposes, when there is no possibility of a public trial or when draconian punishment is used to persuade dissidents from publicizing their actions. There is also an interesting perspective by Storing, another liberal author, that is worth mentioning. His point of view, mainly derived from the writings of King, presents itself at the same wavelength with the ones already quoted. Its peculiarity resides, however, in the fact that Storing opted for illustrating his opinion with a much sexist example, a bold deed that deserves to be remembered through history so readers do not forget that even the most radical ideas about civil disobedience (which is not Storing’s case) can be embedded with race and gender discrimination:

A second issue is whether even an open and loving breaking of the law with a willingness to accept the penalty does not constitute or lead to a defiance of the law and whether it would not on any substantial scale lead to anarchy. An open refusal to obey an unjust law shows the highest respect for law in the same way that an open insult to a degraded woman, with a willingness to be slapped for the insult, shows the highest respect for womanhood. Our usual view, however, is that we owe respect to the law as law, to women as women, even when they do *not* in fact exhibit the traits we respect them for.<sup>73</sup>

The reasoning behind Storing’s perspective is indeed more elaborated than the example he provides. According to him, the breaking of an unjust law ought to be done in a loving, open manner and with a willingness to accept punishment *in a fundamentally just regime* (a very similar idea to Rawls’s *nearly just society*) as a means to “show respect for and concede the legitimacy of this system of law” and not to demonstrate respect to the law in abstract.<sup>74</sup> Nevertheless, despite his criticism of King’s reasoning, the association between civil disobedience and the rule of law remains the same.

If we assume, as stated above, that this *requirement* is a theoretical feature imposed by liberal authors in order to relate civil disobedience to the rule of law understanding, in doing so, the civil rights movement and King’s perspective as the starting point, we may ask why such an approach was chosen. First and foremost, it is essential to bring to light the fact that King’s highest respect to the law – latter transformed by Rawls into *fidelity* to the law – refers not only to the rule of law but also to a *higher law* that contains in itself a deeply religious meaning, a consideration that cannot be expected to be *imposed* as a collective moral or ethical ground. Secondly, the adoption of the civil rights movement as the cornerstone of civil disobedience is based on a rather romantic narrative that is constantly used not only as an example but, most importantly, as a *measure* according to which every contemporary political movement falls short to.<sup>75</sup>

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<sup>70</sup> SINGER, *Democracy and disobedience*.

<sup>71</sup> SINGER, *Disobedience as plea for reconsideration*, p. 122.

<sup>72</sup> SINGER, *Democracy and disobedience*.

<sup>73</sup> STORING, *The case against civil disobedience*, p. 93.

<sup>74</sup> STORING, *The case against civil disobedience*.

<sup>75</sup> PINEDA, *Seeing like an activist*.



The idea that a *properly* conducted lawbreaking can operate as a corrective to the unjustness present in some laws, decisions and politics is a perspective originated from the religious model of civil disobedience. In this context, both King and Gandhi believed that "a series of demanding conditions"<sup>76</sup> should be fulfilled so a movement could be considered a legitimate case of civil disobedience. What is more, both authors and their followers perceived these conditions as, for instance, accepting legal punishment, in *spiritual terms*.<sup>77</sup> As a consequence, for them, "civil disobedience represents a religious quest requiring of practitioners a proper moral bearing"<sup>78</sup> that has an unequivocal religious foundation. It is true that liberal authors successfully placed civil disobedience on a non-sectarian frame by acknowledging that a religious view is insufficient to give satisfactory rational grounds as to why disobedients should follow "supernatural commands or criteria".<sup>79</sup> As stated by Scheuerman, "subsequent, more secular, liberal, democratic, and anarchist accounts of civil disobedience all implicitly start with Gandhi's and King's ideas, trying to preserve their skeletal features while fitting them with a new philosophical and political body".<sup>80</sup> However, this process of emptying civil disobedience of its religious connotation while still demanding that requirements ought to be met so civil disobedience can be considered legitimate is, indeed, a *selective appropriation* very similar to the one mentioned by Hanson when describing how Thoreau's work was republished and modified by its editors and Gandhi according to their goals. The requirements used by Gandhi and King in order to fulfill spiritual demands are now employed to circumscribe civil disobedience to the limits of the rule of law.

Considering how the civil rights movement is engraved in the collective imagination as the most notorious example of civil disobedience, it is of the utmost importance to understand how its narrative was constructed so we may unveil its political and social intricacies. As stated by Pineda, "in popular American discourse, the civil rights movement operates not merely as a powerful example of civil disobedience but also as the horizon of judgment for *all* civil disobedience – one that is constantly receding and impossible to meet",<sup>81</sup> meaning that, unless dissidents are willing to exactly replicate the steps of King and his disciples, including going to jail and being prosecuted, it is very likely that a movement will not be considered a case of civil disobedience. How *Black Lives Matter* is generally perceived is a good example of this unattainable measurement: protesters were heavily criticized not only by far-right enthusiasts but by left political activists as well, including some civil rights activists. As stated by Barbara Reynolds, a civil rights activist: "trained in the tradition of Martin Luther King Jr., we were nonviolent activists who won hearts by conveying respectability and changed laws by delivering a message of love and unity. BLM seems intent on rejecting our proven methods. This movement is ignoring what our history has taught".<sup>82</sup> Remarkably, some reinterpretations of this important feature of the civil rights movement may unveil a different comprehension, as the one proposed by Pineda:

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<sup>76</sup> SCHEUERMAN, *Civil disobedience*, p. 11.

<sup>77</sup> SCHEUERMAN, *Civil disobedience*.

<sup>78</sup> SCHEUERMAN, *Civil disobedience*, p. 11.

<sup>79</sup> COHEN, *Civil disobedience*, p. 116.

<sup>80</sup> SCHEUERMAN, *Civil disobedience*, p. 12.

<sup>81</sup> PINEDA, *Seeing like an activist*, p. 1.

<sup>82</sup> REYNOLDS, *I was a civil rights activist in the 1960s*, n.p.

The point of "jail, no bail" – withholding bail money and voluntarily staying in jail – was *not to signal fidelity to law, stabilize state authority, or contain the unruly potential of dissent*. Rather, through "jail, no bail" student activists transformed an experience defined by fear, stigma, and vulnerability into an enactment of courage, dignity, and freedom. They used their time in jail to multiply and extend their protest into new arenas: the jail cell was a site of solidarity building and a mechanism for mobilizing local and national black publics. Accepting arrest was thus a means of withholding collective and individual cooperation from illegitimate power, and thereby refusing the rituals of submission and domination that defined Jim Crow.<sup>83</sup>

If disobedients are expected to accept legal punishment because civil rights activists did so in the past, we should, at the very least, question why. In order to demonstrate respect to the law in abstract? To demonstrate acquiescence to the rule of law? To convince others (the majority, for instance) with "the kind of humility required of the civil disobedient"?<sup>84</sup> To honor King's legacy? To abide by a model of civil disobedience that no longer bears correspondence to the current reality? It is important to consider that the civil rights movement hoped to change the law and to convince others (particularly moderate whites and figures of authority) of the injustices of racism presented in *some* laws, policies, and decisions, a pertinent set of liberal goals in an allegedly "nearly just society" that only needs punctual correctives. However, are those still the objectives of contemporary political movements such as *Black Lives Matter*?

The popular history of the civil rights movement now served as testament to the power of American democracy. This framing was appealing – simultaneously sober about the history of racism, lionizing of Black courage, celebratory of American progress, and strategic in masking (and at times justifying) current inequities. This history as national progress naturalized the civil rights movement as an almost inevitable aspect of American democracy rather than as the outcome of Black organization and intrepid witness. It suggested racism derived from individual sin rather than from national structure – and that the strength of American values, rather than the staggering challenge of a portion of its citizens, led to its change. The movement had largely washed away the sins of the nation, and America's race problem could be laid to rest with a statue in the Capitol.<sup>85</sup>

Despite the fact that the "[...] King's Gandhian-inflected version of civil disobedience briefly succeeded in gaining the sympathy of moderate whites, eventually preparing the way for major reforms such as the 1965 Voting Rights Act",<sup>86</sup> both the civil rights movement and the liberal approach developed by Rawls present serious limitations concerning civil disobedients objectives. Based on Rawls and other liberal authors' perspective, civil disobedience cannot, in any case, oppose itself to the political or to the legal system. This idea is endorsed by Walzer, to whom

Civil disobedience is generally described as a nonrevolutionary encounter with the state. A man breaks the law, but does so in ways which do not challenge the legitimacy of the legal or political systems. He feels morally bound to disobey; he also recognizes the moral value of the state; civil disobedience is his way of maneuvering between these conflicting moralities.<sup>87</sup>

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<sup>83</sup> PINEDA, *Seeing like an activist*, pp. 19–20, emphasis added.

<sup>84</sup> PINEDA, *Seeing like an activist*, p. 1.

<sup>85</sup> THEOHARIS, *A more beautiful and terrible history*, s/p.

<sup>86</sup> SCHEUERMAN, *Civil disobedience*, p. 33.

<sup>87</sup> WALZER, *Obligations*, p. 24.

Albeit questioning some of the most traditional aspects of civil disobedience, *i.e.* its civility represented by the absence of coercion and violence (up to a point, at least), Walzer insists that civil disobedience must be circumscribed to a nonrevolutionary path, falling into the same category as Rawls, King, Bedau, Storing and so many others. This proposal is actually an attempt to reconcile civil disobedience to the limits of the law and the state. As stated by Storing in respect of King's death, "we have lost not only an eloquent advocate of civil disobedience but a leader who was in the course of transcending civil disobedience *in the direction of statesmanship*",<sup>88</sup> demonstrating that this approximation of civil disobedience and the law is, indeed, the leading attribute of the liberal model.

In fact, this is an attempt to *institutionalize* a political form of dissent that has nothing to do with institutions. On the contrary, civil disobedience arose *against* political institutions that produce unjust laws, decisions and politics. Therefore, civil disobedients do not have to recognize the legal system's legitimacy in order to be considered civil disobedients, nor do they have to demonstrate fidelity or respect to the law by accepting legal punishment and limiting their goals. It is possible that this attempt to almost legalize civil disobedience was an endeavor undertaken so as to transform civil disobedience into something more palatable, less revolutionary, perhaps (even though trying to legalize or institutionalize lawbreaking seems awfully like an oxymoron). The imposition of these constitutive elements can be interpreted, in this sense, as an attempt to create a defined concept of civil disobedience, bringing the subject to the academic debate and, by the same token, defending it against its most important critics of that period (1960-1980), such as Fortas, Griswold or even the then US President Richard Nixon who, amidst the civil rights movements agitation, claimed that the idea that every citizen has an inherent right to decide which laws should be obeyed or disobeyed was a corrosive doctrine.

[...] it is understandable that so much intellectual effort has been invested in an attempt to articulate and justify a doctrine of the permissible forms of civil disobedience. It must be used as a measure of last resort after all other means have failed to obtain one's desired goal; it must be non-violent; it must be openly undertaken; and its perpetrators must submit to prosecution and punishment; such acts must be confined to those designed to publicize certain wrongs and to convince the public and the authorities of the justice of one's claims; it should not be used to intimidate or coerce. Such and similar conditions have been much discussed and often favoured. All of them are open to objections similar to those deployed above against the non-violence requirements.<sup>89</sup>

Nevertheless, this theoretical effort converted civil disobedience into a *domesticated* form of protest, draining its potency and limiting its use to mere adjustments and corrections within the context of a allegedly nearly just society. In the next section, we will argue that a broader, radical conceptualization of civil disobedience is more appropriate to explain how contemporary movements work, sustaining that, instead of adopting a new concept, such as uncivil disobedience, it is more fruitful to dispute the concept of civil disobedience itself, especially against the circumscribed liberal model. In order to reason that there is no ultimate, definitive theoretical definition, we attempted hitherto to demonstrate how the idea of civil disobedience has always been disputed

<sup>88</sup> STORING, *The case against civil disobedience*, p. 85.

<sup>89</sup> RAZ, *Civil disobedience*, p. 162.

through a long process of selective appropriations with different intentions and consequences. Therefore, we suggest the possibility of a new concept of civil disobedience, a concept that takes into consideration the demands of the political struggles of our time so as not to neglect the praxis, placing an excessive emphasis on the academic point of view.

### 3. The radicalism of civil disobedience

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For the liberal model, “[...] activists should keep in mind that the whole point of civil disobedience is persuasion”,<sup>90</sup> which means that “civil disobedients tackle common political concerns by addressing their political equals, with their actions structurally akin to public speech or communication”.<sup>91</sup> According to Rawls, civil disobedience “addresses the sense of justice of the community and declares that in one’s considered opinion the principles of social co-operation among free and equal men are not being respected”,<sup>92</sup> which means that, for the liberal model, civil disobedience presents itself as a *communicative tool* that can be used so as to bring an issue to light, to change the majority’s opinion, and to create political pressure on those who have political power to make decisions. As said by King,

You may well ask, ‘Why direct action?’<sup>93</sup> Why sit-ins, marches, etc.? Isn’t negotiation a better path? You are exactly right in your call for negotiation. Indeed, this is the purpose of direct action. Nonviolent direct action seeks to create such a crisis and establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. [...] So the purpose of the direct action is to create a situation so crisis-packed that it will inevitably open the door to negotiation.<sup>94</sup>

Acknowledging civil disobedience mainly as an appeal to the majority’s sense of justice – and, by proxy, as a *communicative tool* –, in addition to being an overly restricted view, disregards that there are situations that cannot be perceived as appealing to anyone’s sense of justice but have as its objective “increasing the political and economical costs for a certain political option”.<sup>95</sup> What if, however, instead of considering civil disobedience as a way of producing political pressure or changing the majority’s opinion by communicating an issue, a characterization that can only be described as a selective appropriation made by the liberal account, we interpret civil disobedience as a form of doing politics?

If we adopt the point of view of one of the most prominent movements of our time, *e.g.*, *Black Lives Matter*, analyzing it as a paradigm, it is evident that protesters no longer aim to appeal to the conscience of moderate white citizens with a view to promoting legal equality. On the contrary, they explicitly *demand* the extinction of racial inequality altogether, including the one existent in law in the form of structural racism. If we take the

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<sup>90</sup> SCHEUERMAN, *Civil disobedience*, p. 44.

<sup>91</sup> SCHEUERMAN, *Civil disobedience*, p. 44.

<sup>92</sup> RAWLS, *A theory of justice*, p. 320.

<sup>93</sup> In this case, direct action is understood as a synonym of civil disobedience.

<sup>94</sup> KING, *Letter from Birmingham City Jail*, pp. 70-71.

<sup>95</sup> CELIKATES, *Civil disobedience as a practice of civic freedom*, p. 216.

time to name those black lives that were lost due to police brutality or with police's and state's consent, we can easily understand that the time to rely solely on political solidarity, at least in these particular circumstances, has long gone. It seems highly unlikely that *trumpstis* or *bolsonarists* would be willing to hear or discuss any demands made by civil disobedients regarding police brutality or racial justice, even if civil disobedients were to act in a most humble, polite way that would have made King himself proud. By the same token, rather than trying to mollify politicians, protesters can easily try to engage in a new form of politics based on dissent (after all, the main idea behind civil disobedience is the possibility of withdrawing consent according to an individual or a collective principled justification).

As stated by Celikates,

whereas from a liberal perspective, civil disobedience mainly appears as a form of conscientious 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, and as a dynamizing counterweight to the rigidifying tendencies of state institutions.<sup>96</sup>

As pointed out by Biondi<sup>97</sup> in an article about *Black Lives Matter* published almost four years before George Floyd's death, the radicalism now established in contemporary demonstrators are no longer compatible with a demure posture that was once used to persuade and to touch others about the immorality and injustices of racism, sexism, bigotry, and so forth. This idea was in fact proven by the wave of protests that has spread as wildfire in the United States following the death of George Floyd, when rioters, instead of sitting in silence in order to make a stand, burned police stations to the ground to emphasize the fact that, more than 50 years after the civil rights movement, the law - and the police, are not only not protecting black people, but are, instead, actively killing them on a regular basis.

This, of course, does not mean that every act of civil disobedience must be employed in a more radical fashion. If, for illustrative purposes, a movement seeks to ignite the public debate in regard to a particular subject, perhaps, taking into consideration a strategic approach, it is more productive to engage in actions that do not antagonize a substantial part of the population. The difference is that the liberal model defines what civil disobedience *ought to be* and a more broader - and radical - conceptualization aims to explain what civil disobedience *can be*. In this context, one could argue that a radical form of political activism should not be recognized as civil disobedience, reasoning, instead, that a different nomenclature must be adopted.<sup>98</sup> Contrastingly, we already established that there has always been a theoretical dispute concerning civil disobedience's conceptualization, even though the liberal model still prevails in the popular discourse with the civil rights movement as its cornerstone. What is more, it is possible that an approach of civil disobedience that recognizes this dispute, refraining itself from any attempt to colonize an idea that is historically built, is more honest and, consequently, more open to discussion.

<sup>96</sup> CELIKATES, *Democratizing civil disobedience*, p. 7.

<sup>97</sup> BIONDI, *The radicalism of Black Lives Matter*.

<sup>98</sup> For an interesting concept of uncivil disobedience, cf.: DELMAS, *A duty to resist*.

A radical perspective of civil disobedience is no novelty. As written by Scheuerman in an insightful paper published in 2015, in recent years, there has been a shift in the way in which civil disobedience has been perceived. This shift represents a displacement carried out not only by researchers but also by political activists as well, all of whom no longer accept that a liberal account of civil disobedience is sufficient to produce the necessary changes in today's society. In fact, as pointed out by Scheuerman,<sup>99</sup> for contemporary critics of civil disobedience, such as Robin Celikates and Kimberly Brownlee, it is high time to surpass the legalistic orientation that derives from the standard, liberal model, according to which a conscientious and moral challenge to the law can only be achieved if the demonstrators sustained the utmost respect for the law, even when breaking it: "For radicals critics, it is time to move beyond the 'hairsplitting legalistic' orientation of the standard liberal model, which forecloses possibilities for creative protest and stands in the way of far-reaching change".<sup>100</sup>

Many authors may argue, as Scheuerman does in his paper, that this shift, named by him as *an anti-legal turn*, "obscures civil disobedience's identifiably legal contours",<sup>101</sup> a very risky decision considering that, nowadays, the liberal model has become the commonplace account of the subject, leading civil disobedience to be inextricably intertwined with the highest respect for the law and, thus, with the rule of law. In this framework, "nonviolent direct action represented 'the ultimate form of persuasion'. However, even if we assume the fact that "in political communities based on the rule of law, not surprisingly, political discourse tends irrepressibly to take 'legalistic' forms",<sup>102</sup> we cannot presume that this ought to be civil disobedience's destiny. On the contrary, as mentioned before, the law-based approach of civil disobedience is a theoretical construct imposed by the liberal model (especially by King and Rawls) and by a romantic narrative of the civil rights movement that cannot be reconciled with today's political movements. The liberal ideal according to which the law can provide the necessary changes with a view to creating a democratic, just society does not have the same appeal it had in the 1960s and '70s. In fact, this goes hand in hand with a romanticized perspective according to which "the civil rights movement became a way for the nation to feel good about its progress – and King's legacy became enshrined in his 'dream speech'",<sup>103</sup> revealing an unmovable hope that the law and the legal system are just, despite some occasions injustices. Additionally,

The focus in 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.<sup>104</sup>

After all, if creating equality through legal channels were indeed enough to change the *status quo*, as suggested by the liberal model and by the mainstream narrative of the

<sup>99</sup> SCHEUERMAN, *Recent theories of civil disobedience*.

<sup>100</sup> SCHEUERMAN, *Recent theories of civil disobedience*, p. 427.

<sup>101</sup> SCHEUERMAN, *Recent theories of civil disobedience*, p. 427.

<sup>102</sup> SCHEUERMAN, *Recent theories of civil disobedience*, p. 442.

<sup>103</sup> THEOHARIS, *A more beautiful and terrible history*, s/p.

<sup>104</sup> CELIKATES, *Civil disobedience as a practice of civic freedom*, p. 222.

civil rights movement, political movements such as *Black Lives Matter* would not have been created and would not have been needed. The liberal law-based defense of civil disobedience that seems to claim an ontological status must be questioned and its ideological inclinations must be unveiled so we are able to understand its intricacies and complexities, presenting, at the same time, an alternative approach.

When producing this alternative approach, to observe contemporary political movements – a proposition already voiced in this paper – is an engrossing methodological path that may be employed so as to avoid the same conceptual trap the liberal model presents. It seems fairly unreasonable to impose on civil disobedients, individuals who put their bodies at risk in order to protest and create political changes, theoretical requirements that must be followed to legitimize their political actions, even if these requirements were reproduced adopting the civil rights movement as a practical example, as some may suggest. More than a selective appropriation, this is best characterized as a colonization process in which abstracts rules and conceptualizations are imposed on actual civil disobedience movements of our time. Rather than trying to conform contemporary movements to a conceptual proposition made more than 50 years ago, it is more productive to interpret civil disobedience assuming these same contemporary movements as a starting point. In this circumstance,

They [liberal authors] 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.<sup>105</sup>

It is undeniable that the civil rights movement can be interpreted as a paradigm of civil disobedience, but so does *Black Lives Matter*, albeit their apparently irreconcilable differences. In the earlier mentioned discussion regarding the different interpretations and meanings of civil disobedience, the aspect of race and its associated insurgencies are significant, for they present a framework with the possibly two most prominent cases of civil disobedience. In this way, the civil rights movement and *Black Lives Matter* are two historical phenomena or, even, two paradigms "whose role [is] to constitute and make intelligible a broader historical-problematic context".<sup>106</sup> Since the liberal model was developed specifically to address the demands and nuances of civil disobedience during a different era, a new model of civil disobedience is needed to better interpret and explain modern instances of civil disobedience, assuming, in doing so, a practice-based point of view.

The idea of consent raised by Thoreau<sup>107</sup> reveals the fragility of hierarchical political power, as it highlights the fundamental importance of obedience in correspondence between rulers and ruled. Based on this perception, it becomes possible to think about social structure from a bolder and more radical point of view, which accepts

<sup>105</sup> CELIKATES, *Civil disobedience as a practice of civil freedom*, p. 217.

<sup>106</sup> AGAMBEN, *The signature of all things*, p. 9.

<sup>107</sup> THOREAU, *Resistance to civil government*.

the challenge of taking risks and building politics in a community based on disobedience and refusal. Recovering the notion that civil disobedience is a form of political action based on dissent, *i.e.*, based on the possibility of withdrawing consent according to an individual or a collective principled justification, we may define it “[...] as the expression of a democratic practice of collective self-determination, as a dynamizing counterweight to de-rigidifying tendencies of state institutions”.<sup>108</sup> This informal and extra- or anti-institutional form of political action provides individuals with the opportunity to participate in protests when official and regular institutional channels of action and communication fail to meet their needs, a frequent scenario in representative democracies.<sup>109</sup> As a consequence, the vertical structure of state authority is challenged by the horizontal power of the association of individuals, dislodging civil disobedience from a legalistic standpoint to a political one. Notwithstanding the fact that a broader conceptualization may incur in some problems, such as the difficulty to distinguish civil disobedience from revolution or even conscientious objection, it is preferable to incur in such error than to create a concept that constantly delegitimizes valid political actions.

## Conclusion

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The primary concern of this paper was to unveil how civil disobedience’s many conceptualizations, particularly the liberal model, are permeated with ideological and historical intricacies that, more often than not, circumscribes political movements in terms of limitations to the law and state’s institutions and to a series of theoretical prerequisites. The second concern was to suggest a broader, practical-base concept of civil disobedience established on the idea of withdrawal of consent that does not impose constitutive elements and that does not require fidelity to the law. Within this framework, civil disobedients are not obliged to recognize the legitimacy of the legal or the political system, nor do they have to follow a set of rules for their actions to be considered legitimate.

Claiming or advocating for a radical approach to civil disobedience does not imply that conventional models are necessarily ineffective. On the contrary, traditional models may serve the demands of protestors, such as appealing to an authority or the majority, shedding light on a particular issue, or even changing a specific law or policy. The critique lies in the assumption that liberal democracies function as “nearly just societies” – a definition that even Rawls struggles to define accurately – and, because of that, civil disobedience should be constrained to operate within the bounds of the rule of law or constitutional order, always limited to reformist intentions and relegated to an almost symbolic role.

The idea according to which the withdrawal of consent is a form of political dissent is *not* a legalistic one, nor does it require a normative status. Here lies the core of civil disobedience: not in creating pressure on authorities or in following a set of rules imposed by a specific ideological account, but in doing politics in a non-institutional fashion, without hierarchical and legal structures. Of course, a radical conception of civil disobedience acknowledges its inherent incompleteness and seeks solutions from actual political

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<sup>108</sup> CELIKATES, *Civil disobedience as a practice of civil freedom*, p. 223.

<sup>109</sup> CELIKATES, *Civil disobedience as a practice of civil freedom*.



movements, offering a significant advantage in that it allows for reinvention in response to the demands of a particular time, recognizing that it should not be the determinant of a movement's legitimacy.

If we consider, as Agamben and Feuerbach did, that the philosophical element present in each work is precisely what "remains unsaid and demands to be developed", it is up to the present essay to extrapolate the theoretical limits already established about civil disobedience, not to present a final definition elaborated in the light of the academic world as an absolute theoretical construct, but rather to think of civil disobedience as a radical form of political praxis. What Feuerbach and later Agamben defined as *Entwicklungsfähigkeit*, translated as "capacity to be developed", the philosophical element present in any work that has value, whether it be a work of art, science or thought, is what we sought in these pages. We hope that something still remains unsaid and that civil disobedients may discover and articulate it.

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