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David Lefkowitz
University of Richmond, dlefkowi@richmond.edu

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Should the Law Convict Those Who Act from Conviction? Reflections on a Demands-of-Conscience Criminal Defense‡

David Lefkowitz, University of Richmond

How should the judge or jury in a just criminal court treat a civil disobedient, someone who performs a conscientiously motivated communicative breach of the criminal law? In her excellent new book *Conscience and Conviction: The Case for Civil Disobedience*, Kimberley Brownlee boldly contends that all else equal a court of law should neither convict nor punish such offenders.[1] Rather, people who perform conscientiously motivated communicative acts of disobedience to law ought to enjoy what she labels a demands-of-conviction excusatory defense for their criminal conduct.[2] Though I agree with Brownlee that all else equal civil disobedients ought to be fully exculpated for their criminal conduct, I believe she mischaracterizes the nature of the criminal defense to which they are entitled. Whereas Brownlee maintains that such actors ought to be excused for their criminal breach, I argue that they ought to enjoy a justification defense. Acts of civil disobedience are not (morally) wrongful violations of the law for which an actor ought not to be blamed, as Brownlee would have it. They are violations of the law that are not (morally) wrong in virtue of their illegality. It is the absence of wrongdoing, and not merely

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[1] Brownlee (2012).

[2] Brownlee distinguishes between conscientious conviction and conscience, with the former describing a serious and sincere, though possibly mistaken, belief in a moral norm and the latter referring to "a set of practical moral skills that stem from an inward knowledge of the working of our own mind and heart" Brownlee (2012: 52). Since Brownlee's nomenclature is not widespread, I have used the phrase 'demands of conscience' in this paper's title. Henceforth, however, I follow Brownlee in using the phrase 'demands-of-conviction' to refer to a criminal defense for those who are motivated to violate the law by a conscientiously held conviction.

the absence of fault, that renders the conviction and punishment of those who perform acts of civil disobedience inappropriate.

On its face this criticism of Brownlee's project may seem disappointingly small. However, the difference between being justified in one's conduct and merely being excused for it is one Brownlee herself acknowledges to be of great importance to any self-respecting person, and rightly so as I explain below.[3] Moreover the account of legal defenses I offer here allows for a more nuanced account than does Brownlee's of the ways in which a person may point to her conscientious convictions to defend her norm-violating conduct. As I explain below, for example, it reveals the partial truth in both Brownlee's and Jeremy Horder's opposing views on the availability to civil disobedients of a demands-of-conviction excusatory defense. Consider, too, that the plausibility of an argument for a new criminal defense such as the one Brownlee defends likely depends to a considerable extent on how well it coheres with, or follows from, our best understanding of criminal defenses in general. To the extent that recasting a demands-of-conviction defense as a justification rather than an excuse advances this end, it serves to buttress the case for its legal recognition. Finally, consideration of a novel criminal defense provides an opportunity to revisit, reconceive, and perhaps rationally reconstruct those defenses already recognized in a particular jurisdiction (or in many jurisdictions). Even those unconcerned with conscientiously motivated disobedience to law, then, may have reason to pay careful attention to the

[3] Brownlee (2012: 161).

conclusions drawn by those like Brownlee and me whose analysis of criminal defenses is motivated by such a concern.

I begin in section I with a brief description of Brownlee's account of conscientious conviction, civil disobedience, and the moral right to conscientious action. In section II I offer an analysis of the nature of justificatory and excusatory legal defenses. Justificatory legal defenses establish that an agent did no wrong in virtue of performing a criminally proscribed act as such by demonstrating to the law's satisfaction that the particular criminal law the defendant breached lacked legitimate authority over her in the context in which she violated it. Drawing on Joseph Raz's account of the conditions under which law enjoys legitimate authority, I argue that justificatory legal defenses involve the state's recognition either that defendants are more likely to act on an undefeated reason by acting on their own judgment than by deferring to the law, or that within certain limits it is more important in cases like the one in question that people act on their own judgment regarding what they ought to do than that they get it right. Contrary to what I take Brownlee's position to be, justificatory legal defenses do not establish that the defendant's conduct was justified all things considered, only that it was not unjustified in virtue of being a violation of the law. As for legal excuses, I follow John Gardner, on whose analysis of justifications and excuses Brownlee also draws, in characterizing them narrowly as wrongful violations of the law for which the state ought not to fault defendants on the grounds that they lived up to our reasonable or justifiable expectations of them. I contend that the reasonable expectations in question concern certain errors or malfunctions in practical reasoning for which we

ought not to hold agents responsible. Construed in this narrow manner, legal excuses constitute concessions the law makes to human frailty or imperfection. Brownlee's analysis of (legal) excuses is importantly incomplete, I argue; while she rightly notes that paradigmatically excuses involve a claim to be justified in believing, albeit mistakenly, that one was justified in acting as one did, she fails to engage sufficiently with the questions of what can justify a person in holding that mistaken belief and why that justification renders conviction and punishment inappropriate.

In section III I employ the analyses of justificatory and excusatory legal defenses sketched above to demonstrate that Brownlee's own arguments for a demands-of-conviction defense actually support its construal as a justification, not the excuse she seeks to defend. Specifically, I contend that the value of personal autonomy and psychological health to which Brownlee appeals grounds a moral right to conscientious action, or perhaps better, partly characterizes the principle of humanism that Brownlee identifies as the basis for such a right. Moreover, the value of autonomy and psychological health is not the sort of consideration that can excuse wrongful conduct, though distortions of one's practical reasoning caused by fear or anger in response to threats to one's autonomy or psychological health might be. I briefly explore this last possibility in section IV, where I argue that civil disobedients may sometimes have an excuse for breaches of the criminal law that fall outside the scope of their right to conscientious action and for which they are therefore not entitled to a justificatory legal defense. I also examine the aforementioned dispute between Brownlee and Horder regarding the justifiability

of extending an excusatory legal defense to civil disobedients, and argue that while Brownlee correctly concludes that such actors have a prima facie claim to a criminal defense, Horder is largely right when he argues that they ought not to be excused.

Before I turn to the tasks outlined above, I note two important limits on the scope of the discussion. First, as I have indicated several times already, both Brownlee and I take our arguments to establish only prima facie or defeasible claims to a justificatory or excusatory demands-of-conviction defense. We aim to establish what sort of treatment civil disobedients deserve; that is, how a criminal court ought to treat them insofar as it aims to respond to them as responsible agents. Other moral considerations may sometimes justify the state's failure to give defendants what they deserve, however. For example, justifiable concerns regarding its abuse may warrant a demands-of-conviction justificatory defense with a far narrower scope than the moral right to conscientious action it serves to institutionalize.[4] Additionally, the need to strike a balance between individuals' interest in conscientious action and individuals' interest in a stable and effective state that renders them secure in their moral rights may justify the state's imposing certain burdens on those who perform acts of civil disobedience even where, taken in isolation, such conduct does not merit conviction or punishment.[5] Thus an analysis of the treatment conscientiously motivated law-breakers deserve is unlikely to be a

[4] For illuminating discussion of this point, see Horder (2004: 15-20); see also Brownlee (2012: 250-2).

[5] Brownlee and I dispute how best to understand this argument. See Brownlee (2012: 240-8) for criticisms of my argument that the moral right to civil disobedience protects those who perform such acts from punishment but not from penalties; Lefkowitz (2007: 218-23). In Lefkowitz (2012) I offer a preliminary response to those criticisms, but space does not permit me to address them further here.

complete account of how a just state ought to treat them. The second, and related, limit on my investigation concerns its almost exclusive focus on the trial stage of the law's response to conscientiously motivated breaches of the criminal law. That hardly exhausts the domains in which we ought to consider how a just state should respond to such acts. For example, we should consider whether conscientiously motivated disobedience to a particular law, even when it is neither justified nor excused, constitutes a less serious wrong than does non-conscientiously motivated disobedience to the same law. If so, and if punishment ought to be proportionate to the moral seriousness of the wrong, then at least some conscientiously motivated law-breakers might merit lesser sentences than "normal" offenders. This question concerns the sentencing phase, and there are others that concern policing and decisions to prosecute conscientiously motivated violations of the law.[6] One can only do so much in a single paper, however; therefore I set aside the issues identified in this paragraph to focus on desert-based arguments for a demands-of-conviction criminal defense.

I

Brownlee characterizes a person with a conscientious moral conviction as someone with a sincere and serious, though possibly mistaken, moral commitment. She spells out the sincerity and seriousness that are the mark of a conscientiously held conviction in terms of four conditions that together comprise the communicative principle of conscientiousness.[7] A person with a conscientiously

[6] See, e.g., Smith (2012).
[7] Brownlee (2012: 29-47).

held conviction exhibits, as best she can, consistency between her moral judgment, her actions, and her attitude toward herself and others. Her moral judgment applies universally; that is, to all relevantly similar agents in all relevantly similar circumstances. She does not seek to evade the consequences of fidelity to her moral conviction for the sake of personal protection, i.e. simply because doing so will better advance her self-interest than will non-evasion. Finally, all else equal a fully conscientious actor is willing to defend her moral conviction in a reasoned dialogue with others. Together with the non-evasion condition, this last, communicative, condition for the possession of a conscientious moral conviction sometimes entails the necessity of actively challenging existing social practices, including the law and public policy, as part of an effort to engage others in a dialogue regarding the justice of those practices.

Those with conscientious moral convictions, Brownlee maintains, enjoy a limited moral right to act on them.[8] The moral right to conscientious action is grounded in a principle of humanism, according to which "society has a duty to honor the fact that we are reasoning and feeling beings capable of forming deep moral commitments."[9] The limits of the moral right to conscientious action are drawn by respect for others' rights, and therefore it does not extend to acts that "either violate the dignity of others or threaten their basic needs."[10] Though Brownlee says otherwise, it seems to me that the scope of the right is also constrained by the requirement that genuinely conscientious action be

[8] Brownlee (2012: 140-51).
[9] Brownlee (2012: 7).
[10] Brownlee (2012: 141; 149).

communicative in the sense described above. Support for this assertion comes from a consideration of Brownlee's characterization of civil disobedience.

Brownlee holds that civil disobedience "must include a deliberate breach of law taken on the basis of steadfast personal commitment [i.e. a conscientious moral conviction] in order to communicate with a relevantly placed audience, which is usually society or the government, our condemnation of a law or set of policies."[11] As an expression of an agent's conscientious moral convictions, civil disobedience falls within the scope of the moral right to conscientious action. Because it must be conscientiously motivated, only those acts that meet certain process-related constraints that reflect the necessarily communicative nature of conscientious action qualify as civil disobedience. Brownlee spells out these constraints in terms of a civilly disobedient actor's sensitivity to three reasons she has to "not be overly radical" in the form or method she employs to communicate her conviction.[12] First, certain tactics may distract others' attention from the conviction she seeks to express; they may become so focused on what she did that they pay little or no attention to her reasons for doing it. Second, the civilly disobedient actor's attempt to engage others in a dialogue regarding the justice of the law or policy she protests will likely only succeed if she treats (or is seen to treat) others as interlocutors with whom she aspires to engage in a rational, or reason-giving, discussion. Finally, civil disobedients' awareness of their own fallibility gives them a reason to be and to display modesty in their violation of social norms, particularly those such as the

[11] Brownlee (2012: 18).
[12] Brownlee (2012: 20).

laws of a liberal-democratic state that have some claim to epistemic superiority.[13] All else equal, any act of disobedience to law that does not reflect (adequate) sensitivity to these reasons fails to be communicative. It follows that such acts cannot be expressions of a conscientiously held conviction, and so their permissibility cannot be established by appeal to a moral right to conscientious action.[14]

In section IV I briefly consider one sort of defense that might be offered for conduct intended to protest the injustice of a law or policy that falls afoul of these process-related constraints on civil disobedience; what I label failed attempts at civil

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[13] The epistemic authority of such norms ought not to be exaggerated, however, as Brownlee rightly argues.

[14] Brownlee contrasts civil disobedience with what she terms personal disobedience: non-communicative violations of the law motivated by personal conviction that are either evasive or non-evasive. Brownlee rightly points out that, in comparison to the civil disobedient, we have more reason to doubt the seriousness and sincerity of a law-breaker's claim to have acted from moral conviction if she attempts to evade the law's detection of her criminal conduct and refuses to offer a reasoned defense of the conviction on which she allegedly acted. At times, though, it seems that Brownlee makes a stronger claim, namely that actors who do not meet the communicative condition and perhaps also the non-evasion condition lack a conscientious moral conviction altogether.

Brownlee frequently identifies personal disobedience with what other authors refer to as conscientious objection, and then claims to reverse the standard liberal view by arguing that civil disobedients have a stronger claim to accommodation by the state than do personal disobedients. I think she misrepresents the views of many liberal theorists when she equates their notion of a conscientious objector with her conception of a personal disobedient. As I read the theoretical literature on principled disobedience to law (which, admittedly, is far from uniform in how it characterizes these concepts), what distinguishes civil disobedience from conscientious objection is not evasion or communication but whether the disobedient actor aims to bring about a change to existing law or policy or merely seeks to be exempted from it. The "standard liberal view," then, is not that actors who non-communicatively violate the law have a stronger claim to accommodation by the state than do those who do so communicatively. Instead, the claim is that the state should be more accommodating toward those who simply seek an exemption from a law or policy than it is towards those who violate the law as part of a political campaign to change it. Even if the arguments for the "standard liberal view" grounded in democratic authority fail, as Brownlee and I both argue they do, there may be other reasons that support it. The relative strength of the claim to accommodation aside, what I take to be the standard liberal distinction between civil disobedience and conscientious objection leaves room for an argument that the state ought to tolerate conscientiously motivated disobedience to law even when it is not undertaken for the purpose of challenging law or policy. Contrary to Brownlee's assertion (2012: 144-5), then, an argument like my own that grounds a right to civil disobedience in a more general right to political participation need not imply that the state has a duty to accommodate conscientious disobedience to law only when undertaken for a political aim by disempowered minorities.

disobedience. Primarily, however, my concern is with acts of civil disobedience as Brownlee characterizes them. All else equal, a just state ought to accord those who perform conscientiously motivated communicative acts of disobedience to law a demands-of-conviction legal defense, one that I argue contra Brownlee recognizes their conduct as justified, not excused.

II

Normative defenses are responses to accusations of wrongdoing; i.e. to accusations that a person has violated a norm that applies to her in virtue of a certain role she occupies or status she has, such as friend, nurse, moral agent, or legal subject. They constitute attempts to demonstrate to the accuser (and perhaps also to third parties) that she does not have the reason(s) she takes herself to have to blame the accused. Defenses serve this end in at least four distinct ways: an actor may contest the attribution of the act to her; she may deny that she qualified as a responsible agent when she "performed" the wrong act (or perhaps better, when the norm-violating behavior occurred); she may contest the accusation that in acting as she did she committed the wrong of which she is accused, or she may contest the (implicit) claim that she merits blame or some other form of censure for the wrong she committed. The point of the first two defenses is to deny the attribution of the act or behavior to the accused. If a person did not perform the act in question then she does not merit blame for having done that act. The point of the second two defenses is to take responsibility for the act in question, to acknowledge or endorse its attribution to one as a responsible agent, but to argue either that one has a

justification for acting as one did or that one ought to be excused for one's wrongful action.

Arguably this normative practice of accusation and response is central to many actual criminal legal systems, and as a matter of justice, ought to be. Criminal or legal defenses are responses to the state's accusation of criminal wrongdoing; that is, to the charge that one has acted wrongly by violating one or more criminal laws. Many criminal law systems recognize examples of all four types of defense to an accusation of wrongdoing described above. Since the cases of interest in this paper are ones in which the defendant does not protest the law's attribution to her of a criminal act, i.e. to the performance of a token of the type of act described in a particular criminal offense definition, I set aside the first two types of defenses and focus on justifications and excuses. That strategy may strike some as mistaken since civil disobedients sometimes make remarks that might be interpreted as denying their status as responsible moral agents. The best known example, of course, is Martin Luther's proclamation: "here I stand, I can do no other." However, I maintain that these utterances are better interpreted as statements regarding the actions the civil disobedient takes herself to have undefeated reason to perform. Luther's claim, then, is that as a *rational* agent, one able to respond correctly to the reasons that apply to him, he cannot act other than he does. Civil disobedients make remarks like these in order to affirm their rationality, and thereby aim to rebut those who would take their deviant, norm violating, conduct as evidence to the contrary.[15] In

[15] See Brownlee (2012: 169) on this point.

attempting to offer a justification or excuse for her criminal breach the civil disobedient takes responsibility for it.

Since both justificatory and excusatory legal defenses result in the defendant's acquittal, it may seem to be of only academic interest which of the two the accused may offer in defense of her criminal conduct. Yet as John Gardner notes, the outcome of a trial in which the defendant is found justified in her criminal breach is not the same as the outcome of a trial in which she is merely excused for having performed such an act.[16] While the defendant avoids public condemnation and punishment in both cases, in the former she does so because the state determines that she did not act wrongly in virtue of disobeying the law; at least in this respect she did not err or make a mistake in practical reasoning. In contrast, in a case where the defendant qualifies only for an excuse the state finds that she erred in not taking the criminal prohibition as an undefeated reason for action, or as excluding the reason on which she acted, and while it does not fault her for doing so it nevertheless finds her practical reasoning deficient; that is, it judges her to have come up short as a rational agent. Gardner rightly emphasizes that we care about this difference, and Brownlee explicitly concurs.[17] In responding to an accusation of wrongdoing we would rather demonstrate that our conduct was justified than that it was excused because the latter involves conceding a rational failure, a failure to act on the reasons on which we ought to have acted. No self-respecting person

[16] Gardner 132-33

[17] Gardner (2007: 133-4). Brownlee writes "… we not only want to assert our basic responsibility if we take ourselves seriously, but have an interest in asserting it as reasoning beings" and that "according to this Aristotelian picture, if we can, we give a justificatory explanation for any wrong we do" (2012: 161).

wants to be a failure. This is likely to be especially true of the conscientiously motivated civil disobedients on whose behalf Brownlee argues for a demands-of-conviction defense. After all, she maintains that a sine qua non of those who disobey the law on the basis of conscientious moral convictions is that "they be willing to communicate [their] judgment that a perceived injustice warrants [their] opposition."[18] Surely people so attuned to (what they perceive to be) the demands of justice, and so committed to realizing it that they risk the various official and unofficial sanctions that typically attach to violation of the law, will be the kind of people to whom it matters a great deal whether they are, and are publicly judged to be, justified or only excused for their criminal breaches.[19] Moreover, it should matter to us whether conscientiously motivated civil disobedients merit a justificatory defense or an excuse, since we ought to strive to hold people responsible only for that for which they are responsible, whether it be doing no wrong in virtue of performing a criminally prohibited act or only not being at fault for doing so.

In offering a justificatory defense for her criminal breach, a defendant concedes that she performed a token of a type of act prohibited by the criminal law but maintains that she was not wrong to do so. How can that be? If she committed the criminal offense then how can her act not be wrong? The answer, I submit, is

[18] Brownlee (2012: 160).

[19] This is not to deny that civil disobedients may care more about correcting the perceived injustice they oppose than their own treatment at the state's hands. But the fact that on the basis of strategic considerations a civil disobedient may pursue an excusatory defense rather than a justificatory one (e.g. couch her defense in terms of blameless wrongdoing rather than in terms of having committed no wrong) does not entail that she does not care whether others think her criminal breach justifiable or merely excusable.

that justificatory defenses purport to identify cases in which the state lacks authority vis-à-vis the defendant; that is, cases in which agents do not have a duty to obey the law. As I will explain, defendants may contest the law's authority with respect to their performance of a particular act in one of two ways. Either they may argue that in cases like the one in question the law does not serve to enhance its subjects' conformity to right reason, or they may argue that respect for their autonomy precludes the state from requiring them to defer to its action-guiding judgments vis-à-vis the act-type in question. Before turning to the kind of arguments defendants may offer as legal justifications for their criminal breaches, however, I want to emphasize the nature of the claim they make. Contrary to Brownlee (and to Gardner, on whose account of defenses she relies), justificatory legal defenses need not be all things considered justifications, understood as a demonstration that one acted for an undefeated reason.[20] Rather, justificatory legal defenses speak only to the reasons for action an agent has qua legal subject. If successful, what they demonstrate is that an agent did no wrong *in virtue of performing a criminally proscribed act as such*. Since the law enjoyed no legitimate claim to authority over her with respect to the particular act she performed, the defendant did not act wrongly by failing to defer to the law's judgment as expressed by the criminal prohibition on the performance of such acts. Note, however, that a successful justificatory legal defense does not cancel all of the reasons that count against the performance of the act the agent performed. Therefore even a successful justificatory legal defense leaves open the possibility that, in acting as she did, the

[20] Brownlee (2012: 162); Gardner (2007: 97).

agent not only acted wrongly but without an all things considered justification for her conduct.[21]

The foregoing analysis of justificatory legal defenses employs the account of law and legal authority developed by Joseph Raz, one that Brownlee appears to endorse.[22] On that account, law necessarily claims authority over all those within its jurisdiction. Its claim is justified, or the law enjoys legitimate authority vis-à-vis a particular subject, only if "the subject would better conform to the reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not… [and] the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority…"[23] Where these conditions are met, the law typically provides its subjects with protected reasons for action; first order reasons to perform (or not perform) certain acts together with second-order reasons not to consider certain other first-order reasons against performing (or not performing) those acts. Rational actors, by which again I mean ones who are properly responsive to reasons, ought to act on the basis of such reasons when they apply to them, i.e. when the law enjoys legitimate authority over them. Where the independent reasons responsiveness to which the law serves to enhance are moral ones, the rational

[21] The phrasing of this sentence reflects my acceptance *arguendo* of Brownlee's and Gardner's view that one may be justified in acting wrongly. See Brownlee (2012: 161-2); Gardner (2007: 77-82; 95-103).
[22] Brownlee (2012: 99-100). Gardner (2007: 104-7) employs this account as well.
[23] Raz (2006: 1014).

requirement to defer to the law's judgment can be characterized as a moral duty to obey the law.

Justificatory criminal defenses, recall, purport to demonstrate that an agent did not act wrongly in failing to defer to the law's judgment that she ought not to perform the act she did. Given Raz's account of the conditions for law's legitimate authority, one way defendant's can attempt to justify their criminal conduct is by demonstrating that in situations like those in which the agent acted the law's subjects will generally do better at acting on the "reasons that apply to them anyway" if they act on their own judgment regarding what they have undefeated reason to do than if they defer to the law's judgment. Perhaps the best and probably the most common way to make a case for this conclusion is to argue that had those who formulated the law been cognizant of situations like the one in which the defendant acted, they would have changed their formulation so as not to preclude the defendant acting as she did for the reasons that she did. While legal officials may find such arguments most persuasive when they judge the agent in question to have acted for a reason that was undefeated (apart from the criminal law whose authoritativeness is at issue), this is not a necessary condition for the success of such arguments, either in persuading legal officials or on their merits. Rather, all the defendant need establish is that she (and by extension, other similarly situated individuals) was in a better position to ascertain what she had reason to do than was the law.

A second way in which defendants can attempt to legally justify their criminal conduct is to argue that they had a moral right to act as they did. As Raz's

analysis of the conditions under which law enjoys legitimate authority suggests, in some cases it may be more important that an agent act on her own judgment than that she judge correctly, i.e. act for an undefeated reason. Such a claim stands in need of defense, of course, and I argue in the next section that Brownlee offers a compelling one, at least for acts of civil disobedience as she characterizes them. Here, however, I simply assume the justifiability of autonomy-protecting rights so as to focus on the form of the defendant's justificatory argument. In asserting in a court of law that she has a moral right to perform the particular law-violating act she performed, a defendant makes her case not on the merits of her conduct but by challenging the law's normative jurisdiction over her; i.e. the justifiability of its claim to authority over her vis-à-vis the particular act she performed. In evaluating her argument, and so considering whether to grant her a justificatory legal defense, the court need not and perhaps should not consider whether her conduct was justified all things considered (i.e. whether she acted for an undefeated reason). Rather, it should ask whether the defendant actually enjoys the right she claims, and if so, whether her conduct fell within the scope of that right. Affirmative answers to these two questions provide a defeasible justification for her criminal conduct, a defeasible claim to have done nothing wrong merely in virtue of having chosen to do what was criminally prohibited. The justification is only defeasible because, as I noted in the introduction to this essay, considerations such as those related to the

institutionalizing of such a defense may entail that all things considered the law may justifiably refuse to recognize the right in question by granting a legal defense.[24]

Justificatory legal defenses, then, are not complete rational justifications for criminal conduct; that is, they do not show that the defendant acted for an undefeated reason. Rather, legal justifications provide what Gardner labels cancelling permissions.[25] In granting a justificatory legal defense, the law cancels a reason the defendant would otherwise have not to perform a particular act (for certain reasons), namely that she has a legal duty not to do so. In doing so, the state renders it permissible for its subjects to perform particular criminal acts for particular reasons, though it does not provide them with a reason to do so. While this description may suggest otherwise, the court does not make an act justified after the fact (except, perhaps, in the first instance in which a defense is granted, in which case the court makes or modifies the law, rather than applying or interpreting it); rather, the law considers whether the agent had a legal justificatory defense for his criminal conduct at the time he performed the act in question.

Whereas defendants who offer a justificatory legal defense for their criminal conduct maintain that they did no wrong in failing to treat as authoritative a

[24] Brownlee (2012: 123-4) notes that it would be paradoxical for the law to recognize the moral right to civil disobedience, i.e. to conscientious communicative disobedience to the law, by translating it into a legal right. After all, were there a legal right to deliberately break the law in order to communicate one's conscientious convictions, such acts would not actually count as illegal. The foregoing analysis of justificatory legal defenses shows how the law may recognize a moral right to conscientious action that includes civil disobedience without generating this paradox. Acts for which a person enjoys a justificatory legal defense are illegal; that is, they are tokens of an act type proscribed by a criminal offense definition. But they are not wrongful because the criminal norm in question is not authoritative vis-à-vis the actor in question in the circumstances in which she acted. As I argue below, in the case of civil disobedience the explanation for the norm's lack of authority lies in the actor's moral right to conscientious action.

[25] Gardner (2007: 106-7).

particular criminal prohibition, those who offer a legal excuse concede that they ought to have recognized the criminal law's authority but argue that they should not be blamed or faulted for their failure to do so. More precisely, those who offer a legal excuse admit to an error in practical reasoning, a failure either to advert to all and only those reasons that applied to them, or to properly integrate the protected reason provided by a particular criminal norm into their deliberation. I focus here on shortcomings in integration.[26] Reasons are properly integrated into an agent's deliberation when they function correctly, defeating (outweighing) or excluding all and only the other reasons that they do, in fact, defeat or exclude. Failures of integration occur when reasons do not function correctly in an agent's deliberation; for example, when an agent does not take a reason to exclude or defeat some other reason that it does, in fact, exclude or defeat. In slightly less jargon-filled terms, defendants who seek an excusatory defense concede that the law provided them with a reason not to perform the act they did, at least for the reasons that moved them to perform it, and that they erred in failing to respond properly to that reason. Nevertheless they contend that their error was reasonable, where that means that in reasoning as they did they lived up to our justifiable normative expectations of them.

So defined, the category of legal excuse encompasses a far smaller class of arguments than often fall under that heading in criminal law textbooks or in certain philosophical accounts of legal excuse. Construed narrowly, as I follow Gardner in

[26] R.A. Duff (2007: 263-98) distinguishes faultless failures to advert to reasons that apply to one, which he labels unjustified but warranted, from faultless failures of deliberation, which he labels excuses. Gardner (2007: 86-7) groups both types of shortcomings under the heading of excuses.

doing here, excuses are distinct from denials of responsibility (i.e. arguments that deny a defendant's status as a responsible agent, such as the insanity defense) and failures of proof (i.e. arguments that deny the attribution to the defendant of the act specified in the criminal offense definition, as in some mistake of fact defenses). In presenting Gardner's account of defenses, on the basis of which she argues for a demands-of-conviction excusatory defense, Brownlee focuses on Gardner's claim that "the paradigm excuse is that one had a justified belief in justification" though one did not, in fact, have a justification for acting as one did.[27] In a legal context, at least, this claim sweeps too broadly, since it fails to distinguish excuses from failures of proof. While both involve a defendant's claim to have been justified in forming and acting on what was actually a false belief, failure of proof arguments do so in order to contest the attribution of norm-violating conduct to the agent, while excuses do so in order to contest the claim that the agent was at fault for her violation of the norm. A better starting point for an analysis of legal excuses (narrowly construed) is with Gardner's statement in an eponymous article that "the gist of an excuse… is precisely that the person with the excuse lived up to our [normative] expectations."[28] To offer a complete excuse for one's criminal conduct, say by arguing that one acted under duress or that one was provoked, is to maintain that there is an explanation for one's faulty practical reasoning that shows one to have met the law's reasonable or justifiable expectations regarding responsiveness to reasons that apply to one in the circumstances in which one acted. These last

[27] Brownlee (2012: 163).
[28] Gardner (2007: 124).

qualifications highlight the normative component of the standards against which an agent's responsiveness to reasons is measured; for example, we justifiably demand that police officers display greater fortitude in the face of threats of bodily harm than we do of ordinary citizens.[29] Since a defendant with a complete excuse meets the law's reasonable or justifiable expectations of her, it has no desert-based grounds on which to find her at fault for her violation of the law, let alone for punishing her, even though she failed to properly integrate the criminal prohibition on acts of the type she performed into her deliberation. Of course, in the context of a legal *excuse* the law's reasonable expectations of its subjects cannot simply be that they respond appropriately to the reasons for action with which it provides them. Rather, with respect to excuses I contend that the law's reasonable expectations concern the concessions it makes to human imperfection or frailty, including (though perhaps not limited to) certain errors or malfunctions in practical reasoning for which we ought not to hold agents responsible. For example, a defendant who claims duress as an excuse admits her responsibility for the commission of the crime, its attribution to her qua rational agent. She acted for a reason she mistakenly took to be undefeated. What she denies is that she ought to be held responsible for the fact that her fear of another's threat led her to erroneously treat as undefeated the reason on which she acted.

In a legal context, the term 'excuse' applies only to cases in which a defendant can point to a defect in practical reasoning for which she ought not to be held responsible as a complete defense for her criminal conduct. In non-legal contexts,

[29] See Gardner (2007: 129-30) on this point.

however, the term 'excuse' applies as well to partial defenses for norm-violating conduct. In such cases, we recognize the degree to which a given human imperfection or frailty made it more difficult for the agent in question to respond appropriately to the reasons that applied to her. While we do not judge the level of difficulty to have been so great that we think it unjustifiable to blame her at all for what she did, neither do we think it justifiable to blame her as much as we would a person who made the same error in practical reasoning without being subject to the challenges to reasoning well that she faced. Of course, typically some degree of difficulty in reasoning well due to particular human imperfections will not excuse at all. This person to whom the partially excused agent is judged to be comparatively less blameworthy is not the agent who faces no such difficulty at all (God, perhaps?), but a person who acts only under "normal" challenges to reasoning well.[30] Arguably, in at least some jurisdictions the law sometimes recognizes and responds to defendants' partial excuses for their criminal wrongdoing by charging them with a lesser offense and/or sentencing them to a lesser punishment than it might. In doing so, legal officials recognize that when conceived of as a blaming response punishment ought to be doubly proportionate: first to the moral seriousness of the criminal breach the defendant performed, and second to the extent if any to which

[30] Horder (2004: 8-9) says of excuses that they shine a positive light on wrongdoing. Though it may be substantively identical, I think it more apt to say that excuses show the performance of a wrongful act, and so the agent who performed it, in a less negative light; that is, they show her failure to respond appropriately to reasons to be a lesser shortcoming than it would be had she not been subject to the human imperfections or frailties that led her to reason poorly.

she ought to be excused for doing so. Strictly speaking, however, partial excuses do not provide a person accused of a crime with a criminal defense.[31]

In this section I have sought to characterize the precise nature of the response to an accusation of criminal wrongdoing a defendant makes when she offers either a justificatory or excusatory defense for her breach of the criminal law. Legal justifications purport to demonstrate that the defendant did nothing wrong in virtue of her violation of the particular criminal prohibition she breached; that is, she did not act wrongly in failing to treat that prohibition as authoritative, as providing her with a protected reason for action. Legal excuses, narrowly construed, purport to demonstrate that the law ought not to fault the defendant for her failure to properly integrate a particular criminal prohibition into her deliberation, and so for choosing to act in violation of it. It should not do so because the defendant met our reasonable expectations for people like her in situations like the one in which she broke the law, expectations that reflect concessions the law ought to make to human frailty. With this understanding of justificatory and excusatory legal defenses in hand, I now consider whether, and when, a just state ought to recognize such defenses for those who commit conscientiously motivated acts of disobedience to law.

III

[31] Note that partial excuses are not the only grounds a court may have to mitigate the punishment it assigns a particular defendant. Rather, partial excuses constitute reasons the law ought to take into account insofar as it aims to engage with her as a responsible agent, i.e. to give her what she deserves.

Brownlee maintains that those who perform conscientiously motivated communicative acts of disobedience to law have a prima facie claim to the state's excusing their criminal conduct. Though this may be true in a few cases, I will now demonstrate that that Brownlee's arguments actually support a demands-of-conviction *justificatory* defense, not the excusatory one she explicitly sets out to defend. Since as self-respecting responsible agents we aim to justify our conduct if we can and to offer an excuse for it only if we must, this conclusion marks an important correction to Brownlee's account of the rejoinder civil disobedients may give in response to a charge of criminal wrongdoing. Moreover, this correction creates the conceptual space necessary to argue, contra Browlee, that even when conscientiously motivated disobedients to law ought to be punished for their criminal conduct they may still have a prima facie claim to mitigated punishment as a matter of justice and not merely mercy.

Brownlee argues that both respect for autonomy and sensitivity to the psychological injuries a person is likely to suffer should she conform to the law at the cost of betraying her deeply held moral commitments ground a demands-of-conviction defense. Consider, first, the argument from respect for autonomy. Echoing Horder, Brownlee maintains that were the law to insist that its subjects always compromise their moral convictions when adherence to them conflicts with conformity to the law it would unduly affect their prospects for realizing full personal autonomy.[32] The state has a moral duty not to impose such a demand upon them, one that correlates to their moral right to act in ways expressive of their

[32] Brownlee (2012: 167); Horder (2004: 199-200).

conscientious convictions. So, suppose a person trespasses for the purpose of expressing her conscientious moral conviction that a particular law or policy is unjust. The argument from autonomy implies that when brought before a court of law she should offer in her defense not simply the particular conviction that motivated her illegal act but her right as a "reasoning and feeling being capable of forming deep moral commitments" to act on her conviction even, within certain limits, when that involves violating the law. As I argued in the preceding section, however, to do so is to offer a justificatory defense for her criminal conduct. It is to meet the law's accusation of criminal wrongdoing by arguing that she had no duty to treat the criminal norm she violated as authoritative, or more precisely as not excluding the performance of conscientiously motivated communicative acts of disobedience to that law.

Of course, a civil disobedient will almost certainly believe that her criminal conduct was justified all things considered. That is, she will likely believe that her illegal act was not wrong all things considered, and not merely that it was not wrong in virtue of being a violation of the law though wrong for some other reason.[33] We all aspire to act for undefeated reasons, after all, which is just what it means to say that our conduct is justified all things considered. Given this aspiration, it should come as no surprise that when civil disobedients defend their criminal conduct,

[33] That someone might make the latter claim may sound odd. Consider, however, the possibility that in the interval between when she performed the act in question and when she goes to trial for it the agent may conclude that she ought not to have acted as she did because the moral or prudential reasons that applied to her left her with no undefeated reason for so acting. I ought not to have done it, she may concede, but not because it was illegal. Intriguingly, such an agent may have a justification for her violation of the law, but at most only an excuse for her violation of some other norm she also breached in acting as she did.

whether in a court of law, in the media, or in private conversation they oftentimes attempt to show that it was justified all things considered. At least in a liberal state, though, the law does not concern itself with whether its subjects act justifiably all things considered but only with whether they respond properly to the reasons for action it provides them. So while the civil disobedient may want to vindicate her violation of the law by showing that it was justified all things considered, all she need do to respond to a criminal charge is argue that her act was not unjustified because it was a breach of the criminal law.

Brownlee's attempt to justify a demands-of-conviction defense for criminal conduct by appeal to the psychological costs that conformity to the law can impose also reads better as an argument for a justificatory defense than as an argument for an excusatory one. She writes that the law's demand that in cases of conflict fidelity to it always take priority over loyalty to her moral convictions might well threaten an agent's integrity, leave her alienated from the life she lives, and subject to frequent weakness of the will.[34] These setbacks to an agent's psychological health are deeply problematic both in their own right and in terms of their contribution to an agent's autonomy. With regard to the latter, Brownlee rightly points out that "in valuing autonomy, it is necessary to value also the conditions for autonomy, one of which is an integrated mind and the capacity for practical reasoning."[35] If valuing the conditions for autonomy is part of what is involved in valuing autonomy, and if properly valuing an agent's autonomy requires recognizing her right to

[34] Brownlee (2012: 168).
[35] Brownlee (2012: 168).

conscientious action, then valuing the conditions for autonomy requires recognizing a right to conscientious action. As should now be clear, however, a civil disobedient who employs this chain of reasoning to respond to a criminal charge offers a justificatory defense of her illegal conduct. In cases where obedience to law threatens to seriously damage an agent's ability to act autonomously, it may sometimes be more important from a moral standpoint that she act on her own judgment of what she ought to do than that she defer to the law's judgment, even if her judgment is mistaken while the law's is not. If it can do so without unduly burdening others, i.e. unjustifiably violating or failing to protect their moral rights, then the state should tolerate conscientiously motivated criminal conduct so as to refrain from injuring the psychological capacities that are conditions for civil disobedients' autonomy.

Brownlee also offers as a reason for the law to acknowledge a demands-of-conviction defense "the psychological importance, distinct from autonomy, of our not always having to give priority to literal adherence with the law over our own beliefs and commitments" (Brownlee, 168). I am not entirely clear on what Brownlee has in mind here, but one plausible basis for this psychological importance is the phenomenological suffering that normally accompanies the experience of alienation or weakness of the will. Might a conscientiously motivated law-breaker offer the suffering she risked were she to have obeyed the law she breached as an independent basis for a justificatory defense of her criminal conduct? It depends on whether the interest people have in being free from the suffering that typically characterizes the aforementioned psychological harms is

weighty enough to generate a prima facie right against the state that it not impose upon them the risk of suffering such harms.[36] If people have such an interest, then like the interest in autonomy it can serve to define a domain of conduct in which it is more important that people act on their own judgment, i.e. that they conform to their conscientiously held but possibly mistaken moral convictions, than that they defer to the law's authority (even where doing so would enable them to better act on the reasons that truly apply to them). That is, the right in question would provide a basis for a justificatory defense for conscientiously motivated criminal breaches that fell within the scope of the right to conscientious action.

Do people have an interest in freedom from the suffering concomitant with alienation and akrasia weighty enough to ground a right, a prima facie claim at least against the state that it refrain from exposing them to a significant risk of it by requiring obedience to its laws whenever they conflict with a person's conscientious convictions? I am of two minds. On the one hand, to maintain that such a right exists is to argue that the avoidance of personal suffering sometimes entails not only a right to do wrong but also a right to act on what is actually a defeated reason.[37] Such a claim might be rejected on the grounds that people only have a right not to suffer *unjustly*, and that insofar as conscientiously motivated disobedients to law would actually do better at acting on the reasons that apply to them by conforming to the law than by acting on their own judgment, the suffering that will follow if they conform to the law may be unfortunate but it is not unjust. Or at least this

[36] Brownlee (2012: 120-1) explicitly adopts an interest theory of rights.
[37] As in the previous section I put the point this way because Brownlee maintains that acts can be wrong but justified all things considered; i.e. done for an undefeated reason.

conclusion holds in cases where the reasons to which the agent's conformity is enhanced by deference to the law are moral obligations or duties. On the other hand, if an agent's interest in autonomy can ground a right to do wrong, it is not obvious why the interest in not suffering the injuries Brownlee posits cannot also do so. Brownlee holds that "the moral rights arising from moral conviction are rooted in the principle of humanism"[38] which, recall, holds that "society has a duty to honor the fact that we are reasoning and feeling beings capable of forming deep moral commitments."[39] Perhaps the duty to honor people as feeling beings indicates that people's interest in not experiencing the phenomenological suffering characteristic of alienation and akrasia is weighty enough to provide an independent ground for a moral right to conscientious action that can underpin a justificatory defense for certain criminal breaches. In practice resolving this dispute may well prove unnecessary, since it seems likely that any case where the law imposes on a civil disobedient a significant risk of experiencing the phenomenological suffering that typically accompanies alienation and akrasia will also be one in which it threatens her full realization of personal autonomy. Moreover, even if the phenomenological suffering likely to accompany fidelity to law at the expense of loyalty to deeply held moral convictions does not provide a justificatory legal defense for an agent's criminal breach it may still legally excuse it, warrant a lesser punishment, or provide a reason for the state to treat her mercifully.[40]

[38] Brownlee (2012: 120).
[39] Brownlee (2012: 7).
[40] I touch on all three of these possibilities below.

Reflection on the nature of (legal) excuses further supports the claim that the considerations Brownlee adumbrates actually support a demands-of-conviction justificatory defense. The gist of an excuse, recall, is a person's claim to have lived up to our reasonable or justifiable expectations of her as a rational agent, expectations regarding her attentiveness to reasons and her integration of them into her practical reasoning. To offer an excuse for one's unjustified conduct is to argue that one ought not to be held responsible for shortcomings in these respects. If true, this claim explains why one's act, though wrong, does not reflect poorly on one. Given the nature of excusatory arguments, and her desire to defend a demands-of-conscience excuse, Brownlee ought to explain how it is that a conscientiously motivated law-breaker's moral commitments interfere with her responsiveness to the reasons that apply to her, and why, as a concession to human imperfection and frailty, the state ought not to hold her responsible for her defective practical reasoning. She does nothing of the sort, however. Instead, Brownlee appeals to the *value* of autonomy and freedom from psychological injuries such as alienation and akrasia as reasons for the law to honor and respect its subjects by acknowledging a demands-of-conviction defense. But as I have now argued at length, the claim that people have an interest in autonomy (and perhaps also in psychological well-being) sufficiently weighty *or valuable* to ground a prima facie duty on the state not condemn them for their conscientiously motivated communicative acts of

disobedience to law grounds a legal justification for criminal conduct, not an excuse.[41]

Brownlee herself recognizes the justificatory overtones in her argument for a demands-of -conviction defense. The value the conscientiously motivated offender seeks to protect, she writes, "include the genuine value of her autonomy, agency, and capacity for persistent commitments, which together may seem to lend a justificatory gloss to what would otherwise have to be an assertion of mere excusability."[42] Of course, a successful argument for a demands-of-conviction defense grounded in respect for the conscientious law-breaker's autonomy must grapple with how to construe its value in cases where an actor chooses to act wrongly. But Brownlee briefly describes several plausible answers to this challenge, including treating autonomy as non-instrumentally but conditionally valuable, with the condition being that an agent choose well, or less demandingly, that she not violate others' moral rights. Why, then, does she not argue for a demands-of-conviction justificatory defense, or perhaps more accurately, recognize that this is the conclusion her argument warrants? Perhaps it is because she believes that only those who can show that their act was justified all things considered can claim a

[41] The passages in which Brownlee argues for a demands-of-conviction defense include only a single remark that connects her discussion of the nature of excuses with her claim that, all else equal, conscientiously motivated law-breakers ought to be legally excused for their communicative acts of disobedience to law. In characterizing their disobedience to law as an "autonomous act taken on the strength of their [conscientious] commitments," Brownlee writes, such actors can give reasons for mistakenly believing that they had undefeated reasons to act as they did. But it does not follow that in doing so these actors must be offering an excuse for their criminal conduct, as Brownlee suggests. Rather, they may wish to demonstrate their conscientious motive because doing so is necessary to establish that they acted within their right to conscientious action, and so necessary to establishing that they were justified in not treating the particular law they violated as authoritative.

[42] Brownlee (2012: 166).

justificatory legal defense, and she wishes to argue that conscientiously motivated disobedients to law are entitled to a legal defense even in some range of cases in which their conduct is not justified all things considered. As I argued in the previous section, the first of these two claims is mistaken. Still, it does offer an explanation for the surprising fact that Brownlee elects to argue only for an excusatory defense on behalf of conscientiously motivated disobedients to law.

IV

The justificatory defense for which I maintain Brownlee actually argues extends only to those acts that fall within the scope of an agent's right to conscientious action. What, then, of conscientiously motivated acts of disobedience to law outside the scope of that right, or at least ones the state judges to be outside the scope of that right? Might at least some of those who perform such acts be legally excused for doing so? I think the answer is yes, though at least in a moderately just legal system examples may be few and far between even before we take into account limits on the recognition of a legal excuse grounded in considerations other than the agent's desert. The more common case will likely be one in which the actor who performs a conscientiously motivated communicative breach of the criminal law can offer a partial excuse for her actions, one the law ought to treat as presumptive grounds for a mitigated sentence (or, if possible, conviction for a lesser offense).

An agent's conscientiously held conviction can excuse her criminal conduct only if it causes the defect in practical reasoning that leads her to mistakenly conclude that she has an undefeated reason to perform a token of some criminally

proscribed act type. Jeremy Horder offers one such example in his discussion of what he calls a demands-of-conscience excuse, namely an assisted suicide "mercy killing" performed as a result of "conscience-driven emotional difficulties."[43] The "emotional pressure" to which the defendant is subject prevents her from recognizing or responding appropriately to the law's proscription of such acts as a reason that defeats her victim's repeated request for assistance in taking his life. As Horder describes the case, defendant and victim have been married for fifty years (in virtue of which I take it he means to imply that they have special associative duties to one another), they have an intimate and detailed knowledge of the suffering experienced by those with victim's incurable disease, and each has promised to assist the other in committing suicide should either ever suffer from the disease in question.[44] Moreover, in pressing her to assist him in ending his life, the victim implicitly consents to her doing so. In short, defendant has a host of reasons to assist her spouse in taking his own life, all of which we may assume he has repeatedly called to her attention. Suppose, however, that all of these reasons are excluded by the law's prohibition on intentionally killing (innocent) people. Assume that defendant has a reason (indeed a duty) not to kill morally innocent people, one that defeats her reason (perhaps also a duty) to lessen her loved one's suffering and that renders null the putative promissory obligation at issue. She will better conform to the reasons that apply to her in this case by deferring to the law rather than acting on her own judgment, colored as it is by her emotional response to her

[43] Horder (2004: 225).
[44] Horder (2004: 209).

spouse's plight. Nevertheless, I believe it is at least arguable that the fortitude to reason well in these circumstances exceeds what we may reasonably expect of the defendant. That is, we may not justifiably demand that, when deliberating about whether to assist her dying spouse in committing suicide, she recognize and respond to the reason the law gives her not to act on the reasons that her dying spouse repeatedly brings to her attention. If so, then defendant has a prima facie claim to be fully excused for committing the crime of assisting another in taking his own life.[45]

Brownlee notes that concrete examples invite nothing but controversy, and no doubt that is true of the foregoing case. Furthermore, though the defendant's deeply held commitments may account for her failure to respond appropriately to the law, her act is not a communicative one since it is not done "either *in order* to engage others or *because* the act will engage others in deliberation about the merits of the cause."[46] But that is all the more reason to construe the act as (at best) excusable, and perhaps by contrast lend credence to the claim that we ought to construe communicative acts of disobedience to law that fall within the scope of the right to conscientious action as legally justified. In fact, the suggestion that only conscientiously motivated *communicative* disobedience to law can qualify for a justificatory legal defense, while only conscientiously motivated *non-communicative* disobedience to law can qualify for an excuse, sheds new light on the dispute

[45] Horder only claims that the defendant is entitled to a partial excuse because he thinks only minor violations of individual rights can be fully excused.
[46] Bronwlee (2012: 160). The story might be constructed so as to make defendant's criminal conduct evasive or non-evasive.

between Horder and Brownlee regarding the extension of a demands-of-conviction defense to civil disobedience. The primary point of disagreement between them concerns the possibility of reconciling a moral right to civil disobedience with legitimate democratic authority. Brownlee offers a compelling rebuttal to those like Horder and Raz who argue that no such reconciliation is possible.[47] The success of her argument entails that civil disobedients have a prima facie claim against the state that it neither convict nor punish them for criminal conduct that falls within their right to civil disobedience. Horder errs, that is, in arguing that a just legal order ought not to extend a criminal defense to civil disobedients.[48] However, Horder also identifies a second reason not to extend a demands-of-conscience excuse to civil disobedients, namely that they violate the law deliberately and with a political aim, i.e. for the purpose of challenging some law or policy. Brownlee focuses on the latter of these two features, which she refers to as the strategic action problem, but I believe it is the former that explains why civil disobedience, meaning conscientiously motivated *communicative* disobedience to law, does not qualify for an excuse. As Horder puts the point, "by way of contrast [to a civil disobedient], if D is to be excused on a demands-of-conscience basis, his or her engagement in the law-breaking religious practice must have more or less spontaneously reflected, in terms of reasons for action, solely and simply a sense of moral obligation."[49] Both the spontaneity of a conscientiously motivated actor's violation of the law and her lack of any communicative intent cohere with, and provide evidence for, its arising

[47] See Brownlee (2012: 174-78); see also Lefkowitz (2007: 211-17).
[48] Horder (2004: 221-5).
[49] Horder (2004: 201).

out of a defect in the actor's practical reasoning caused by the emotional pressure to which she was subject. Where that pressure was such that it would not be reasonable or justifiable to expect her not to make the error in practical reasoning that she did, the conditions for a complete excuse are met. Thus it is the nature of excuses that rules out their application to civil disobedience, not the incompatibility of civil disobedience and legitimate democratic authority. In short, while Horder correctly maintains that that a just legal system ought not to excuse acts of civil disobedience, Brownlee argues correctly that those who perform them are entitled to a demands-of-conviction defense (albeit not the type of defense for which she claims to be arguing).

The foregoing argument may give rise to two confusions I wish to dispel. First, I do not claim that spontaneous disobedience to law must be non-communicative; after all, many historically important acts of civil disobedience began with people spontaneously protesting unjust laws or policies (and, for that matter, entire regimes). Rather, I contend only that when it is excusable conscientiously motivated disobedience to law will be spontaneous and non-communicative because those properties characterize conduct that can be explained in the manner necessary to provide an agent with an excuse for so acting. Second, I have not argued that in a just legal system no one who might be colloquially described as a civil disobedient could ever have a claim to be legally excused for her criminal conduct. All else equal it may be that a just legal system ought to extend an excusatory legal defense to those conscientiously motivated disobedients to law who *fail* in their attempt to perform civil disobedience (as Brownlee describes it)

because of the emotional pressure under which they act. An actor who violated one or more of Brownlee's process related constraints on what counts as civil disobedience might defend herself in a court of law as follows: though she committed a criminal breach without a legal justification, her anger and frustration over the injustice of a given policy and the apathy of political leaders and her fellow citizens in the face of that injustice caused her to mistakenly conclude that her conduct, though illegal, was (legally) justifiable. I went too far, she might say, an apt description insofar as it implies that she would have enjoyed a justificatory legal defense had she committed certain other criminal breaches in order to oppose the policy in question. We need not worry here about whether (all else equal) legal officials ought to grant such an actor a complete excuse, i.e. an excusatory defense, or at most a partial excuse that calls for conviction on a lesser offense and/or a reduction in sentence. The point I wish to emphasize is simply that the conceptual argument against excusing acts of civil disobedience set out in the previous paragraph does not rule out the possibility of excusing those conscientiously motivated actors who attempt unsuccessfully to perform communicative acts of disobedience to law.

Brownlee, too, notes that conscientiously motivated law-breakers who cannot avail themselves of a demands-of-conviction defense may nevertheless wish to call the state's attention to, in her words, the onerousness for them of abiding by the law. "[E]ven when their acts are not fully exculpable, civil disobedience is disobedience grounded in deeply and conscientiously held commitments that understandably make it difficult for disobedients both to follow laws that

contravene those commitments and to refrain from communicating in effective ways their objections to those laws" (Brownlee, 235). Their reason for doing so, Brownlee argues, is that it provides the state with a reason to treat them mercifully, to mitigate its punishment not as a matter of respect for them as responsible agents but out of concern for them as sentient creatures who are suffering. Perhaps it does, though a court's attempt to respond to criminal offenders as victims risks both interfering with its primary duty to respond to them as perpetrators (i.e. as responsible agents) and muddying the public's perception of its condemnation of their illegal conduct. More importantly, it is arguable that we ought to distinguish as best we can between a person's conscientiously held commitments making it so difficult for her to respond properly to the law that she qualifies for at least a partial excuse for her criminal conduct, and cases where the onerousness of conforming to the law does not rise to that level. In the former case the civil disobedient warrants a lesser punishment as a matter of justice, while in the latter case she may only plead for mercy.

* * *

The fact that I have gone on at length regarding what I believe to be errors in Brownlee's account of a demands-of-conviction defense should not be taken as a reason to spend one's time reading other texts. Indeed, quite the contrary; *Conscience and Conviction* is a thought-provoking work full of insights not only on the topics discussed in this paper but on practical reasoning, moral pluralism, and just punishment as well. Perhaps the book's most outstanding feature is the moral sensitivity Brownlee displays throughout; this book does not merely contain an

account of conscience, it exemplifies the exercise of one. Anyone who chooses to engage with Brownlee's book will be well rewarded for his or her decision to do so.

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