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**TACKLING CULTURE AND DISOBEDIENCE: HOW THE
1981 SPRINGBOK TOUR CAN SHAPE A MODEL OF
CIVIL DISOBEDIENCE FOR AOTEAROA NEW ZEALAND**

**LLB (HONOURS) RESEARCH PAPER
LAWS 520: LAW AND DISOBEDIENCE**

TE KAUHANGANUI TĀTAI TURE – FACULTY OF LAW



2023

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Abstract

How civil disobedience should be defined is a heavily contested subject, with many theorists having offered various definitions. Civil disobedience, however, is often seen as an American concept. While most definitions are presented as being universal, it seems improbable that definitions imbued by American culture will be appropriate to apply to other states. This paper therefore seeks to propose an alternative model of civil disobedience, specifically tailored to Aotearoa New Zealand.

Examining Aotearoa's commitment to democracy, the paper argues that the model should be loosely based on radical democratic theory. However, it also argues that the model should incorporate learnings of real-world civil disobedience. The case study of the 1981 Springbok Tour means that an Aotearoa model of civil disobedience should allow for violence in select situations, take a somewhat feminist approach to the publicity and illegality requirements, allow for Māori understandings of resistance and the presence of multiple motivations. While future analyses of civil disobedience in Aotearoa should necessarily continue to develop this definition, the model provides a first taste of Kiwi civil disobedience.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14,994 words.

Subjects and Topics

Civil disobedience, Springbok Tour 1981, Aotearoa New Zealand, Māori resistance, feminism, violence.

I Introduction

Civil disobedience is often positioned as American in both "origin and substance".¹ Culture impacts how we think, thus flowing into how we theorise.² Any theory of civil disobedience will therefore be, consciously or unconsciously, imbued with the culture of the theorist. This may mean that popular models of civil disobedience are inappropriate for the Aotearoa New Zealand (Aotearoa) context. As such, this paper posits that a model of civil disobedience should be developed for Aotearoa.

There are a multitude of ways in which a model could be developed. This paper will consider classic and modern models of civil disobedience, as well as the bases for those theories. Liberal theory, for instance, is pervasive in civil disobedience literature, although the liberal state has been critiqued by democratic and feminist theorists. Aotearoa's commitment to democracy, as well as its arguably growing consciousness of feminist and Māori perspectives, suggest such critiques should be integrated into a model of disobedience.

Examining a specific example of civil disobedience also allows an analysis of how it plays out on the ground, thereby building a model "from the ground up". The Springbok Tour 1981 (the Tour) will be used as that example. There are four ways that the Tour impacts an understanding of civil disobedience in Aotearoa: the role of violence, feminist discourse surrounding the Tour, the Māori dimensions of resistance and the presence of multiple motivations.

The paper will begin by outlining key models of civil disobedience and position those in relation to their respective contexts. The second part of the paper will discuss why those models are out of kilter with understandings of civil disobedience in Aotearoa. Thirdly, the

¹ Hannah Arendt "Civil Disobedience" in *Crises of the Republic* (Harvest Books, 1972) at 83.

² See, for example: Catherine West "How Culture Affects the Way We Think" (Association for Psychological Science 19th Annual Convention, August 2007).

paper will argue that Aotearoa's commitment to democracy as a fundamental constitutional principle broadly aligns with the radical democratic position, meaning that an Aotearoa model of civil disobedience should use that as a starting point. The paper will then outline the history of the Tour and consider why it is relevant to an Aotearoa model of civil disobedience. The next parts of the paper will examine four tenets of the Tour that should shape civil disobedience: the role of violence, feminist discourse surrounding the Tour, Māori dimensions of resistance and the presence of multiple motivations. The final part of the paper will propose an Aotearoa model of civil disobedience.

This paper rejects the notion of universality in civil disobedience. This allows nuance to be provided for, seeking to avoid, at its worst, ethnocentrism. While this paper focuses on Aotearoa, specific models of civil disobedience could be developed for other jurisdictions. For states that differ more greatly from the West, this could provide welcome new definitions.

II What is Civil Disobedience?

It is not at all clear what civil disobedience is. There are, however, many *opinions* on what it is, resulting in a myriad of models all based on different understandings of the world. This part of the paper will discuss some key understandings of civil disobedience – namely, that of John Rawls, Carl Cohen, Hannah Arendt, and Robin Celikates – and position them within their relevant contexts.³

A John Rawls

John Rawls' model of civil disobedience is perhaps one of the most influential (and widely critiqued) in Western thought.⁴ He posits that civil disobedience is "a public, nonviolent, conscientious yet political act contrary to law, usually done with the aim of bringing about

³ This is not to insinuate that other thinkers are not worthy of examination. These theorists have been chosen because of their relevance to this paper.

⁴ Robin Celikates "Democratizing Civil Disobedience" (2016) 42 *Philos Soc Crit* 982 at 983.

a change in the law or policies of the government".⁵ There are therefore three key requirements: publicity, nonviolence, and illegality, Rawls also noting the actions will usually aim for wider governmental change. This model is strict – there is little flexibility to the requirements, meaning that any protest that does not meet all requirements is not civil disobedience.

The context helps to explain why the model is so restrictive: in particular, Rawls' understanding of liberal theory. A liberal state, simply, "respects the right to political participation".⁶ For Rawls specifically, however, he imagines a "constitutional and democratic" state.⁷ Rawls linked "the rule of law for democratic institutions" to "a simultaneous battle against poverty and inequality".⁸ So while a formal right to political participation is important, it is equally important that the state ensures those liberties are a reality, by, for instance, providing government money on a regular basis "to encourage free public discussion".⁹ He also requires that other civil rights are respected, defining the "basic liberties of citizens" as also including, for instance, freedom of speech and assembly, and freedom of thought.¹⁰

In *A Theory of Justice*, Rawls offers two general principles of justice that should underscore society. The first is the principle of equal liberty, which states "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all".¹¹ The second is the difference principle, stating that social

⁵ John Rawls *A Theory of Justice* (The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1971) at 364.

⁶ Joseph Raz "A Right to Dissent? I. Civil Disobedience" in *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford, 1979) at 273.

⁷ Prakash Sarangi "Notion of 'State' in John Rawls' Theory of Justice" (1991) 52 *The Indian Journal of Political Science* 195 at 197.

⁸ Julian Coman "John Rawls: can liberalism's great philosopher come to the west's rescue again?" *The Guardian* (online ed, United Kingdom, 20 December 2020).

⁹ Sarangi, above n 7, at 200.

¹⁰ Rawls, above n 5, at 61.

¹¹ At 250; Robert F Ladenson "Rawls' Principle of Equal Liberty" (1975) 28 *Philosophical Studies* 49 at 49; Piero Moraro *Civil Disobedience: A Philosophical Overview* (Rowman & Littlefield International, Ltd, London, 2019) at 53.

and economic inequalities can only be justified if "the long-run expectations of the least advantaged social group should be maximised".¹² Those inequalities "are to be to the greatest benefit of the least advantaged members of society".¹³

Rawls' theory, grounded in these principles, therefore creates Rawls' 'ideal' state, within which his model of civil disobedience is designed. Because his model "is designed for a just or nearly just society",¹⁴ it follows that there is a strong presumption against disobedience. This is because "(f)irst, disobedience undermines law and order and destabilizes society; second, disobedients violate the moral duty to comply with the law; and third, disobedients flout democratic processes".¹⁵ Civil disobedience therefore is only justified where there are:¹⁶

...serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity.

Philosopher and political theorist Candice Delmas notes therefore that Rawls conceptualises civil disobedience as "a *limitation* on democratic sovereignty":¹⁷ limited to where "the injustice protested is so serious as to trump respect for democratic procedures",¹⁸ and "appealing to fundamental rights which governments — including democratic majorities — violate".¹⁹

The liberal principle of neutrality, where the state is framed as a neutral entity, is also relevant to Rawls' model. Under this principle, a state cannot "rightfully endorse or

¹² JEJ Altham "Rawls's Difference Principle" (1973) 48 *Philosophy* 75 at 75; Rawls, above n 5, at 250.

¹³ Samuel Freeman "Rawls on Distributive Justice and the Difference Principle" in Serena Olsaretti (ed) *The Oxford Handbook of Distributive Justice* (Oxford University Press, Oxford, 2018) 13 at 16.

¹⁴ Kimberley Brownlee "The civil disobedience of Edward Snowden: A reply to William Scheuerman" (2016) 42 *Philos Soc Crit* 965 at 967.

¹⁵ Candice Delmas "Civil Disobedience" (2016) 11 *Philosophy Compass* 681 at 686.

¹⁶ Rawls, above n 5, at 372; Moraro, above n 11, at 53.

¹⁷ Candice Delmas, above n 15, at 687.

¹⁸ At 687.

¹⁹ At 687.

institutionalize a particular judgment or set of judgments" on particular matters.²⁰ The classic example is religious toleration, where the state does not pass judgment on or endorse one religion over another. As Rudisill asserts, "the spirit of tolerance and disdain for coercive force are crucial motivators of modern politics and social structuring."²¹ If the state is neutral, it follows that instances of civil disobedience should be limited. That is, civil disobedience cannot have the purpose of calling the state to abandon its neutrality and take a particular stance, where (arguably) "there can be more than one right judgment made", "there is no right or wrong judgment to be made", or where there "is a sufficient degree of uncertainty regarding the matter being judged".²²

The liberal state also classically distinguishes between the public and private spheres. This is connected to "a central tenet of liberal thought: the insistence that because individuals have rights, there are limits on the power of government vis-a-vis the individual".²³ There is a presumption "that it is not legitimate for the government to be paternalistic or highly regulatory".²⁴ This distinction, however, has been heavily critiqued by feminists, seeing the personal as also being political.²⁵ This will be explored more fully in the Women, Feminism and Civil Disobedience part of the paper. However, it is worth mentioning that whether Rawls fully subscribed to the public/private distinction is contested. For example, while many see Rawls' ambivalence towards the family as "reflect[ing] a patriarchal inability to address coercive family structures",²⁶ it is argued he treats the family as part of both public and private aspects of life, thus depicting "the dual nature of families".²⁷ Nonetheless, the distinction between the public and private spheres generally forms an integral part of the liberal state. If regulation by the state is limited to only the public sphere, the scope of civil

²⁰ John Patrick Rudisill "The Neutrality of the State and Its Justification In Rawls and Mill" (2000) 23 *Auslegung* 153 at 154.

²¹ At 153.

²² At 154.

²³ Robert H Mnookin "The Public/Private Dichotomy: Political Disagreement and Academic Repudiation" (1982) 130 *University of Pennsylvania Law Review* 1429 at 1429.

²⁴ At 1429.

²⁵ Carol Hanisch *The Personal is Political* (1969).

²⁶ Mary Barbara Walsh "Private and Public Dilemmas: Rawls on the Family" (2012) 44 *Discord and Adaption* 426 at 426.

²⁷ At 427.

disobedience is also restricted, in the sense that only actions taken in the public sphere of life can have political effect. Any action outside of the public sphere cannot constitute civil disobedience as it is outside the realm of state regulation.

Liberalism and liberal state theory therefore provide integral context to Rawls' theory of civil disobedience. The resulting model is clear and certain: it has precise elements to be satisfied by a prospective civil disobedient. This restricted model also arguably allows civil disobedience to obtain a certain gravitas. That does not mean, as will be discussed, that Rawls' model of civil disobedience is immune to critique.

B Carl Cohen

Carl Cohen proposes a similarly restricted model of civil disobedience. Cohen states that "an act of civil disobedience is an illegal public protest, non-violent in character".²⁸ His reasoning is of particular interest to this paper.

Firstly, Cohen requires law-breaking: "unless the law is broken the act is not one of civil disobedience."²⁹ With regards to publicity, Cohen notes:³⁰

Normally the civil disobedient considers his act to be one of concern to the entire community; his conduct aims at effecting some change in the public of his community. Therefore no secret is made (and the authorities are usually notified in advance) of proposed acts of civil disobedience. Clandestine acts simply will not qualify as civil disobedience.

It seems, therefore, that there is also an alignment between Cohen's model and the liberal state. As discussed, the classic liberal state distinguishes between the public and the private spheres. Here, Cohen draws a line in the sand between privacy and civil disobedience. He presumes that public life is where authority takes the most control, and effecting change in the community stems from the public. Such assumptions are less than optimal, especially

²⁸ Carl Cohen "Civil Disobedience and the Law" (1966) 21 Rutgers Law Review 1 at 3.

²⁹ At 2.

³⁰ At 2.

considering feminist perspectives. Critiques of these ideas will be examined in later parts of this paper.

For non-violence, Cohen notes:³¹

Some hold that an act involving violence cannot... qualify as civil disobedience. Others hold that any case of civil disobedience involving violence would surely be, for that reason, much harder to justify, but might be civil disobedience nevertheless. Either side of this argument could be consistently maintained.

Despite stating that either position is arguable, Cohen nonetheless states that civil disobedience is non-violent. The lack of reasoning is frustrating. This paper, however, will discuss the various justifications for violence (or lack thereof) at a later point.

Cohen's model of civil disobedience therefore also broadly aligns with the liberal state, especially when considering his views on democracy. Cohen stresses the idea of equality in some of his other work.³² He is further well-known for his opposition to affirmative action schemes, noting that "for most Americans, affirmative action now means not the combating of discrimination but rather its enforcement through a system of preferences".³³ Combining his stance on affirmative action with ideas in other work, it seems that for Cohen the state, being representative of its constituents, should remain neutral. Cohen's version of liberalism, therefore, has a demonstrable bearing on his model of civil disobedience.

C Hannah Arendt

Historian and political philosopher Hannah Arendt provides a different perspective to her predecessors. Arendt characterises civil disobedience as essentially American, arguing:³⁴

³¹ Cohen, above n 28, at 3.

³² See Carl Cohen "The Justification of Democracy" (1971) 55 *The Monist* 1.

³³ Carl Cohen "Race, Lies, and" *Commentary* (online ed, United States, June 1996).

³⁴ Arendt, above n 1, at 83.

...civil disobedience... still is primarily American in origin and substance; that no other country, and no other language, has even a word for it, and that the American republic is the only government having at least a chance to cope with it.

Arendt is not alone in these assertions.³⁵ Further, many well-cited figureheads of civil disobedience, like Henry David Thoreau and Martin Luther King, Jr are themselves American.

Arendt focuses on civil disobedience being a *community activity*, arising when:³⁶

...a significant number of citizens have become convinced either that the normal channels of change no longer function, and grievances will not be heard or acted upon, or that, on the contrary, the government is about to change and has embarked upon and persists in modes of action whose legality and constitutionality are open to grave doubt.

She emphasises that it is "organised" minorities who practise civil disobedience, who have convincing numbers but also a "*quality of opinion*".³⁷ With publicity, she agrees with Rawls and Cohen that clandestine actions, which a criminal would perform, cannot constitute civil disobedience.³⁸ Arendt further condemns violence: violence would turn the civil disobedient into the rebel, dancing on thin ice towards becoming a revolutionary.³⁹

Of particular interest is civil disobedience's "compatibility with the law".⁴⁰ Arendt sees the "crisis" of civil disobedience as related to John Locke's social contract theory, "which brought about not government but society".⁴¹ While citizens may not agree to individual laws, they have *tacitly consented* to the society they are born into.⁴² Because the legal and

³⁵ See, for example: Lewis Perry *Civil Disobedience: An American Tradition* (Yale University Press, New Haven, 2013) at ix.

³⁶ Arendt, above n 1, at 74.

³⁷ At 76.

³⁸ At 75.

³⁹ At 77.

⁴⁰ At 82.

⁴¹ At 86.

⁴² At 88.

governmental system exists on a social basis, the crisis relates to the system as a whole rather than to individual laws. Indeed, Arendt heavily criticises modern day democracies:⁴³

Representative government itself is in a crisis today, partly because it has lost... all institutions that permitted the citizens' actual participation, and partly because it is now gravely affected by the disease from which the party system suffers: bureaucratization and the two parties' tendency to represent nobody except the party machines.

Also significant is Arendt's discussion of judicial review: "civil disobedience among our political institutions might be the best possible remedy for [the] ultimate failure of judicial review".⁴⁴ The "political question doctrine" in American courts means some actions by the legislature and the executive are not reviewable.⁴⁵ The lack of accountability means that civil disobedience should arguably fill that gap. While it is not positioned as such, the argument broadly accords with radical democratic theory, in that civil disobedience performs an important democratic function where other procedures have failed.

Arendt, therefore, provides a slightly different model of civil disobedience. While some elements align with Rawls and Cohen, her understanding of society involving tacit consent and of civil disobedience as a community action means that civil disobedience takes on a somewhat different flavour.

D Robin Celikates

In contrast, Robin Celikates provides a radical democratic model of civil disobedience. It is therefore more widely constructed than those of Rawls, Cohen, and even Arendt. Civil disobedience is conceived:⁴⁶

...as an intentionally unlawful and principled collective act of protest (in contrast to both legal protest and 'ordinary' criminal offenses or 'unmotivated' rioting), with which citizens – in the broad sense that goes beyond those recognized as citizens by a particular state – pursue the political aim of changing specific laws, policies, or

⁴³ Arendt, above n 1, at 89.

⁴⁴ At 101.

⁴⁵ At 100.

⁴⁶ Celikates, above n 4, at 985.

institutions (in contrast to conscientious objection, which is protected in some states as a fundamental right and does not seek such change) in ways that can be seen as civil (as opposed to military).

Celikates developed this model partially in response to previous theorists. He cites Rawls, noting the standard elements of civil disobedience are "far from unproblematic and uncontested":⁴⁷ for instance, the effectiveness of blocking an intersection may be hampered by publicity, and it is unclear whether nonviolence includes trespassing.⁴⁸ He further considers the political aspects of categorising civil disobedience:⁴⁹

...describing an event, activity, person or group as 'violent', far from being a neutral observation, is always also a politically charged speech act that can reproduce forms of marginalization and exclusion that are often racialized and gendered.

With civility, rather than the "liberal emphasis on the non-violent, symbolic and law-abiding character of civil disobedience", protestors acknowledge "some kind of civil bond with their adversaries", leading to "self-limitation and self-restraint".⁵⁰ Celikates' understanding of civil disobedience is, therefore, broader in scope than his predecessors.

Further, Celikates discusses the difference between symbolic politics and real confrontation, noting that effective civil disobedience must contain aspects of both. The "symbolic effect of civil disobedience... obviously depends on the efficacy of its confrontational strategy – otherwise it would simply evaporate".⁵¹ However, "[civil disobedience] can function as real confrontation only if those practising disobedience remain aware of its irreducible symbolic dimension".⁵² While he does not explicitly discuss

⁴⁷ Celikates, above n 4, at 983.

⁴⁸ At 983.

⁴⁹ At 984.

⁵⁰ At 986.

⁵¹ At 988.

⁵² At 988.

violence, it does logically follow that some violence can comprise part of civil disobedience.

Finally, Celikates' understanding of democracy flows to the heart of his model. Instead of civil disobedience being "a *limitation* on democratic sovereignty",⁵³ Celikates sees civil disobedience "as an *expression* thereof".⁵⁴ Civil disobedience is situated as "the expression of a democratic practice of collective self-determination, and as a dynamizing counterweight to the rigidifying tendencies of state institutions".⁵⁵ Celikates highlights the fact that democracy is usually imperfect, often having structural deficits "in... representation, participation and deliberation".⁵⁶ Civil disobedience therefore brings conversations to the attention of the state and public consciousness which may otherwise be lost.

Celikates' model is therefore in many ways the polar opposite to some of his predecessors. Each of the models do, however, have something in common: they are clearly infused by how each of the theorists see the world. For Rawls and Cohen, liberal theory means that the disruption of a (democratically elected) state should be minimal. Locke's social contract and tacit consent imbue Arendt's model of civil disobedience. However, for Celikates, civil disobedience provides a mechanism for strengthening democracy. Understanding these contexts allows for a fuller understanding of what model of civil disobedience may be appropriate for Aotearoa.

III Civil Disobedience as an Overseas Creation

⁵³ Delmas, above n 15, at 687.

⁵⁴ At 687.

⁵⁵ Celikates, above n 4, at 988.

⁵⁶ At 989.

There is no one definition of civil disobedience that can be agreed upon. What is *striking*, however, is how each definition is connected to a specific context. As discussed, civil disobedience is often seen as American. While Arendt herself was not American, after fleeing Germany she eventually settled in New York. Rawls and Cohen were both American. Celikates, a German political philosopher, is not American or based in America, and it is perhaps telling that he provides the most radically different model. Nonetheless, his discussion does not completely evade the United States, noting that Henry David Thoreau and Martin Luther King, Jr are among the "often-invoked paradigm cases".⁵⁷

Humans can think beyond themselves, and as the world becomes increasingly cosmopolitan it is important to think as a global citizen. However, that does not mean humans are unaffected by external influences. Antonio Gramsci's concept of ideology is helpful at this point, developing a Marxian concept of ideology. Marxism saw ideology as having a "class character": "there was an ideology of the capitalist class and an ideology of the working class, both ideologies antagonistic, defined, and mutually exclusive in their totality".⁵⁸ Gramsci, however, theorised that ideology was not delineated by class but rather used, in some ways, to maintain a class order. The hegemonic class:⁵⁹

...held state power through its economic supremacy and through its ability to have, among other things, successfully articulated or expressed in a coherent, unified fashion the most essential elements in the ideological discourses of the subordinate classes in civil society.

The ideas of the hegemonic class therefore become shared by the rest of society, thus somewhat obscuring class differences and allowing the hegemonic class control. These ideas are spread through transforming culture, using "social institutions and structures such

⁵⁷ Celikates, above n 4, at 984.

⁵⁸ Valeriano Ramos Jr "The Concepts of Ideology, Hegemony, and Organic Intellectuals in Gramsci's Marxism" (1982) *Theoretical Review*; Encyclopedia of Anti-Revisionism On-Line "The Concepts of Ideology, Hegemony and Organic Intellectuals in Gramsci's Marxism" <www.marxists.org>.

⁵⁹ Ramos Jr, above n 58; Encyclopedia of Anti-Revisionism On-Line, above n 58.

as the family, churches, the media, schools, the legal system, and other organizations such as the trade unions, chambers of commerce, and economic associations".⁶⁰

The Gramscian concept of ideology therefore shows ideas can be shaped culturally: humans are not in total control of how they think. This can also be seen with unconscious biases, those "that exist without our conscious knowledge, the ones that manifest themselves in our actions and reactions often without us realising it".⁶¹ Unconscious bias "is the result of cognitive reasoning that was embedded in our brain long before we even realized it. It is based on our own background, culture, and personal experiences".⁶² It is impossible to not have your views shaped by the culture around you. That is not to say that all culture is accepted blindly or immune from critique, but rather that culture often seeps into one's psyche as second nature. Influences may also be more overt, the classic example being patriotic posters displayed during the war effort that inspired citizens' support for one's country.⁶³

When it comes to academic development on civil disobedience, the United States focus of the literature means that the work is therefore consciously and unconsciously influenced by American culture. The flow on effect is that those models are arguably not fit-for-purpose for other states. The models are not useless: Aotearoa shares many characteristics with the United States, the most obvious being that both are liberal states. It is important, however, to think critically how those similarities are discussed and applied: is a neutral state present in Aotearoa? Should violent acts constitute civil disobedience? How does Aotearoa perceive the public-private divide? These questions will all be explored in the following parts of the paper.

⁶⁰ Ramos Jr, above n 58; Encyclopedia of Anti-Revisionism On-Line, above n 58.

⁶¹ Pragya Agarwal *Sway: Unravelling Unconscious Bias* (Bloomsbury Sigma, USA, 2020) at 10.

⁶² Norma Graciela Cuellar "Unconscious Bias: What is yours?" (2017) 28 JTCN 333 at 333.

⁶³ Stephanie Gibson "Second World War posters" Museum of New Zealand: Te Papa Tongarewa <www.tepapa.govt.nz>.

IV Democracy as a Fundamental Constitutional Principle in Aotearoa

While each model of civil disobedience has been developed in a largely American context, and thus are not suitable for direct application to Aotearoa, some formulations are arguably more suited than others. This is particularly apparent when looking at Aotearoa's commitment to democracy as a fundamental constitutional principle.

Democracy plays a key function in Aotearoa's constitutional arrangements, forming the basis of the electoral system. While this is common among states, Aotearoa seems to have a particularly strong affinity for democratic governance.⁶⁴ For instance, Sir Kenneth Keith notes that democracy is the "underlying principle" of Aotearoa's constitution, where "the King reigns, but the government rules".⁶⁵ This is supported by academics Matthew Palmer and Dean Knight, saying "Parliament stands at the centre of New Zealand's constitutional system and radiates the nation's strong commitment to representative democracy."⁶⁶

However, it is the type of democracy that Aotearoa is committed *to* that is important. Rawls and Celikates both base their models of civil disobedience on their understandings of democracy – resulting in two very different models. The kind of democracy that Aotearoa practices (at least theoretically) should therefore be ascertained.

Firstly, the Official Information Act 1982 (OIA) speaks to Aotearoa's support for government criticism. The OIA had "lofty" goals: "to "increase progressively the availability of official information" to promote democratic participation, political

⁶⁴ This argument is derived from an earlier LAWS441 Honours paper. See Sarah Burton "Context Matters: On Aotearoa New Zealand's "Reluctance" to Adopt the Statute of Westminster" (LLB (Hons) Paper, Victoria University of Wellington, 2023).

⁶⁵ Cabinet Office *Cabinet Manual 2023* at 3.

⁶⁶ Matthew Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Bloomsbury Publishing, London, 2022) at 49.

accountability and good government".⁶⁷ Overall, it sought to implement the principle of open government, which "include[s] both transparency and accountability".⁶⁸ The Law Commission considered that the OIA was "generally achieving its stated purposes".⁶⁹ Further, "the principle of open government [was now] central to the ethos of public administration".⁷⁰

The OIA is far from the only instrument used for these purposes. Palmer and Knight note that several instruments have similar aims: judicial review (indeed, recall Arendt's discussion of how civil disobedience could remedy "gaps" left by judicial review), statutory appeals, administrative appeals, the Ombudsman, the Controller and Auditor-General, Inquiries, public records and reason-giving.⁷¹ None of these mechanisms are perfect in ensuring transparency or accountability – for instance, those who make OIA requests "often complain that the process is gamed... so as to avoid timely and meaningful disclosure",⁷² through, for instance, "baseless refusals".⁷³

The spirit of these laws is, however, what should be focused on. These instruments encourage a democracy that, in general, recognises that citizens grant the mandate of government, and provides opportunities for citizens to have a voice beyond voting. Citizens can criticise the government in power, even though they may have voted them in. This is similar to the radical democratic position, as individual citizens are in a stronger position

⁶⁷ Steven Price "The Official Information Act 1982: A Window on Government or Curtains Drawn?" (NZCPL Occasional Paper No 17, November 2005) at 3.

⁶⁸ Richard Mulgan *Making Open Government Work* (Palgrave Macmillan, Basingstoke, United Kingdom, 2014) at 6.

⁶⁹ Geoffrey Palmer "A Hard Look at the New Zealand Experience with the Official Information Act After 25 Years" (paper presented to the International Conference of Information Commissioners, Wellington, 27 November 2007) at 10; Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997).

⁷⁰ Palmer, above n 69, at 10; Law Commission, above n 69.

⁷¹ Palmer and Knight, above n 66, at ch 8.

⁷² At 185.

⁷³ At 185.

to criticize the government. Civil disobedience, under Celikates' model, is an expression of democracy because citizens can assert viewpoints that are missing from the government narrative. In general, Aotearoa's laws also attempt to allow citizens the same opportunities to assert missing views, for example through criticism generated by OIA requests.

Secondly, Aotearoa also arguably encourages some forms of direct decision-making and contestation like referenda. Aotearoa allows two forms of referenda: government-initiated and citizen-initiated (CIR). The latter was introduced in 1993,⁷⁴ allowing citizens to propose a referendum. If, after 12 months, at least 10% of enrolled voters have "sign[ed] a petition in support of the question", a non-binding referendum will be held.⁷⁵ While CIR have been criticised for several reasons,⁷⁶ the very presence of CIR shows, at least, that value has been placed on direct democracy in Aotearoa.

There have been twelve government-initiated referenda in Aotearoa's legal history. This small number suggests they are "not widely used".⁷⁷ Importantly, however, five of those have occurred within the last 12 years.⁷⁸ Politicians now also include referenda as part of political campaigns.⁷⁹ Referenda are therefore increasingly playing a role in Aotearoa's democracy.

Further, a recent study examined Aotearoa's appetite for referenda between 2015 and 2016, following the flag change referendum. The study concluded that "it was clear that support

⁷⁴ Citizens Initiated Referenda Act 1993.

⁷⁵ Cabinet Office, above n 65, at 7.141.

⁷⁶ See, for example: Bridget Fenton and Andrew Geddis "Citizens initiated referenda" (2009) NZLJ 334.

⁷⁷ Tamsin Black "Why Are You Asking Me? A Critical Analysis of Referendum Use in New Zealand" (LLB (Hons) Dissertation, Victoria University of Wellington, 2020) at 11.

⁷⁸ Referenda occurred in 1949 (2 referenda), 1967, 1990, 1992, 1993, 1997, 2011, 2015, 2016, 2020 (2 referenda).

⁷⁹ See, for example, the ACT party's current proposed referendum on co-governance: ACT "ACT proposes referendum on co-governance" <www.act.org.nz>. Inclusion of this example does not mean that the author agrees with this policy.

for referenda was higher in 2016 than 2015".⁸⁰ This increase may have been "due to a rise in political disaffection",⁸¹ or because "the flag referendums have remedied [the] negative past experiences of referenda".⁸² Overall however, the "results suggest that... the New Zealand public is (increasingly) supportive of referendums."⁸³ This increasing support arguably accords with the radical democratic position. While most, if not all, important decisions are traditionally made by the government, referenda allow citizens to engage with popular forms of decision making – a direct say on law-making.

Considering the importance of democracy to Aotearoa's constitutional arrangements, and the type of democracy that Aotearoa practices, it is argued that both are aligned, broadly, with radical democratic theory. A radical democratic model of civil disobedience, such as that presented by Celikates, should therefore form the starting point for an Aotearoa model of civil disobedience. Other models of civil disobedience discussed however remain relevant, particularly for the purpose of critique.

V The Springbok Tour 1981

The Tour protests are firmly embedded in the public psyche of Aotearoa. Considering its historical significance, this paper will use the Tour protests as a primary case study of civil disobedience from which to build an Aotearoa theory of civil disobedience, with the historic settlement at Parihaka being used as a secondary case study to examine Māori dimensions of civil disobedience. Following a theory building approach, the case study will form.⁸⁴

⁸⁰ Lara M Greaves, Luke D Oldfield and Barry J Milne "Let the people decide Support for referenda since the New Zealand flag change" (2020) 16 *Kōtuitui: New Zealand Journal of Social Sciences Online* 133 at 137.

⁸¹ At 140.

⁸² At 141.

⁸³ At 142.

⁸⁴ Kathleen M Eisenhardt and Melissa E Graebner "Theory Building from Cases: Opportunities and Challenges" (2007) 50 *AMJ* 25 at 25.

...the basis from which to develop theory inductively. The theory is emergent in the sense that it is situated in and developed by recognising patterns of relationships among constructs within and across cases and their underlying logical arguments.

There is also value in more traditional methods of theory building, particularly "by combining observations from previous literature".⁸⁵ The paper will therefore take a combined approach to designing a model of civil disobedience for Aotearoa, looking at both the Tour combined with an analysis of previous theorists.

The Tour protests are perhaps an unconventional example, considering how classic models of civil disobedience would take offence to some characteristics, like violence. There is, however, something to be said for movements encapsulating the "spirit" of civil disobedience. A protest movement may, for instance, be theoretically precluded from constituting civil disobedience because it does not fulfil the elements of a particular model. Such a result can feel unsatisfying: the movement, *instinctually*, seems to be a case of civil disobedience. In these circumstances, it is suggested that civil disobedience should be altered to align with popular understanding.

A History of the Tour

A brief history of the Tour and its context is required to understand key aspects of civil disobedience. This part of the paper will outline the necessary aspects of the protests.

1 Context of the Protests

From 1948 to the early 1990s, South Africa instituted the policy of apartheid (in Afrikaans: 'apartness'): a racial segregation policy. Apartheid "served to maintain the political and

⁸⁵ Kathleen M Eisenhardt "Building Theories from Case Study Research" (1989) 14 AMR 532 at 532.

economic supremacy of the white minority".⁸⁶ Not only was segregation practised in "the routine of daily life" – *petty apartheid* – but it was also seen in "the wholly unique system of racially biased laws that limit the personal freedom of all South African blacks and prohibit them from any significant political voice in their Government" – *grand apartheid*.⁸⁷ The comprehensive nature of the policy was such that "no other country in the world practice[d] such a thorough degree of discrimination based solely on race".⁸⁸

Such a policy was understandably criticised by the international community. A specific condemnation came in the form of the Gleneagles Agreement, adopted at a meeting of the Commonwealth Heads of Government and including Aotearoa's Prime Minister Robert Muldoon. Of particular interest is the duty of governments:⁸⁹

... it is the urgent duty of each of their Governments vigorously to combat the devil of apartheid by withholding any form of support for, and by taking every practical step to discourage contact or competition by, their nationals with sporting organisations, teams of sportsmen from South Africa or from any other country where sports are organised on the basis of race, colour or ethnic origin.

While the statement strongly condemned apartheid, it was a statement of political intent rather than a formal source of international law like a treaty.⁹⁰ It therefore did not provide

⁸⁶ Christopher Riches and Jan Palmowski *A Dictionary of Contemporary World History* (6th ed, Oxford University Press, Oxford, 2021).

⁸⁷ Robert S McNamara "Before It's Too Late in South Africa" *The New York Times* (New York, 14 August 1985) at A23.

⁸⁸ At A23.

⁸⁹ "Commonwealth Statement on Apartheid in Sport" (1977) 27 *New Zealand Foreign Affairs Review*; and Charles Christian "The Gleneagles Agreement – a legal perspective" (1981) 6 *New Zealand International Review* 7 at 8.

⁹⁰ Christian, above n 89, at 7.

a legally enforceable mechanism for noncompliance. Disputes "ultimately [had to] be resolved by a political rather than a judicial process".⁹¹

The criticism levied against South Africa's apartheid also extended well into the public psyche. In the rugby context, discontent had become apparent as early as 1921, the agreement to not select Māori players for South African tours being characterised as "effectively importing apartheid".⁹² A 1973 Springbok tour of New Zealand was banned, only for an All Blacks tour of South Africa to go ahead in 1976 under the newly elected National government,⁹³ who had campaigned on a platform that "[e]very New Zealander should be free to have contact or to play sport with... anyone in the world".⁹⁴ The 1976 tour was met with significant backlash, with marches across Auckland, Christchurch, Wellington and Dunedin.⁹⁵ It has been said that "the opposition campaign was potent because of rugby's metonymical role in Aotearoa/New Zealand",⁹⁶ the topic creating a deep divide between New Zealanders. Those who supported the tours believed that politics should not come into sport, while those opposed believed that the tours constituted implicit tolerance of apartheid. It is with this context that the decision to allow the 1981 Tour to go ahead was made.

2 *The Tour Begins*

The first games set the scene for the course of the Tour. In the first game, around 300 protesters marched to Rugby Park, with a brawl breaking out between rugby fans and

⁹¹ Christian, above n 89, at 7.

⁹² Malcolm Maclean "Football as Social Critique: Protest Movements, Rugby and History in Aotearoa, New Zealand" (2000) 17 IJHS 255 at 256.

⁹³ Hamish McDougall "'The whole world's watching': New Zealand, International Opinion, and the 1981 Springbok Rugby Tour" (2018) 45 JSH 202 at 209.

⁹⁴ At 209.

⁹⁵ "The rally in Cathedral Square last evening" *The Press* (Christchurch, New Zealand, 29 May 1976) at 1.

⁹⁶ Maclean, above n 92, at 256.

protestors.⁹⁷ Two men stormed the field, and thirteen protestors were arrested, "strew[ing] shattered glass, nails, and fishhooks onto the playing surface, delaying the match".⁹⁸ The intensity of the protests only increased with the next game in Hamilton, which was cancelled following a pitch invasion.⁹⁹

What is important in these examples is the burgeoning use of violence, both by the police and by pro-Tour civilians. In Gisborne, one protestor noted that she and other women were continually "dumped back by police waiting at the top" of a bank.¹⁰⁰ The response of spectators was to scream "get those fucking bitches, get those sluts! Block them blueies"!¹⁰¹ Similarly in Hamilton, another protestor suffered a snapped tendon in her arm during an arrest, grappling with "angry, kicking and gouging spectators".¹⁰² These incidents exemplify the violence faced by protestors.

Those incidents, however, pale in comparison to the Molesworth Street protest: "Wellington's darkest hour of the tour".¹⁰³ When a demonstration began moving up Molesworth Street on 29 July 1981, the police "drew a line"¹⁰⁴ and used unprecedented force – "[drawing] batons and [raining] down blows on unarmed protestors".¹⁰⁵ This serious use of violence became a turning point of the Tour. While violence was not absent from previous demonstrations, this was the first instance where demonstrators had been

⁹⁷ Leonie Hayden "Three things you didn't know about the 1981 Springboks tour" *The Spinoff* (New Zealand, 28 December 2021).

⁹⁸ Sebastian Potgieter "A Long Shadow: The 1981 Springbok Tour of New Zealand" (2019) 36 *Sporting Traditions* 23 at 36.

⁹⁹ Hayden, above n 97.

¹⁰⁰ Sandra Coney "new zealand women protest apartheid" (1981) 11 *off our backs* 12 at 12.

¹⁰¹ At 12.

¹⁰² At 12.

¹⁰³ Trevor Richards "'Wellington's darkest hour of the tour': 40 years since violence erupted on Molesworth St" *Dominion Post* (online ed, Wellington, New Zealand, 29 July 2021).

¹⁰⁴ Interview with Rachel Bush, Bert Hill and Alick Shaw, Bush and Shaw were Springbok Tour protestors and Bill was a Police Inspector (John Sellwood, *Close Up*, TVNZ, 4 July 2006).

¹⁰⁵ Interview with Bush, Hill and Shaw, above n 104.

deliberately and violently set upon by the police, with many becoming seriously injured. It has also been suggested by Alick Shaw, "chief marshall of protestors,"¹⁰⁶ that "what happened was a result of the government's direct intervention with the highest levels of the police force".¹⁰⁷

3 *The Third Test*

An outpouring of violence occurred at the final test in Auckland: "the most violent day of the tour".¹⁰⁸ A total of 270 protestors, and 32 police officers, had to receive medical treatment, alongside 91 arrests.¹⁰⁹ Protestors clashed with police, protestor Geoff Chapple encapsulating the violence:¹¹⁰

...it was a street fight, and in hot blood [action squad] Patu was giving as good as it got. Even, they were winning. *They must not! Clang!* The law. Hawkish above it all. Police violence throughout the tour, but not this retaliation. A revenge random according to whose face was recognisable to sifting police teams in the photographs, the video tape, the news film commandeered later, but vindictive. In cold blood, the law. Unlawful assembly. Riot.

Violence was rife not just among police, but also among spectators.¹¹¹ Spectators took matters into their own hands by attacking protestors and encouraging violence: for instance, after Hilda Raven climbed onto the pitch at Eden Park, protestors yelled to "kick her face in, the bitch".¹¹² The attacks further rained down from the skies – a hired aeroplane dropped

¹⁰⁶ Tom Hunt "The night of the batons: still defiant 30 years on" *Dominion Post* (online ed, Wellington, New Zealand, 3 August 2013).

¹⁰⁷ Interview with Bush, Hill and Shaw, above n 104.

¹⁰⁸ Geoff Chapple *When the Tour Came to Auckland* (eBook ed, Bridget Williams Books, Wellington, 2013) at ch 2.

¹⁰⁹ At ch 2.

¹¹⁰ At ch 2.

¹¹¹ At ch 2.

¹¹² At ch 2.

leaflets, smoke-bombs and the infamous flour bombs. One flour bomb took out All Black Gary Knight.¹¹³ Therefore, radical violence was employed during the third test.

As protestors were united in their opposition to government policy (to "leav[e] sporting contacts to sporting bodies")¹¹⁴ which could not be directly violated, they were required to break other laws. There are many laws that would have been contravened across the Tour: the following discussion will highlight some, but far from all, of the lawbreaking. As most protestors will not have had tickets to the games, and therefore no authorisation to be at the rugby grounds, the pitch invasion at Hamilton likely constituted trespass. Had any protestors had tickets, the pitch invasion would likely have breached the terms and conditions of entry, thereby violating contract law. Hinengaro Davis was "sentenced to six months imprisonment" for unlawful assembly.¹¹⁵ In Palmerston North, charges were laid for "obstructing police... using insulting language, wilfully damaging a car and unlawfully interfering with a car".¹¹⁶

Other potential violations related to the violence itself. Chapple, for instance, was convicted of disorderly behaviour.¹¹⁷ Hone Harawira was charged with three charges of participating in riot and four charges of assault with intent to cause grievous bodily harm, although he was acquitted.¹¹⁸ Jane Kelsey noted that she faced hijacking charges following

¹¹³ Interview with Doug Rollerson and Marx Jones, Springbok Tour protestors (Mark Sainsbury, Close Up, TVNZ, 4 July 2006).

¹¹⁴ Michele A'Court "Who takes the blame: A Society Divided Over the Springbok Tour" *Salient* (Wellington, New Zealand, 8 June 1981) at 16.

¹¹⁵ Rebecca Evans "Rebecca Evans on her Life" *Broadsheet* (New Zealand, October 1982) at 17.

¹¹⁶ Geoff Kaandorp "The 1981 Springbok Tour and the Anti-Apartheid Movement in Palmerston North" (BA (Hons) dissertation, Massey University, 2000) at 41.

¹¹⁷ Chapple, above n 108, at 'About the author'.

¹¹⁸ Interview with Hone Harawira, Springbok Tour protestor and former MP (Moana Maniapoto, Te Ao with Moana, Whakaata Māori, July 2021).

an airplane sit-in, and has undisclosed Tour-related criminal convictions.¹¹⁹ Marx Jones spent six months in prison on undisclosed charges following his flour bombings.¹²⁰

Returning to the idea of violence, it cannot be said that the violence by protestors was unprecedented. There was a clear line of escalation as the tour progressed. At the start of the tour violence appears, but not on a large scale. At Molesworth Street, there is a turning point in the use of force by the police, who are emblematic of the state. The use of police force in Molesworth Street arguably led to growing violence in the protests, culminating with the third test.

It is also important to note that protestors did not originally intend to use violence, with many demonstrations being "for the most part, peaceful and broadly inclusive".¹²¹ Protest organisers explicitly adopted a strategy that "involve[d] the use of non-violent civil disobedience to force the cancellation of the tour".¹²² While New Zealand has never had a specific right of protest, with the right resting on the intersection of several rights, the original aims speak to an intention of legal, peaceful protests. Changes to the strategy to use violence seem to have been implemented in response to increasing levels of violence being levied against them, rather than due to other intentions of protesters.

4 Further Strategies of the Protest Movement

The events described above comprise the dominant narrative of the Tour. While important, there are further elements that are deserving of discussion. The first is the involvement of

¹¹⁹ Interview with Jane Kelsey, Springbok Tour protestor and academic (Moana Maniapoto, Te Ao with Moana, Whakaata Māori, July 2021); "Protest conviction causes trouble for Kiwi academic" *Stuff* (online ed, New Zealand, 16 November 2010).

¹²⁰ James McOnie "Flour-bomber goes back to Eden Park" *New Zealand Herald* (online ed, New Zealand, 9 July 2006).

¹²¹ Malcolm Maclean "Anti-apartheid boycotts and the affective economies of struggle: the case of Aotearoa New Zealand" (2010) 13 *Sport in Society* 72 at 76.

¹²² Allan Greene "National Day of Shame: We Can Still Stop the Tour" *Salient* (online ed, Wellington, New Zealand, 20 July 1981).

women. Women were in the thick of the violent action,¹²³ Coney saying "regular marchers [had] got used to seeing M[ā]ori women in a literally up-front role in the anti-tour campaign... women, and especially M[ā]ori women, form[ed] the backbone of the anti-tour movement".¹²⁴

There were other ways, however, that women became involved. For many women, "the first political step taken in opposition to the power of rugby was in their own domestic realm, opposing the men in their own families".¹²⁵ For instance, one protest group called WAR ("Women Against Rugby") "deliberately used the withdrawal of domestic labour servicing rugby as a political tool".¹²⁶ A third form girl created "School Children Against the Tour", marching "to declare their views on apartheid and the tour".¹²⁷ This was supported by female teachers: a woman school teacher who had "supported and assisted" a similar protest "was severely castigated for encouraging the young in an act of unseemly disrespect".¹²⁸ Further, Eastbourne women organised a regular demonstration at the central railway station, singing "about the situation of South African blacks to the generally indifferent, sometimes contemptuous commuters".¹²⁹

There are bound to be further strategies employed by women beyond those cited. Those mentioned, however, show that while physical and often violent protest techniques were widely covered, they do not represent the variety of strategies employed. Women were not limited to disobeying the law: rather, they used various forms of disobedience (such as disobeying expected standards of behaviour) across the public and private spheres.

¹²³ See Coney, above n 100.

¹²⁴ Sandra Coney "Women Against the Tour" *Broadsheet* (New Zealand, September 1981) at 8.

¹²⁵ Shona M Thompson "Challenging the Hegemony: Women's Opposition to Rugby and the Reproduction of a Capitalist Patriarchy" (1988) 23 *International Review for the Sociology of Sport* 205 at 206.

¹²⁶ At 206–207.

¹²⁷ Donna Awatere, Judith Aitken and Ros Noonan "Rugby, Racism and Beer: New Zealand in the winter of 81" *Broadsheet* (New Zealand, November 1981) at 18.

¹²⁸ At 18.

¹²⁹ At 19.

The second notable element of the Tour was its relationship with Māori rights movements. As has been noted, the first discontent observed between apartheid and rugby was the failure to select Māori players for the All Blacks in 1921. This sentiment was echoed in the forthcoming years, with the 1960 "anti-tour movement's central slogan [being] 'No M[ā]oris [*sic*] No Tour'".¹³⁰ This rhetoric reached its peak in the 1980s, as "a change in attitude to the Treaty of Waitangi began to emerge".¹³¹ The promise of tino rangatiratanga contained in te Tiriti o Waitangi (te Tiriti) became more significant, with "a new argument emerg[ing] that the Treaty should not be considered fraudulent, but had not been honoured by the Crown or by Pakeha."¹³²

At the beginning of the Tour, the president of the Māori Council attended the welcoming ceremony at Te Poho-o-Rawiri Marae, but announced "we will not make another such welcome on a Māori Marae unless your government can show it is prepared to change its policies on apartheid".¹³³ When the Hamilton game was cancelled, it was noted by City Councillor Margaret Evans that it was, in part, due to the Māori rights movements:¹³⁴

...[it is] a tremendous growing up with the dawning recognition of the renaissance of the tangata whenua [people of the land, M[ā]ori] and the acceptance that we have many issues of our own to talk through.

Māori women were also particularly involved in protests, seeing the alignment between opposing apartheid and what they sought as justice. Halt All Racist Tours (HART) organiser Kitch Cuthbert said at the time "we bring to the anti-racist struggle our own

¹³⁰ Maclean, above n 92, at 256.

¹³¹ At 267.

¹³² At 267.

¹³³ Sebastian Potgieter "(Re)Presenting 1981: Narrating the Springbok Rugby Tour of New Zealand" (2021) 48 JSH 170 at 175.

¹³⁴ Maclean, above n 92, at 258.

history and lifetime of oppression. We can identify with the people we're fighting for".¹³⁵ Unlike Māori men, Māori women had "less to lose", due to men's "sexist connection with rugby":¹³⁶ "for Maori men, rugby has been a bargaining ground".¹³⁷

Thus, the Māori rights movement was interconnected with the general Tour protests:¹³⁸

For some M[ā]ori, the anti-tour campaign presented an opportunity to have Pakeha 'turn their eyes from overseas racism to te take M[ā]ori'. Awatere contends that it was the most significant event in M[ā]ori history since the Second World War and allowed many Pakeha to realize that New Zealand's racism was 'different in degree but not in kind from what was happening in South Africa'. The intense focus on issues of race and racism and the passions these generated through involvement with rugby union, created an environment conducive to a more comprehensive assessment of New Zealand's colonial experience, and the position of M[ā]ori in contemporary society.

It was not just women and Māori who resonated with the struggle against apartheid. Other, often marginalised groups, in society also joined the protest movement for ulterior purposes. The lesbian community, for instance, is prominently featured in feminist coverage of the Tour. Coney noted that:¹³⁹

The marches give lesbians the opportunity to demonstrate a commitment to equalise all races, an aspect of lesbian thinking not often apparent in a society that thinks of lesbians as only sexual beings.

Lesbian activists therefore supported the overall goal of the protest, but also saw the Tour movement as an opportunity to disrupt common misconceptions about lesbianism.

Politics, as it always does, also arguably played a motivating role. Academic Valerie Baisnee has posited that "most protesters were middle class Labour supporters. For the first

¹³⁵ Coney, above n 124, at 8.

¹³⁶ At 8.

¹³⁷ At 8.

¹³⁸ Maclean, above n 92, at 267.

¹³⁹ Coney, above n 124, at 10.

time the New Zealand middle class massively demonstrated".¹⁴⁰ Considering that the National Party comprised the government in 1981, it is not a stretch to infer that some protested at least in part to demonstrate their dissatisfaction with the current government.

It should also be noted that while many protestors sought to illuminate issues like racial discord or sexism in Aotearoa, this was by no means a homogenous belief. Other protestors, for instance, sought to "defend the self-proclaimed peaceful race relations in New Zealand, and project an image of a country where races lived in harmony", despite the fact that "racial harmony, however, was more myth than reality".¹⁴¹

Overall, the Tour protest movement is much more multifaceted than it seems. Even those viewpoints discussed are unlikely to cover the full breadth of views present among protestors. That is not to say that the violence and aim of condemning apartheid were not significant aspects of the demonstrations, but rather to suggest that a fuller understanding of what happened will allow Aotearoa to learn more about civil disobedience.

B Key Areas for Understanding

Having looked at the Tour's history, it is apparent there are a number of key areas to investigate in order to theorise a model of civil disobedience for Aotearoa. The first focuses on violence in civil disobedience: can violence comprise part of civil disobedience? Or should violence mean that a protest transcends the boundaries of civil disobedience?

The second key question is, considering the prominent role of women in the Tour protests, how should feminism and feminist practices inform the meaning of civil disobedience? Is it necessary for civil disobedience to be explicitly feminist? More specifically, should an Aotearoa model of civil disobedience be feminist?

¹⁴⁰ Valerie Baisnee "Creating a Usable Past: The 1981 Springbok Tour in Fiona Kidman's New Zealand Memoirs" (2016) *Cultures of the Commonwealth* 177 at 182.

¹⁴¹ At 183.

The Māori rights movement and its relationship to apartheid are also relevant. Considering the broader constitutional importance of Māori in Aotearoa (being a bicultural state), it is important to investigate the relationship between Māori and civil disobedience. For instance, how should Māori understandings of civil disobedience influence an Aotearoa model of civil disobedience?

Finally, it is apparent that alongside the desire to condemn apartheid, there were several motivations present among protestors: for instance, to bring light to women's issues, racial disharmony in Aotearoa, perceptions of the LGBTQI+ community, political views or to defend a perceived view of Aotearoa. Does joining a protest movement for multiple reasons have any bearing on whether the movement can be characterised as civil disobedience? To put it another way, if you were to join the Tour protests because you were against apartheid AND wanted to bring light to women's treatment in Aotearoa AND because of your support for Māori rights, does that preclude you from being a civil disobedient?

Despite the difficulty of these questions, the next part of this paper will attempt to tackle what principles can be derived from each area in order to inform an Aotearoa model of civil disobedience.

VI Violence and Civil Disobedience

The outpouring of violence during the Tour protests is a testament to the will of supporters and protestors of the Tour alike. Violence, however, has typically been excluded from classic models of civil disobedience. Modern models of civil disobedience leave open the possibility of violence, but generally do not explicitly address the point.¹⁴² This part of the

¹⁴² See, for example: Celikates, above n 4.

essay will argue that violence, in some circumstances, can be "civil", and should form part of civil disobedience in Aotearoa.

What is important to focus on with the Tour is not the fact that violence occurred, but rather the underlying reasons *for* the violence. The violence used by protestors was not simply for the sake of it. Instead, there is a clear turning point between the Molesworth Street incident and the final test. The original intent of the demonstrators was to be peaceful; violence over the course of the tour arguably only increased after police violence at Molesworth Street, and increased violence by pro-Tour citizens.

It is tempting to hold that the sheer amount of violence used means that the demonstrations should not constitute civil disobedience, the demonstrations causing injury to around 270 protestors and 32 police.¹⁴³ It would therefore seem prudent to discourage violence for health and safety reasons. However, the high level of police violence at Molesworth Street arguably means that the violence used by protestors was proportionate to respond to the threat posed. The Tour protests are often remembered for the helmets donned by protestors as they geared up for demonstrations.¹⁴⁴ The helmets were worn "to protect [protestors] from police batons and objects thrown by rugby supporters".¹⁴⁵ The protestors, arguably, were therefore generally a "defensive effort", rather than an offensive effort seeking to use *more* violence than was required. Other actions taken also corroborate this. The flour bombs, for instance, were not designed to cause harm, but rather a visual and symbolic disruption. Jones deliberately used paper so the bombs would "burst on impact" without injury.¹⁴⁶ The protestors' mimicry, therefore, is self-restrained in that it is dictated by the violence around them.

¹⁴³ Chapple, above n 108, at ch 2.

¹⁴⁴ Andre Chumko "The 1981 Springbok Tour, as told through objects" *Stuff* (online ed, New Zealand, 7 August 2021).

¹⁴⁵ Chumko, above n 144.

¹⁴⁶ McOnie, above n 120.

It is also important to consider the democratic implications of allowing violence to be part of civil disobedience. If we are to accept, as has been argued, that New Zealand's practice of democracy is analogous to radical democratic theory as theorised by Celikates, the increased use of violence arguably reflects the democratizing potential of civil disobedience. The use of violence at Molesworth Street was, in effect, an attempt to stifle the messages of protestors. This is especially so if the police had been acting under government directions, as has been alleged.¹⁴⁷ Even if the police were acting independently, the crackdown in effect attempted to stifle the discourse. In this situation, where agents of the state are stifling a message, the increased use of violence at the third test is emblematic of civil disobedience's democratizing potential. The violence was intended to balance that used by the state so that important messages around racism were not lost to the public consciousness.

It may even be argued that the use of violence goes beyond democratisation: it challenges state oppression. The repression of the protest at Molesworth Street was a "politically charged speech act",¹⁴⁸ aiming to communicate that this kind of protest was unacceptable: "violent, uncivil and criminal",¹⁴⁹ reasoning that protestors had violated the rule of law.¹⁵⁰ If we are to then accept that the violence employed by protestors (as a *response* to state violence) render their demonstration uncivil, that effectively allows the state to marginalise anti-Tour groups. As marginalisation is a key component of Celikates' radical democratic discussion, labelling the demonstration as uncivil would be inconsistent with Celikates' conception of civil disobedience. In other words:¹⁵¹

¹⁴⁷ Interview with Bush, Hill and Shaw, above n 104.

¹⁴⁸ Celikates, above n 4, at 984.

¹⁴⁹ At 984.

¹⁵⁰ Interview with Bush, Hill and Shaw, above n 104.

¹⁵¹ Philip K Hamlin "The 1981 Springbok Tour of New Zealand" (1982) 4 Auckland U L Rev 313 at 323.

If the law and the government are immune to serious critique, if those who criticise have the substance of their argument defined as irrelevant, or find themselves discredited as individuals, then our political philosophy needs an overhaul.

On that basis, the violence at the third test should be accepted in a definition of civil disobedience. Actions taken should not be separated from the context in which they are exercised. The escalation of violence by the police and pro-Tour citizens effectively forced protestors to also increase their use of violence. Considering the democratizing potential of civil disobedience, this use of violence should be permitted under an Aotearoa model of civil disobedience.

This argument therefore broadens the ability to employ violence to instances where a) violence is used in response to violence or attempted oppression by another group, especially the government, and b) the violence used is proportionate to the "threat" posed. However, should the violence requirement be expanded further? Should violence be allowed to constitute civil disobedience in other circumstances? While violence is classically excluded from models of civil disobedience, Celikates, for instance, prefers a model predicated on civility, stating that any demonstration should be conducted "in ways that can be seen as civil (as opposed to military)".¹⁵² This construction is wider than the principle ascertained from the Tour protests.

On one hand, if Aotearoa aligns closely with radical democratic values, perhaps a construction of civil disobedience such as that theorised by Celikates should be adopted in an Aotearoa model. On the other hand, the Tour case study does not suggest that in practice Aotearoa accepts a greater use of violence in civil disobedience. Both positions are clearly arguable. On balance, however, it seems that adopting the narrower position may be more appropriate for Aotearoa. While there is evidently a desire to allow some level of violence into civil disobedience, to go further than is demonstrated in the Tour is perhaps more

¹⁵² Celikates, above n 4, at 985.

speculative than is necessary. An analysis of other instances of civil disobedience in Aotearoa, or future instances of protest, could change this position. This paper however argues that, based on the Tour, a model of civil disobedience should allow for violence in those narrow circumstances.

VII Women, Feminism and Civil Disobedience

Women formed a significant part of the Tour movement, not only in numbers but in leadership and diversifying the approaches to protest taken. They, of course, sought to condemn apartheid. However, there were also other dynamics at play: namely, the relationship between rugby, men and women in Aotearoa. Various academics have concluded that in Aotearoa, rugby is representative of and a tool of the patriarchy. Historian Jock Phillips notes that rugby was historically:¹⁵³

..."a man's game", with an 1891 proposal to send a women's team on tour being "hit hard": "rugby was 'unwomanly' and the public would never support it. The attempt was subsequently dismissed as 'a huge farce'.

Thompson further notes that in Aotearoa, where rugby is "decidedly [part of the] dominant culture, the 'woman as object' attitude has been... documented as prevalent".¹⁵⁴ These attitudes are compounded when it comes to Māori women or other women of colour. Such attitudes comprised part of why women protested the Tour.

There is also an intersection between why and how women protested. While rugby in Aotearoa has traditionally been linked to patriarchy, "the domestic labour of women has always serviced rugby".¹⁵⁵ It therefore makes sense that alongside traditional protest actions, women protested in the private sphere, withdrawing domestic labour "as a political

¹⁵³ Jock Phillips *A Man's Country? The Image of the Pakeha Male: A History* (Penguin Books, New Zealand, 1996) at 94.

¹⁵⁴ Thompson, above n 125, at 206.

¹⁵⁵ At 206.

tool".¹⁵⁶ This withdrawal of labour was not only a new site of disobedience, but also a new method of disobedience. Disobedience was used in a wider way than just disobedience to the law: instead, disobeying the traditional patriarchal rules of labour distribution.

The presence of these dynamics creates an interesting question of whether and how such perspectives should influence an Aotearoa model of civil disobedience.

A Feminist Perspectives in Aotearoa and Beyond

Feminism in Aotearoa experienced growth in the 1980s, in part arguably because of the Tour. Before this can be examined, however, it is important to note that feminism as a concept is not homogenous in Aotearoa. While feminism is generally understood as a women's movement, feminism has historically prioritised the voices of white women and ignored those of women from minority groups.¹⁵⁷ In Aotearoa specifically, Māori women have been excluded from the feminist movement. This paper will therefore examine the feminist movement generally and the mana wahine movement. Academic Naomi Simmonds has described mana wahine as being:¹⁵⁸

...often referred to as Māori feminism; ...however, it is not quite as straightforward as this. Patricia Johnston and Hine Waitere (2009) acknowledge the complexity of mana wahine, which is about recognising the authority, dignity, and power (the mana) of Māori women. Its central strand lies in the intersection of being both Māori and female, and thus Māori women are often intimately entangled in multiple oppressions - those arising from sexism, racism, and colonisation, but others too, such as homophobia.

¹⁵⁶ Thompson, above n 125, at 206–207.

¹⁵⁷ See, for example: Kimberle Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989 U Chi Legal F 189 at 144.

¹⁵⁸ Naomi Simmonds "Mana wahine: Decolonising politics" (2011) 25 Women's Studies Journal 11 at 13.

Mana wahine is therefore an extension of kaupapa Māori theory,¹⁵⁹ examining the ordeal of women intertwined with the indigenous experience. It is important to recognise that "the assertions of M[ā]ori women ought to be read within the growing pan-M[ā]ori nationalism and not merely as a metonymical extension of the white women's movement in Aotearoa/New Zealand".¹⁶⁰

Returning to the discussion of feminist growth, Fougere has argued that rugby is no longer synonymous with patriarchy, his position being that:¹⁶¹

...in New Zealand, rugby no longer accurately mirrors the relationship between men and women in the larger culture and [he] suggests that the dissension over the Springbok tour was, in part, a reflection of this change. [Fougere] contrasts the relatively equal numbers of men and women in the anti-tour movement with the maleness of rugby crowds and administration. Recent moves towards anti-discrimination in sport and a critical approach from some quarters are also evidence of a rejection of stereotypical masculine definitions.

Considering that Fougere was writing in 1981, in the recent aftermath of the Tour, it is doubtful whether Aotearoa's culture could have shifted that significantly. It can however be deduced that the Tour protests caused at the very least a significant jolt to the patriarchal elements of Aotearoa's culture.

For Māori women, the shift and "assertion of female identity" has been seen as "a direct outcome of the nationalistic struggle for sovereignty",¹⁶² the Tour protests following Dame Whina Cooper in the 1975 Land March.¹⁶³ Mohanram asserts that:¹⁶⁴

¹⁵⁹ Simmonds, above n 158, at 11.

¹⁶⁰ Radhika Mohanram "The Construction of Place: Maori Feminism and Nationalism in Aotearoa/New Zealand" (1996) 8 NWSA Journal 50 at 61.

¹⁶¹ Lois Bryson "Sport and the Oppression of Women" (1983) 19 Journal of Sociology 413 at 424.

¹⁶² Mohanram, above n 160, at 63.

¹⁶³ At 61.

¹⁶⁴ At 63.

...by playing the significant roles at the level of the nation, women gain in importance and visibility. To attribute their prominence to global feminism alone would be to erase the centrality and significance of M[ā]ori nationalism.

This point will be developed further in the Māori and Civil Disobedience section.

In the present day, while women in Aotearoa are not equal to men, progress has been made towards gender justice. Aotearoa's parliament now has majority women members,¹⁶⁵ with the phenomenon of Jacinda Ardern also suggesting that Aotearoa is growing warmer to female-associated styles of leadership: "in times when populist leaders with a hyper-masculine leadership styles took control from Brazil to Hungary, she brought compassion, kindness and empathy to politics."¹⁶⁶ Aotearoa consistently ranks highly on indexes that purport to measure gender equality.¹⁶⁷ What is really interesting are international perceptions of Aotearoa. International coverage of Aotearoa's parliamentary makeup and the birth of Ardern's child while Prime Minister has branded Aotearoa as "a leader for gender parity in politics".¹⁶⁸ Overseas publications routinely focus on the parity in Aotearoa's government – for instance, in Cabinet.¹⁶⁹ Internationally, therefore, Aotearoa carries a brand of female empowerment.

With all of that in mind, is Aotearoa therefore a feminist state? The concept of state feminism may be helpful at this point. State feminism was originally defined as "a variety of public policies and organizational measures, designed partly to solve general social and

¹⁶⁵ New Zealand Parliament "New Zealand Parliament celebrates majority women MPs" (23 November 2022) <www.parliament.nz>.

¹⁶⁶ Hilde Coffe "Jacinda Ardern: the 'politics of kindness' is a lasting legacy" *The Conversation* (New Zealand, 21 January 2023).

¹⁶⁷ See, for instance: World Economic Forum *Global Gender Gap Report 2023* (June 2023).

¹⁶⁸ Inter-Parliamentary Union "Women in politics in New Zealand: here's what they are doing right" (22 March 2021) <www.ipu.org>.

¹⁶⁹ Tess McClure "A very welcome thing: New Zealand cabinet reaches gender parity for first time" *The Guardian* (online ed, United Kingdom, 11 April 2023); Kelly Ng "New Zealand cabinet reaches gender equality for the first time" *BBC News* (online ed, United Kingdom, 12 April 2023).

economic problems, partly to respond to women's demands".¹⁷⁰ State feminism sees the state as an arena for change, where "democracies can and should be feminist".¹⁷¹ Indeed, state feminism has grown in recent years with Sweden explicitly declaring itself to have "a feminist government".¹⁷² However, whether the state can truly be feminist is a source of contention, some arguing "the state is part of patriarchy and thus tainted by the dynamics of gendered power relations and male domination".¹⁷³

Despite the advances outlined, it is unlikely that Aotearoa could truly be considered a feminist state. Aotearoa is far from a feminist utopia: for instance, Aotearoa's focus on Kate Sheppard as the bastion of feminism arguably illustrates that Aotearoa's feminism remains "dominated by a heterosexual, middle class, and particularly white perspective".¹⁷⁴ There is work to be done in creating space for the many conceptions of *mana wahine*.¹⁷⁵ No declaration has been made branding Aotearoa as having a feminist government. Nonetheless, Aotearoa's successes should not be completely disregarded.

Overall, therefore, Aotearoa has a complicated relationship with feminism. While the Springbok Tour was an important step forward for women, it should also be acknowledged that for Māori women, progress was forged also in the context of the Māori nationalist movement. Further progress has been made in recent years – and while Aotearoa cannot be considered a feminist state, international coverage and internal progress does mean Aotearoa has a growing *reputation* as a state with feminist aims.

¹⁷⁰ Helga Hernes *Welfare State and Woman Power: Essays in State Feminism* (Norwegian University Press, Oslo, 1987) at 15, as cited in Amy G Mazur and Dorothy E McBride "State feminism" in Gary Goertz and Amy G Mazur (eds) *Politics, Gender, and Concepts: Theory and Methodology* (Cambridge University Press, Cambridge, 2008) 244 at 247.

¹⁷¹ Mazur and McBride, above n 170, at 244.

¹⁷² Stefan Löfven "Statement of Government Policy 21 January 2019" (21 January 2019) Government Offices of Sweden <www.government.se>.

¹⁷³ Mazur and McBride, above n 170, at 246.

¹⁷⁴ Sally Crawford "Playing the Trump card: Glorifying Aotearoa New Zealand feminism in 'dangerous times'" (2018) 32 *Women's Studies Journal* 100 at 112.

¹⁷⁵ Simmonds, above n 158, at 21.

B Feminist Critiques of the Liberal Position

This paper has already examined the liberal position taken by Rawls and Cohen. The classic liberal position is, as has been alluded to, not without critique. This part of the paper will look at feminist critiques of the liberal position, and how those may inform a model of civil disobedience.

Rawls and Cohen agree that civil disobedience must be public. For Cohen, the basis for this rests on the ability to effect change in one's community:¹⁷⁶

Normally the civil disobedient considers his act to be one of concern to the entire community; his conduct aims at effecting some change in the public life of his community. Therefore no secret is made (and the authorities are usually notified in advance) of proposed acts of civil disobedience. Clandestine acts simply will not qualify as civil disobedience.

Cohen assumes change occurs in the public sphere. Cohen's argument is therefore very much in line with liberalism's distinction between the public and the private spheres, resting on the basis that public life is where authority takes the most control, and that effecting change in the community comes from public acts.

From a feminist perspective, however, the assumption that change occurs in the public sphere is inherently problematic. As famously articulated by Carol Hanisch, "personal problems are political problems. There are no personal solutions at this time. There is only collective action for a collective solution".¹⁷⁷ Unlike the teachings of the liberal state, issues in the private sphere also need to be addressed by the state. This can be extended to calls for change that come from the private sphere. If the state should necessarily interfere with issues in the private sphere, it follows that protestors should be able to demonstrate in the private sphere and claim the title of civil disobedience. To deny protestors who work in the private sphere the civil disobedient label would be inconsistent and inherently patriarchal.

¹⁷⁶ Cohen, above n 28, at 2.

¹⁷⁷ Hanisch, above n 25, at 4.

Gendered issues in the private sphere are just as deserving of regulation by the state to promote women's status.

To therefore suggest that actions performed privately, such as WAR's withdrawal of domestic labour, do not constitute civil disobedience because they are not public is the product of misunderstanding. Cohen assumes only actions in the public sphere are political and can thus affect change. On the contrary, the withdrawal of domestic labour could cause a major inconvenience to players that they would have to deal with personally, forcing them to grapple more intensely with women's roles.

In any case, while Aotearoa is a liberal state, it does not necessarily adhere to the public/private divide. Some of Aotearoa's laws do regulate the private sphere: the classic example is rape law reform in 1986. The Rape Law Reform Bill No. 2 ended spousal immunity for rape, meaning that any non-consensual sex, including within marriage, can constitute rape.¹⁷⁸ The state therefore criminalised what had previously been seen as private harms.¹⁷⁹ The same argument has also been made with regards to reform of the "longstanding rule that prevented a woman from testifying against her husband in a criminal trial (even if she wished to)".¹⁸⁰ It cannot, however, be said that Aotearoa has totally abandoned the public/private divide: for instance, the defence of compulsion in Aotearoa still specifies that:¹⁸¹

...where a woman who is married or in a civil union commits an offence, the fact that her spouse or civil union partner was present at the commission of the offence does not of itself raise a presumption of compulsion.

¹⁷⁸ Rachel Dudley Tombs "The Most Vital Change': Feminist Activism and the Criminalisation of Marital Rape in 1980s New Zealand" (MA Thesis, University of Otago, 2021) at 3.

¹⁷⁹ Elisabeth McDonald "Feminist legal theory in Aotearoa New Zealand: The impact of international critical work on local criminal law reform" (2014) 28 *Women's Studies Journal* 68 at 73.

¹⁸⁰ At 74.

¹⁸¹ Crimes Act 1961, s 24(3).

Because this specification presumes a married women "would only commit an offence at the behest of her husband... it recognise[s] the presumption of male control in the private sphere".¹⁸²

Despite the inconsistency in Aotearoa's law, Aotearoa is arguably moving away from strict adherence to the public/private divide in lawmaking. On that basis, an Aotearoa model of civil disobedience too should move away from classical liberal theory to be more consistent with Aotearoa's own lawmaking practices.

WAR's withdrawal of domestic labour is also not an illegal act, which is again contrary to liberal definitions of civil disobedience. Returning to liberal theory, it will be recalled that neutrality is a key feature: the state should not "endorse or institutionalize a particular judgment or set of judgments" on matters where there are arguably 'no right answers', such as religion.¹⁸³

There are two key feminist objections to this. The first, as argued by Catharine MacKinnon, is that the state itself is not neutral, but rather inherently patriarchal: "[the male] point of view is the standard for point-of-viewlessness. Its particularity the meaning of universality,"¹⁸⁴ and so male power becomes the state default.¹⁸⁵ This is arguably relevant to Aotearoa, as argued by Kerensa Johnston. She argues that, instead of forming a partnership with the Māori Women's Welfare League, the Government created the New Zealand Māori Council. This decision "exclude[d] Māori women from decision-making roles" and insinuated that Māori men were "to exercise political power".¹⁸⁶

¹⁸² McDonald, above n 179, at 73.

¹⁸³ Rudisill, above n 20, at 154.

¹⁸⁴ Catharine MacKinnon *Towards a Feminist Theory of State* (Harvard University Press, Cambridge, 1989) at 116–117.

¹⁸⁵ Catharine MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8 *Signs* 635 at 645.

¹⁸⁶ Kerensa Johnston "Discrimination, the State and Maori Women: An Analysis of International Human Rights Law and the Convention on the Elimination of All Forms of Discrimination against Women" (2005) 8 *Yearbook of New Zealand Jurisprudence* 31 at 46.

The second objection to the neutral state is that it means the state traditionally does not intrude on matters that it arguably should comment on. Under a formal equality model, where women are treated equally to men, "laws should be gender neutral... but such laws cannot support appropriate different treatment of women, in relation to sex-specific accommodation".¹⁸⁷ McDonald has discussed this with regards to Section 194(b) of the Crimes Act 1961, saying it "is a gender specific offence that does treat the gender of the victim as an aggravating feature – elevating what could be charged as a 'common assault'... to 'male assaults female'".¹⁸⁸ The Law Commission has recommended its repeal, arguing that it "is an incoherent offence and unjustifiably victim specific".¹⁸⁹ While this accords with a formal equality approach, it ignores the success of this law in the context of intimate partner violence, with "92% of the offences committed under s 194(b) being coded as family violence".¹⁹⁰ A neutral law would, therefore, conceal the gendered nature of the harm.

The upshot of the two objections is that state neutrality, where the state still grapples with issues of patriarchy, means the law is not always designed to appropriately support women. Despite formal equality, the culture of Aotearoa means that the law can play out on the ground in a very different way to how it is written. For civil disobedience, it is therefore arguable that illegality should not be required. If laws are designed so women are afforded formal equality but not *substantive* equality, it seems fitting that disobedience should be conceptualised in a wider way than just disobedience to the law. For WAR, the demonstrators were still disobedient in the way they broke societal rules of labour distribution.¹⁹¹ At least one feminist argument therefore justifies removing the illegality requirement.

¹⁸⁷ McDonald, above n 179, at 70.

¹⁸⁸ At 72.

¹⁸⁹ At 72.

¹⁹⁰ At 72.

¹⁹¹ Thank you, Anna Dombroski, for raising this point in LAWS520 seminars.

C A Feminist Model of Civil Disobedience for Aotearoa?

So how should these critiques influence civil disobedience in Aotearoa? This paper posits that, firstly, civil disobedience in Aotearoa should not require publicity. The analysis above, considering liberal theory, demonstrates that the publicity requirement misconstrues what political actions are, and to exclude particularly the actions of WAR from civil disobedience would ignore actual instances of how civil disobedience plays out on the ground. Further, while Aotearoa is not a feminist state, it does arguably have a 'brand' as a state with feminist aims. To adopt a model of civil disobedience that is feminist in form would align with the current 'branding', but would also afford legitimacy to those who practise civil disobedience to progress feminism in Aotearoa, as an expanded notion would allow more leeway in protest options.

The publicity requirement has also been criticised by other theorists, including Celikates. Celikates questions Rawls' need for publicity, in particular the idea of informing authorities in advance:¹⁹²

...the exercise and effectiveness of well-established forms of civil disobedience such as blocking a busy intersection, occupying a university building, or obstructing the deportation of so-called illegal immigrants depends on not giving the authorities fair notice in advance.

Considering that the criticism itself is not novel, alongside Aotearoa's direction as a state, the publicity requirement should not comprise part of an Aotearoa model of civil disobedience. Should the same conclusion be reached for the illegality requirement?

While removing the illegality requirement would sit on steady theoretical grounds, it should be acknowledged that illegality does seem to comprise a cornerstone of civil disobedience. Even one of the most radical democratic theorists, Celikates, does not touch illegality, holding that civil disobedience does need to be unlawful.¹⁹³ Weighing up this

¹⁹² Celikates, above n 4, at 983.

¹⁹³ At 985.

fact against the arguments for removing the illegality requirement above, it does seem that illegality should be questioned in some form, if an Aotearoa model of civil disobedience is to align with lived experience.

Considering the traditional importance of illegality, it may be said that illegality should not *necessarily* be a requirement of civil disobedience, but that it may be difficult to establish civil disobedience without performing an illegal act. In the case of the Tour, the actions taken by WAR should be read in context: they were taken alongside a variety of other illegal strategies to condemn apartheid. Thus, whether a legal act is civil disobedience will be highly context specific.

VIII Māori and Civil Disobedience

The Tour demonstrations also brought to light the marginalisation of Māori. As has been discussed, the Tour demonstrations occurred during "a change in attitude to the Treaty of Waitangi",¹⁹⁴ the promise of tino rangatiratanga becoming more significant, with a new emphasis on the fact that the Treaty had not been honoured by the Crown or Pakeha.¹⁹⁵

It is important to recognise that the Tour protests were not the singular event that highlighted Aotearoa's race relations, but rather comprised part of a series of protests that sought, among other things, rangatiratanga. One example is the 1975 Land March. The march "focused on the 'twin themes of landlessness and cultural loss'", with marchers seeking "respect for communal ownership of tribal lands... They demanded... that 'not one more acre of M[ā]ori land' be alienated".¹⁹⁶ While the protest focused on land, its political significance transcended boundaries:¹⁹⁷

¹⁹⁴ Mclean, above n 92, at 267.

¹⁹⁵ At 267.

¹⁹⁶ Richard S Hill *Māori and the State: Crown-Māori relations in New Zealand/Aotearoa, 1950-2000* (Victoria University Press, Wellington, 2009) at 168.

¹⁹⁷ At 169.

[The march] was a reassertion of autonomist M[ā]ori demands and aspirations at a time when the political and social climate was becoming more receptive to them. As one historian later noted, the march represented M[ā]ori, at an auspicious moment, 'symbolically reclaiming the tino Rangatiratanga promised by the Treaty of Waitangi'.

The Bastion Point demonstrations also occurred during this time. From January 1977, Bastion Point was occupied by protestors, who for 507 days.¹⁹⁸

...defied the Government and the Supreme Court, to dramatise the unconscionable dealings of past Governments over the 280 ha of M[ā]ori land in the Auckland garden suburb of Orakei, declared "inalienable" by the Native Land Court in 1873, but bought up by the Crown over a 50-year period. The agony of Bastion Point was brought to an end on May 25, 1978, with the most powerful show of state force (600 police) against Māori people since the dismemberment of Parihaka in 1881.

The land was eventually returned following Ngāti Whātua's successful Waitangi Tribunal claim in 1987.¹⁹⁹

The two examples given paint a picture of Māori determination in the lead up to the Tour. Joe Hawke, leader of the Action Group at Bastion Point, said in 1977:²⁰⁰

A... result of the Land March and Bastion Point is that the M[ā]ori people have become politically active. The feeling of determination has been strengthened and there is a new positive attitude amongst the people to regain their land and to reassert their own culture and heritage.

These are far from the only examples of Māori protest. The search for Māori liberation in a settler-colonial state forms a significant part of protesting and civil disobedience in Aotearoa, and thus arguably should form part of any Aotearoa model of civil disobedience.

¹⁹⁸ R J Walker "The Genesis of Maori Activism" (1984) 93 *The Journal of Polynesian Society* 267 at 277.

¹⁹⁹ Deidre Brown "Contemporary Māori Architecture" in Elizabeth Grant, Kelly Greenop, Albert L Refiti and Daniel J Glenn (eds) *The Handbook of Contemporary Indigenous Architecture* (Springer, Singapore, 2018) 107 at 107; see also the Waitangi Tribunal report: Waitangi Tribunal *The Taranaki Report: Kaupapa Tautahi* (Wai 143, 1996).

²⁰⁰ "Bastion Point: Nothing to Lose and Everything to Gain" *Salient* (Wellington, New Zealand, 18 July 1977) at 9.

It should be noted that this is not the only approach available. Some may see incorporating Māori values and ideas about resistance as a necessary step in developing civil disobedience. Others, however, may see such development as an unwelcome mixing of the two systems: that Māori traditions of resistance should be treated with the same gravitas as civil disobedience without having to be forced to integrate with a Western model. Both positions are possible, and this paper does not seek to assert which approach is better. The purpose of this section is simply to explore how an Aotearoa model of civil disobedience may be reshaped, *if* the first position is to be taken.

A Te Tiriti o Waitangi

The nuances of te Tiriti and the treaty relationship in Aotearoa are complex, comprising an entire area of jurisprudence. A deep-dive into all of these dimensions is unfortunately beyond the scope of this paper. This part of the paper seeks to give a basic understanding of te Tiriti and outline some preliminary ideas on its relation to civil disobedience.

The first article of te Tiriti stipulates that Māori allow the Crown 'kāwanatanga' (governance). The second article then guarantees Māori 'tino rangatiratanga', qualifying the kawatanga right given in article one. The concept of tino rangatiratanga is difficult to translate into English. The Waitangi Tribunal has discussed tino rangatiratanga as being "equated to full authority", having a "similar meaning to mana", and "embracing the right to self determination".²⁰¹ Moana Jackson has further described tino rangatiratanga "as an equivalent of sovereignty", particularly in a treaty relationship context.²⁰² Mason Durie notes that despite these differences:²⁰³

It is possible to identify at least two facets of tino rangatiratanga: the way in which Māori and the Crown share power; and the way in which power sharing occurs within Māori society. Tino rangatiratanga is as much about political arrangements within

²⁰¹ Mason Durie "Tino Rangatiratanga" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Oxford, 2005) 3 at 4.

²⁰² At 5.

²⁰³ At 6.

Māori society as about arrangements between Māori and others. The essential tasks are for Māori to reach agreement about decision-making within Māori society and for Māori and the Crown to agree on the most appropriate constitutional arrangements that will reflect the status of Māori as indigenous people and recognise the guarantee of the Treaty of Waitangi.

Te Tiriti o Waitangi, alongside the Treaty of Waitangi, forms the basis for the current state: then-President of the Court of Appeal, Robin Cooke, has labelled it as a foundation document and fundamental charter.²⁰⁴ It has also been described as the "'foundation document' of the 'nation', or 'society' or constitution".²⁰⁵ Considering that this agreement has been struck between Māori and the Crown, a model of civil disobedience based purely on Western philosophy would be inappropriate. The promise of tino rangatiratanga, further, has potential ramifications for civil disobedience, particularly its relationship to revolution.

In classic models of civil disobedience, what separates civil disobedience from revolution is how a civil disobedient understands constituted authority. Cohen, for example, states that:²⁰⁶

Revolution seeks the overthrow of constituted authority, or at least repudiates that authority in some sphere; civil disobedience does neither. The civil disobedient accepts, while the revolutionary rejects, the frame of established authority and the general legitimacy of the system of laws.

In a settler-colonial state, however, the imposition of a colonial system of law without regard to indigenous systems, like tikanga Māori, means that some Māori validly reject the legitimacy of the constituted authority and the general legitimacy of the system of laws. Moana Jackson, for instance, has noted that:²⁰⁷

²⁰⁴ Robin Cooke "Introduction" (1990–1991) 14 NZULR 1 at 1 and 6.

²⁰⁵ Andrew Sharp "The Treaty in the Real Life of the Constitution" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Oxford, 2005) 308 at 308.

²⁰⁶ Cohen, above n 28, at 3.

²⁰⁷ Moana Jackson "The connection between white supremacy and colonisation" *E-Tangata* (online ed, New Zealand, 24 March 2019).

...a deliberate misremembering of history... has obscured the reality of what colonisation really was, and is. It has replaced the harsh reality of its racist violence and its illegitimate usurpation of power with a feelgood rhetoric of Treaty-based good faith and Crown honour.

Margaret Mutu offers similar ideas:²⁰⁸

...they illegitimately usurped our power and dispossessed us, leaving us in a state of poverty, deprivation and marginalisation. They fabricated myths to justify their criminal activities, set up an illegitimate parliament with unfettered powers, passed laws legalising their crimes and then covered it up with amnesia.

Considering the tino rangatiratanga promised in te Tiriti, this is a completely legitimate position to hold. For Māori who take this position, it seems that it would automatically preclude them from civil disobedient title. Civil disobedience seems to function as a colonial tool – it forces tangata whenua to accept a colonial government in order to obtain the gravitas of a civil disobedience title.

The distinction between civil disobedience and revolution is therefore flawed. Take the example of a protestor who does not accept that Aotearoa's government is legitimate based on the above reasoning, yet protests against a specific law existing under said government. While the protestor may not believe the government is legitimate, they may take a pragmatic approach to systemic change, focusing on incremental change. The protestor believes they are a civil disobedient.

For the protestor to be denied the civil disobedient title seems fundamentally unjust. It ignores that people can act pragmatically: they can disagree with the state's legitimacy while simultaneously believing that working within its confines is the best way to progress. It is not, however, just pragmatists who should obtain the civil disobedient title. Considering the culture of Māori protest, the promises of tino rangatiratanga, and

²⁰⁸ Margaret Mutu "'To honour the treaty, we must first settle colonisation' (Moana Jackson 2015): the long road from colonial devastation to balance, peace and harmony" (2019) 49 *Journal of the Royal Society of New Zealand* 4 at 4.

Aotearoa's status as a settler-colonial state, where there is a principled act of protest that seeks to change "specific laws, policies or institutions" (to take inspiration from Celikates' model),²⁰⁹ the fact that a protestor rejects the colonial system should not deny them a civil disobedience title, should they want it. This modification to civil disobedience accounts for Aotearoa's particular history, rather than inscribing a Western model.

B Case Study: Parihaka

Just as there is value in using the Tour as a case study, in discussing Māori forms of civil disobedience the events of Parihaka help us to examine values that may inform civil disobedience. There are obviously further examples of Māori civil disobedience that can and should be evaluated in the future, but Parihaka has been chosen because of its historical significance and alignment to well-cited civil disobedient Mahatma Gandhi. Protestors at the Tour also cited Parihaka as inspiration for their movement, stating they explicitly looked to New Zealand history when designing the anti-Tour campaign.²¹⁰ It was particularly fitting as 1981 was the 100-year anniversary of the events at Parihaka.²¹¹

This paper will only focus on select elements of Parihaka.²¹² As many colonial stories start, Parihaka begins with land confiscation. The Government had confiscated land in central Taranaki, but "had, to all intents and purposes, abandoned [it]" following the war.²¹³ Well before the war had ended, however, "a movement for peace and development" was established by Te Whiti o Rongomai and Tohu Kakahi at Parihaka. In 1878, the Government decided to establish European settlement on this land. The refusal of the Government to meaningfully engage with Māori at Parihaka led to passive resistance.

²⁰⁹ Celikates, above n 4, at 985.

²¹⁰ Merata Mita "Patu!" (documentary, 1983). Considering the nonviolent aspects of Parihaka, Parihaka's influence may have been minimal. Nonetheless, the events may have inspired in at least a small way.

²¹¹ Mita, above n 210.

²¹² For a fuller description of the resistance at and invasion of Parihaka, see: Waitangi Tribunal, above n 199; and Hazel Riseborough *Days of Darkness: Taranaki 1878–1884* (Allen & Unwin, Wellington, 1989).

²¹³ Waitangi Tribunal, above n 199, at 200.

This passive resistance was instituted in several ways, but of most importance for this paper are actions taken by ploughmen. When the Government refused to meet with Te Whiti regarding potential reserves, ploughmen "were sent to plough settlers' land throughout Taranaki".²¹⁴ Such actions were "laden with meaning": "the sword had been replaced by the biblical representation of peace, the ploughshare, but the ploughshare was being used to plough lands unjustly obtained".²¹⁵

1 The Taranaki Report

The Waitangi Tribunal has discussed the relationship between the ploughmen, fencers, and civil disobedience,²¹⁶ also comparing the actions of Martin Luther King Jr, Tohu and Te Whiti. The Tribunal firstly notes that "like the Parihaka prophets, King experienced shallow negotiations and broken promises".²¹⁷ Further, "the objective for Tohu and Te Whiti, as for King, was to secure resolution by meaningful negotiation".²¹⁸ The nonviolent direct action used, such as ploughing the customary land and repairing fences broken by the Armed,²¹⁹ "create[d] such a crisis and foster[ed] such a tension that a community which ha[d] constantly refused to negotiate [was] forced to confront the issue".²²⁰

The Tribunal also discussed civil disobedience where the state has reneged on its promise of protection:²²¹

Those who break the law are bound to suffer the legal penalty, but even they are entitled to the law's protection. In Taranaki, the normal standards of protection were denied. For the prophets of Parihaka, there must also have been a larger question, since

²¹⁴ "Parihaka" Taranaki Iwi: Me Tōngai Harakeke <www.taranaki.iwi.nz>; see also Waitangi Tribunal, above n 199, at 225.

²¹⁵ Waitangi Tribunal, above n 199, at 226.

²¹⁶ At 231.

²¹⁷ At 231.

²¹⁸ At 232.

²¹⁹ At 225 and 227. The Armed Constabulary was "a national force formed... originally to combat M[ā]ori 'hostiles' and to keep civil order: see "New Zealand Armed Constabulary Force" National Library <www.natlib.govt.nz>.

²²⁰ Waitangi Tribunal, above n 199, at 232.

²²¹ At 232.

their objective was not the overthrow of the State. Is there a circumstance where civil disobedience is justified? The pacifist's answer is given by King... Like Tohu, Te Whiti, and Gandhi, King based his case on the laws of divinity.

King cited St Augustine's refrain that "an unjust law is no law at all" – but that to evade or defy the law would lead to anarchy. The only option is civil disobedience: "one who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty".²²² He further refutes the criticism that peaceful civil disobedience may incite violence by comparing a civil disobedient's situation to that of the robbed – would you "[condemn] a robbed man because his possession of money precipitated the evil act of robbery"?²²³ The Tribunal found that "that, in our view, is the case the ploughmen and fencers would have preferred. It is also the case for the Taranaki claims".²²⁴

The Tribunal therefore infers that Parihaka is an example of civil disobedience. Their endorsement of an unjust law having to be broken "openly" has significant ramifications. It suggests, in opposition to feminist critiques, that civil disobedience must take place publicly – although arguably one can break a law in the private sphere and still be "open" about it.

It also raises an important discussion about the relationship between the civil disobedient and the state. This paper has previously argued that violence should constitute civil disobedience where it is used in response to state violence. Here, the Tribunal mentions a situation that broadly aligns with those ideas, discussing how the state denied Taranaki the normal standards of protection. It perhaps can be understood that civil disobedience should not just focus on the actions of the purported civil disobedient, but rather it should take into account the entire context, including actions of the state.

²²² Waitangi Tribunal, above n 199, at 233.

²²³ At 234.

²²⁴ At 234.

2 *Principles from Parihaka*

Parihaka also demonstrates key aspects of the relationship between particular Māori values and civil disobedience. Academics Ken Taiapa, Helen Moewaka Barnes and Tim McCreanor have discussed the relationships between some Māori values and resistance, particularly ahi kaa and mārakai. Ahi kaa focuses on "both home fires and those who keep them alive".²²⁵ Translated literally, "ahi" is "fire" and "kaa" is "to burn" – thus "ahi kaa keep[s] places warm through human presence".²²⁶ Fires traditionally "maintain[ed] claims to whenua for those who are not physically present".²²⁷

When people left their whenua... a large log was burnt in a pit then buried so that it would smoulder for up to a couple of months. If a challenge was made that the whenua was unoccupied, the smouldering log would be unearthed to demonstrate occupation. Therefore, ahi kaa encompasses the idea of uncovering a fire and reigniting the flame.

Today, "for hapū and iwi, ahi kaa is the platform on which mana whenua is affirmed and the growing of food on whenua is validated".²²⁸ Mārakai, on the other hand, involves the idea of growing food on the whenua.

With regards to Parihaka, Taiapa, Barnes and McCreanor also highlight the centrality of manaakitanga ("the importance of nurturing and the responsibility of looking after those in your care", as well as selflessness, generosity and "the type of responsibilities that a host has to his or her guest"²²⁹) in welcoming manuhiri into "a social and cultural system of cooperation and collective resistance".²³⁰ They also discuss the obligation of maintaining

²²⁵ Ken Taiapa, Helen Moewaka Barnes and Tim McCreanor "Mārakai as Sites of Ahi Kaa and Resistance" (2021) 10 MAI Journal 148 at 149.

²²⁶ At 149.

²²⁷ At 149.

²²⁸ At 149, citing Annie Te One "Mana Whenua, Mātaawaka, and Local Government—An Examination of Relationships Between Māori and Local Government in Wellington and the Hutt Valley" (PhD thesis, The Australian National University, 2018).

²²⁹ Carwyn Jones "A Māori Constitutional Tradition" 6 VUWLRP 135/2016 187 at 196.

²³⁰ Taiapa, Barnes and McCreanor, above n 225, at 150.

kotahitanga (unity, togetherness, solidarity²³¹) to "work together on peaceful resistance to land alienation and other colonising aggressions".²³² Finally, they stress the importance of mārakai at Parihaka:²³³

The planting and maintenance of mārakai was essential to survival and assertion of ahi kaa at Parihaka. Mārakai are an important aspect of mahinga kai, a broad and inclusive term related to all aspects of "food work". Mahinga kai is central to identity and survival (Hutchings, 2020; Panelli & Tipa, 2009) and has become a key focus of claims to the Waitangi Tribunal and to approaches taken to reassert ahi kaa. In summarising associations between people and food, Panelli and Tipa (2009) situate ahi kaa within embedded relationships and responsibilities, reflecting deep associations between people and place that mahinga kai practices are able to reignite and maintain.

There are a few potential implications for civil disobedience in Aotearoa. It is firstly interesting to note the broad similarities between kotahitanga and Arendt's focus on civil disobedience as being collective, rather than individualistic. This perhaps shows that Western civil disobedience and Māori resistance methods are reconcilable.

The importance of mārakai is also, in some ways, reminiscent of Celikates' ideas. Mārakai is not just a food source, but rather communicates a deep symbolic connection by asserting of ahi kaa. The Tribunal has recognised this, saying the ploughmen "were ploughing their customary land and demonstrating that they were now without land at all. Symbolism assists oral societies to explain events memorialised in stories."²³⁴ The symbolism, as theorised by Celikates, in part allows the disobedience to actually function as a communicative tool.

Despite the broad analogies to Western civil disobedience, Māori values, concepts of resistance, and disobedience should also inform a model of civil disobedience simply

²³¹ "Kotahitanga" Te Aka: Māori Dictionary <www.maoridictionary.co.nz>.

²³² Taiapa, Barnes and McCreanor, above n 225, at 150.

²³³ At 150.

²³⁴ Waitangi Tribunal, above n 199, at 226.

because the ideas are important in and of themselves. This may mean giving particular regard to the manaakitanga and/or kotahitanga involved in a demonstration. It may also mean altering the classic requirements of civil disobedience. For instance, while the mārakai at Parihaka was illegal due to land confiscation, similar symbolic acts could take place legally during a protest. Civil disobedience in Aotearoa should recognise that Māori values are often absent from Western law, thus meaning that Māori practices of resistance may not satisfy of classic models of civil disobedience. While it will necessarily be context-specific, civil disobedience should therefore expand to catch such examples.

C Tikanga Māori

Tikanga Māori may also be able to shape a model of civil disobedience. While often conceptualised as Māori customary law, it is not law in the same sense as Western law. Tikanga is derived from the root word "tika", meaning correct or right.²³⁵ Tikanga, therefore, is "the "right" Māori way of doing things".²³⁶ There is an element of morality to tikanga that can be noticeably absent from Western laws.

Civil disobedience classically relies on a transgression of a law. Considering that tikanga is based on "doing the right thing", that begs the question of whether tikanga can or cannot be unjust. Further, can a transgression of tikanga, as compared to a transgression of law, constitute civil disobedience? Is it ever morally acceptable to transgress tikanga? On a broad level – what counts as law?

While these questions are deserving of discussion, they are best left to those who have the requisite knowledge and understanding of tikanga Māori. This paper merely seeks to pose the question and suggest there may be room for the development of civil disobedience in this area.

²³⁵ Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 4 Wai L Rev 1 at 2.

²³⁶ Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2017) 5 Te Tai Haruru Journal 25 at 27.

D Changes to Civil Disobedience

With that discussion in mind, how should Māori perspectives shape a model of civil disobedience for Aotearoa? Firstly, those who reject the legitimacy of the state in the context of settler-colonialism should not necessarily be prevented from being civil disobedients.

From the Waitangi Tribunal, it is suggested that civil disobedience must be public: however, in light of compelling feminist critique, this paper does not accept this assertion. The Waitangi Tribunal also offers that the actions of the state, for instance where the state has denied civil disobedients the normal standards of protection, should be taken into account when considering civil disobedience, rather than only focussing on the civil disobedient's actions.

Particular attention should also be paid to how Māori values inform acts of resistance. Practices like *mārakai* provide an important symbolic aspect to resistance, and the fact that they do not align with Western concepts should not necessarily prevent a finding of civil disobedience.

IX Multiple Motivations of Civil Disobedients

The Tour literature paints a picture of a protest that is made up of multiple motivations. As has been seen, protestors simultaneously condemned apartheid while believing the Tour would be beneficial for gender justice in Aotearoa, for Māori rights, or for the LGBTQ+ community – or all four at once.

This assortment of perspectives is potentially in tension with classic models of civil disobedience, which seem to suggest one objective is expected of civil disobedients. Cohen notes that "whatever the object of protest, and whether the complaint be wise, or justifiable, or neither, there must be some object".²³⁷ Even modern models seem to suggest one

²³⁷ Cohen, above n 28, at 2–3.

objective, with Celikates noting that civil disobedience should "pursu[e] the political aim of changing specific laws, policies, or institutions".²³⁸

It is arguable whether these models do restrict civil disobedients to having only one objective, but in any case, the position should be clarified. Protestors should not have to limit their belief systems to participate in civil disobedience - to require such precision would ignore the nuance of human thought and context, where experiences, values and strategy are often interconnected. For instance, the desire to condemn apartheid naturally aligns with support generally for minority groups and their interests.

Thus, a protestor having multiple motivations for their presence at a demonstration should not preclude them from being a civil disobedient.

X An Aotearoa Model of Civil Disobedience

As has been shown, there are many ways to construct a model of civil disobedience. This paper will offer one more. The difference, however, is that this model is squarely focussed on Aotearoa.

Considering Aotearoa's particular affinity for democracy and the *type* of democracy practiced, this paper will use a radical democratic model of civil disobedience, such as that theorised by Celikates, as a starting point. The model will, however, incorporate the critiques discussed – namely those on violence, the relationship between women and civil disobedience, Māori rights and values, and the presence of multiple motivations. Combining those together, a model of civil disobedience for Aotearoa may be defined as follows:

Civil disobedience in Aotearoa is a principled collective act of protest (as opposed to "ordinary" criminal offenses or "unmotivated" rioting),²³⁹ that pursues a political aim of

²³⁸ Celikates, above n 4, at 985.

²³⁹ At 985.

changing specific laws, policies, or institutions: other motivations, however, may be present. The protest may occur in the public or the private sphere. Particular attention should be paid to the state in deciding whether an action constitutes civil disobedience: violence, for instance, can form part of civil disobedience where a) violence is used in response to violence or attempted oppression by another group, especially the government, and b) the violence used is proportionate to the "threat" posed. Considering the settler-colonial history of Aotearoa, rejection of the state's legitimacy should not prevent a finding of civil disobedience.

Whether or not the act must be intentionally unlawful will be highly context-specific. A legal act may constitute civil disobedience where it is taken alongside a variety of other illegal strategies, or where symbolic Māori acts are not encompassed by colonial laws. Māori values, generally, should continue to inform the Aotearoa model of civil disobedience: consequently, this definition of civil disobedience may change as principles become apparent.

Adopting this model of civil disobedience may or may not have significant consequences. It is suggested that academics in Aotearoa should adopt this new model of civil disobedience. While using it may mean that some analyses may be out of line with international work, this paper argues that it is arguably more important – and more accurate – for any work focused on Aotearoa to represent the circumstances of civil disobedience as it plays out on the ground. It also provides ample food for thought in comparative work.

For those in Aotearoa who engage in protest and civil disobedience, adopting this model of civil disobedience may matter in that it provides a relatively broad definition, allowing more to obtain the label. Some protestors may have regard to this work in determining protest strategy. Ultimately, however, what is most important is not the academic development of a definition, but whether their actions result in real, tangible change – civil disobedience or not.

XI Conclusion

This paper has attempted to design a model of civil disobedience for Aotearoa, considering especially the Springbok Tour demonstrations as a case study. Because previous models of civil disobedience have centred on the United States, as well as the classic liberal state, the model proposed for Aotearoa differs slightly in its definition. Aotearoa's commitment to democracy favours a more widely constructed definition of civil disobedience. Particular changes have been made to the violence, publicity and illegality elements, informed by relevant critiques of state violence, feminist viewpoints and Māori perspectives.

This definition is not intended to provide the definitive answer to what civil disobedience is in Aotearoa. It will be important in the future to examine other instances of civil disobedience so that a fuller picture of Aotearoa's civil disobedience can be drawn. One thing, however, is for sure – it is very different picture to the United States.

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