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The communicative aspects of civil disobedience and lawful punishment

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Abstract A parallel may be drawn between the communicative aspect of civil disobedience and the communicative aspect of lawful punishment by the state. In punishing an offender, the state seeks to communicate both its condemnation of the crime committed and its desire for repentance and reformation on the part of the offender. Similarly, in civilly disobeying the law, a disobedient seeks to convey both her condemnation of a certain law or policy and her desire for recognition that a lasting change in policy is required. When disobedients and authorities target each other, their confrontation allows for a direct comparison of the respective justifiability of their conduct. Their confrontation is explored in this paper with an eye to analysing how civil disobedients and authorities should engage with each other.

Keywords Civil disobedience · Communication · Desert · Deterrence · Dialogue · Justification · Punishment

Introduction

My purpose in this paper is to tease out a parallel between the communicative aspects of civil disobedience and the communicative aspects of lawful punishment by the state. Both practices are associated with a backward-looking aim to demonstrate condemnation of and protest against certain conduct as well as a forward-looking aim to bring about through moral dialogue a lasting change in that conduct. The confrontation between these communicative practices not only allows for a direct comparison of their respective justification, but also presses the claim that authorities and civil disobedients each endeavour to engage in a moral dialogue. In what follows, I explore this parallel with an eye to analysing how civil disobedients should treat and be treated by the law.

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A communicative theory

In punishing an offender, argues Joel Feinberg (1994: 77–79), the state seeks to convey not only its disavowal, condemnation, and denunciation of the crime committed, but also its desire for repentance and reformation on the part of the offender. Similarly, I believe, in civilly disobeying the law, a disobedient seeks to convey not only her disavowal, condemnation, and denunciation of a certain law or policy as well as her dissociation from both that law or policy and the authority that enacted it, but also her desire for recognition by that authority and the relevant majority that a lasting change in law or policy is required.[1] This sketch of the paradigm case of civil disobedience does not limit to certain laws the range of policies that a disobedient may target through her activism. Whereas some thinkers exclude from the class of civilly disobedient acts those breaches of law that protest the decisions of non-governmental agencies (trade unions, banks, private universities, etc.),[2] I maintain that disobedience in opposition to the decisions of such agencies can reflect a larger challenge to the legal system that permits those decisions to be taken and thus such disobedience can fall under the umbrella of civil disobedience.[3] The same applies to disobedience against the decisions of international bodies or foreign governments; conscientious and communicative breaches of law undertaken in protest against these decisions can count as civil disobedience.

The forward-looking aspect of civil disobedience has two parts. The first is to lead the authors of the law or policy in question to reform that law or policy. The second is to lead these policymakers and society generally to internalise the reasons behind the disobedient's condemnation and disavowal of that law or policy so that no similar law or policy will be implemented in future. As I have argued elsewhere, when a civil disobedient has these kinds of aims, this places certain restrictions upon the modes of disobedient communication that she reasonably may use to realise those aims. Since, as a strategy, coercion is likely to turn policymakers against a position, a disobedient who sincerely aims to have a long-term impact upon policymakers' views has reason not to force policymakers to adopt her position, but rather rationally to persuade them of the merits of her view and the flaws in the law or policy she opposes. In short, to be serious in her aim to bring about a lasting change in law or policy, she must recognise the importance of engaging policymakers in a moral dialogue.[4] Too radical a protest could obscure the moral force of her objection. This is a reason to prefer civil disobedience as a strategy to radical disobedience.[5] But, it is not a reason to prefer civil disobedience to legal protest. A common challenge to civil disobedience is that those who employ it step unnecessarily outside the proper channels of political participation. There are, however,

[1] See Brownlee, 2004: 337–351 for a fuller discussion of paradigmatic civil disobedience.

[2] See Raz, 1979: 264.

[3] It would be a mistake to hold that the non-governmental policies and practices opposed by civil disobedients are somehow not matters of law. In condemning such policies, civil disobedients challenge, amongst other things, the legal framework that accepts these policies and practices as lawful.

[4] Brownlee, 2004: 337–351.

[5] By ''radical disobedience'', I mean extreme forms of dissent—militant action, coercive violence, terrorisation—which lack the conscientious communication and persuasive aims exemplified in paradigmatic civil disobedience.

reasons to think that civil disobedience often better contributes to a moral dialogue with society and the state than legal protest does.

First, as Bertrand Russell (1998: 635) observes, typically it is difficult to make the most salient facts in a dispute known through conventional channels of participation. The controllers of mainstream media tend to give defenders of unpopular views limited space to make their case. Given the sensational news value of illegal methods, however, engaging in civil disobedience often leads to wide dissemination of a position.[6] Second, civil disobedience may be preferable to legal protest for the non-consequentialist reason that, in paradigm cases, disobedients demonstrate through their action the sincerity and strength of their conviction. Legal protest, being legal, is granted certain protection or *de facto* legitimacy by the law not extended to civil disobedience: the legal protester will not be called upon by the law to defend her decision to protest. This means that whatever conscientious intentions underpin her protest need not meet the same standards as those that distinguish serious civil disobedients from ordinary offenders. The only conscientious intentions that a legal protester could be required to have are those that prevents her protest from losing its legality.

These comments on civil disobedience as a mode of communication require two qualifications. First, although civil disobedients are constrained in their use of coercion by their conscientious aim to engage in moral dialogue, nevertheless they may find it necessary to employ limited coercion in order to get their issue onto the table. Only then may they undertake meaningfully to persuade authorities and society of its merits. Their actions also may have a coercive aspect irrespective of their persuasive aims since many kinds of civil disobedience—illegal boycotts, refusals to pay taxes, draft dodging, sit-ins, and so on—make it more difficult for a system to function and thus can have a potent effect upon leaders' decisions. However, such modest coercion does not muffle disobedients' moral plea in the way that radical protest does, and so its use can be consistent with the persuasive aims of civilly disobedient communication.

Second, although a disobedient addresses decision-makers in the first instance, she also addresses a variety of other parties including victims of the law or policy (if such victims exist), society as a whole, other dissenters or potential dissenters, and even other communities not necessarily affected by the law or policy at issue. In addressing different groups, a disobedient aims to persuade them of the merits of her cause and ultimately to bring about a large-scale shift in perspectives and commitments. Moreover, when the authority whose policies she challenges is unresponsive, a person may find it necessary to address directly groups other than that authority if she is to succeed. For example, if the object of her challenge is the policy of a foreign government, she may have to target either her own government or economic leaders to prompt them to put pressure on the foreign power.

Turning to punishment, the constraints on mode of communication that typically apply to serious civil disobedients also apply to authorities who sincerely aim to have a lasting effect upon an offender's conduct and views. When authorities aim to

[6] John Stuart Mill makes a similar point with regard to dissent in general. Sometimes, says Mill, the only way to make a view heard is to allow, or even to invite, society to ridicule and sensationalise it as intemperate and irrational. (Mill, 1999) Admittedly, the success of this strategy depends partly upon the character of the society in which it is employed; but we should not rule it out as a mode of communication.

communicate censure in a way that will lead the offender to appreciate the moral reasons behind this condemnation, they must recognise that they have reason to be modest in the imposition of punishment. As Andrew von Hirsh (1998: 171) observes, to perform the function of normative communication, moderation in punishment is required because too harsh threats from the law would drown out the moral appeal. Excessive or inappropriate punishments also would fail to respect the offender as a rational agent with whom the law may engage in moral dialogue.

One might question whether, in certain cases, the communication of condemnation by government should take the form of punishment. One could argue, for example, that lawful punishment is an inappropriate way for the state to communicate its disapprobation to civilly disobedient offenders. Although an abolitionist characterisation of illegal actions as conflicts to be resolved oversimplifies things, this characterisation perhaps is apt in the context of civil disobedience given the features paradigmatic to that practice. When disobedients breach the law in the conscientiously communicative ways exemplified in paradigmatic civil disobedience, they enter into a conflict with authority at the level of deeply held conviction. In this context, a reconciliation of antagonistic parties may be a more appropriate objective than the condemnation and punishment of disobedients. There are two issues here. First, should the law be engaged in condemning civil disobedients? Second, if so, is punishment the appropriate vehicle through which to communicate that condemnation? Although defenders of restorative justice would answer negatively to the second, they might affirm the first since allowing each side to communicate its position is a necessary step to reconciliation.

But, despite the appeal of non-punitive restorative justice, punishment cannot be ruled out as a mode of communication that authorities may use against civil disobedients because not all conflicts between disobedients and the state merit a reconciliation of perspectives (as opposed to a revision in perspective on the part of the offender). Moreover, it would be a mistake, as Antony Duff (2003: 348) points out, not to recognise the contribution that punishment can make to reparation and restoration:

> A crime involves not merely (nor always) material damage to a victim's interests, for which material compensation might be appropriate, but a wrong done by the offender to the victim. An appropriate ''restoration'' or ''reconciliation'' between them must then involve a proper recognition of that wrong and of its implications...A suitable programme of ''restoration'' must thus involve the offender in recognising, repenting, and apologising for the wrong he has done.

Duff maintains that this process of restoration involves the same central elements as punishment understood as the government's effort to engage in a moral dialogue with the offender. Punishment, on this picture, not only communicates both disapprobation of the offender's action and a desire for repentance and reformation on her part, but also gives the offender an opportunity to communicate her repentance by accepting the punishment, apologising, and making reparation where possible.

Having sketched out the communicative aims of lawful punishment and civil disobedience, we may now examine more fully the kinds of reasons that could justify their exercise.

Justification

Civil disobedience

Several factors are relevant to the justification of civil disobedience such as, first, how serious, sincere and committed disobedients are in their actions, second, how well-founded their challenges are, and third, how much harm is done or risked through their disobedience. Rare is the case that civil disobedience (or indeed any action) will be morally right from all valid perspectives. In the typical case, an action is wrong to the extent that it violates one moral value or principle but justified to the extent that it respects or fosters another. This justification adds to the rightness of the act and can make it all things considered alright to perform.[7] An act of civil disobedience, therefore, is wrong to the extent that it violates basic rights, for example, or exposes other people to undue or excessive risks, or shows disrespect for property, or has seriously untoward consequences, or generates hostility and intolerance of dissent. Even in a particularly reprehensible political regime (such as apartheid South Africa or antebellum America), a demand for justification for civil disobedience is legitimate when that disobedience has these features. Such calls for justification nevertheless can be met to the extent that the disobedience is performed for undefeated reasons. The following three types of reasons contribute to the justification of an act of civil disobedience.

First, as Duff (2001: 28) observes, when a person sincerely believes that certain decisions or policies are wrong, this commits her not only to avoiding such decisions herself and to judging the conduct of people who pursue such decisions as being wrong, but also to communicating this judgment in some situations; to remain silent, to let the action pass without objection, could cast doubt on the sincerity of her conviction. When the object of her judgment is a law, her conviction gives her subjective intrinsic reasons relating to moral consistency and self-respect to dissociate herself from this law and to communicate her dissociation to the government and society.[8] When the object of her judgment is a non-governmental policy or a foreign policy, her conviction gives her reason to communicate her condemnation of that policy both to its authors and to those who permit it to be applied. But, personal conviction alone is insufficient to justify civil disobedience since that conviction may be oriented toward poorly founded commitments.

To be fully justified, second, her conviction must be well-founded. She must have objective intrinsic reasons for her challenge deriving from a respect for the value of considerations that are objectively valuable. On a pluralist outlook, a variety of considerations could generate objective intrinsic reasons to condemn a law or policy such as justice, transparency, trust, security, social welfare, rights, integrity, democracy, stability, autonomy, equality, privacy, and so on. When a law or policy offends these considerations, a person may be justified not to adhere to that law. The trickier question is whether she may also be justified not to adhere to a different law

[7] C.f. Gardner, 2002. Like Gardner, I endorse a non-closure theory of wrongdoing, which allows that actions can be wrong, but justified. In other words, an action that violates a requirement nonetheless may be taken for undefeated reasons.

[8] Subjective intrinsic reasons are reasons based upon one's own values and one's need for self-respect. They may be contrasted with objective intrinsic reasons, which derive from a respect for the value of a relationship or institution that is itself objectively valuable. C.f. Soper, 2002.

in order to demonstrate her challenge to a given law or policy.[9] Since persons who use indirect civil disobedience *ceteris paribus* have no objective intrinsic reasons to breach the law that they breach, the justification for their act of disobedience must turn on subjective intrinsic reasons of moral consistency and self-respect to make their protest known, objective reasons to protest in some way against an objectionable policy, and instrumental reasons favouring indirect action in this case over direct action.

Instrumental reasons are the third category of reasons relevant to justification. In a case where direct disobedience would have grave consequences, then indirect disobedience may offer a more justifiable option. For example, a person is never justified in committing murder to communicate condemnation for the injustice of overly harsh penalties for murder, yet that person may be justified in taking indirect action to make the protest known. The justification for her action stems partly from its appropriateness as the action to take. When she chooses a particular mode of civil disobedience because it is an effective vehicle through which to communicate protest and to persuade others of the merits of her view, and does so with minimal harm and maximal expected good, this contributes to the justification of her action.[10] But, in a case where indirect civil disobedience would be either misconstrued or viewed in isolation from the law or policy opposed, then direct disobedience, assuming it meets certain moral standards (which are determined by the content of the law opposed), may have greater justification.

In addition to analysing the appropriateness of direct action versus indirect action, a disobedient must consider the appropriateness of her particular strategy (for instance vandalism, sit-ins, trespassing, illegal boycotts, illegal strikes) since the specific action that she performs and the manner in which she performs it matter greatly for justification. As John Gardner and Timothy Macklem (2002: 458) note,

> Sometimes people perform actions for reasons which do not in fact support their performing those actions but which support their performing other actions instead. They have those reasons, for it would be logically possible for them to do, for those reasons, as those reasons would have them do. Unfortunately, what they actually do for those reasons is something else.

In the context of civil disobedience, a person may have reasons for engaging in one form of disobedience, but choose to engage in another form that is not supported by these reasons. For example, she may have an undefeated reason to participate in a road block because this action is well suited to her political concerns and is one that her government and society understand and respond well to or because this action has a public impact that does not greatly harm the interests of others; but she has no

[9] The distinction often drawn between direct civil disobedience and indirect civil disobedience may be less clear-cut than one might think. For example, would refusing to pay taxes that support the military be an act of indirect or direct civil disobedience against foreign policy? Although this act presumably would be classified as indirect civil disobedience, a part of one's taxes, in this case, would have gone directly to support the policy one opposes.

[10] The justifiability of indirect civil disobedience marks a key place where the parallel between civil disobedience and lawful punishment breaks down. Given the emphasis that the communicative theory of punishment places upon engaging the offender in a moral dialogue, it presumably would be impossible, on this account, to justify indirect punishment such as either punishing someone other than the offender or punishing the offender for an action other than the offence for which she is convicted.

undefeated reason, say, to trespass on government property or to engage in strategic violence. In taking the latter actions, she is guilty of a certain error of judgment about which actions are supported by reasons that admittedly apply. Given her error, the best she could claim is that her conduct is morally excused, as she had reason to believe that she had reason to undertake that particular act of civil disobedience.[11]

When, by contrast, her civilly disobedient action is supported by undefeated reasons that apply to her situation then, provided she acts for those reasons, her choice of action is justified.

Punishment

Although our primary concern in this discussion is how civil disobedients should be treated by the law, we should consider certain nuances of the communicative theory of punishment to determine how thoroughly the parallel with civil disobedience holds up. Communicative theorists, for example, are not unanimous over the reasons to punish. Duff (1998: 162), for one, argues that condemnation itself immediately justifies punishment. He maintains that punishment may be seen as a secular form of penance that vividly confronts the offender with the effects of her crime. Punishment, he says, is justified on these grounds even when the offender (1) has no chance to repeat her wrong, (2) has already repented and does not need the censure to persuade her of the law's position, or (3) will remain unpersuaded. Von Hirsch (1998: 171), by contrast, believes that communication of censure alone does not justify punishment; added to it must be the aim of deterrence. Von Hirsch argues that, although criminal sanctions primarily should serve to support citizens' moral reasons for not breaching the law, nevertheless a limited complementary role must be given to prevention.[12] John Tasioulas (2006: 286) challenges von Hirsch's hybrid approach on the grounds that it faces the danger of becoming incoherent, ''since what is introduced as a supplement to censure [namely the appeal to prevention] threatens to subvert the fundamentally communicative character of his theory.'' Bringing in deterrence at the level of justification detracts from the law's engagement in a moral dialogue with the offender as a rational person because it focuses attention on the threat of punishment and not the moral reasons to follow this law.

Although deterrence is part of the aim of communicating censure and of seeking through moral dialogue to effect a change in attitudes and values, it can play no independent part in the justification of punishment on a communicative theory except in rare cases like national emergency.[13] Central to the justification of punishment must be its appropriateness as the vehicle through which to communicate deserved censure. That said, not all consequential reasoning is ruled out of the justification of punishment. When deciding on the appropriate punishment, one must consider how the punishment will be received, that is to say, what form of punishment will most effectively communicate the particular condemnation that the state

[11] One might wonder whether a person shows an error of judgment if she undertakes civil disobedience before all legal methods have been exhausted. In reply, as noted above, civil disobedience often is more effective than legal protest is. Moreover, the intelligibility of ''last resort'' may be questioned, as it is unclear whether a person could ever claim to have exhausted all legal options. Presumably, she could continue to use the same tired, conventional methods indefinitely.

[12] See also Ashworth and von Hirsch (2005): 12–13.

[13] C.f. Tasioulas, 2006: 279–322.

seeks to convey.[14] And when choosing between two punishments that are equally justified on a desert basis, one must consider their respective benefits, including their deterrence benefits, to determine which is more appropriate. Adducing such consequential considerations as part of the justification for punishment reaffirms the parallel between this practice and civil disobedience since, as argued above, instrumental reasons concerning the most appropriate and effective mode of communication also bear on the justification of an act of civil disobedience.

Like Duff, von Hirsch maintains that punishment is appropriate irrespective of the offender's attitude prior or subsequent to censure. Von Hirsch (1998: 170) states that censure ''is not just a crime-prevention strategy...for otherwise there would be no point in censuring actors who are repentant already...or who seemingly are incorrigible...'' Any human actor, says von Hirsch, should be treated as a moral agent, having the capacity (unless clearly incompetent) to evaluate others' assessment of her conduct and to respond in ways typical of a deliberating being. In taking this view, von Hirsch and Duff may be criticised for not fully appreciating the relevance of repentance to decisions to punish. When an offender demonstrates repentance prior to punishment, it cannot be disregarded in the determination of the appropriate response by the law. Since a key aim of punishment, on the communicative theory, is to lead the offender to repent her action and to reform her conduct, when the offender demonstrates prior to punishment that she does repent and has reformed, this gives the law reason to show mercy and to impose a lesser punishment on her than that which she deserves according to justice. (Tasioulas, 2003: 101)[15] On this nuanced communicative theory, justified punishment is distinguished from deserved punishment and the notion of moral dialogue is filled out in a meaningful way that takes account of the offender's contribution to that dialogue.

One might argue that the consideration that repentance warrants a lesser punishment should also apply to the case of the offender who clearly will never repent. In other words, since a key aim of punishment on the communicative theory is to lead the offender to repent, when she never will repent the law has little reason to punish. Although this argument is not forceful since it ignores the law's reasons to communicate condemnation and to attempt to engage in amoral dialogue, it nevertheless highlights the relevance of defiance to the decision to punish. Communication between the law and an offender fails not only when the offender is unable to understand the reasons for the censure or to change her conduct, but also when the offender refuses to repent and to reform her conduct though she understands the message and could alter her behaviour and attitudes if she chose to do so. When an offender denies the justification of the censure communicated through lawful punishment, she may challenge her alleged culpability both through the appeals system and through her behaviour subsequent to punishment. If she continues to act in a way that the law deems punishable, she shows that her position remains unaltered by the government's communication. Persistent defiance by a political offender must be given thoughtful consideration with an eye to appreciating why the offender refuses to repent. It is true that, in some contexts, although punishing this person means not engaging successfully in a moral dialogue with her, that punishment may

[14] I thank Antony Duff for highlighting this point.

[15] This position discounts the suggestion that full punishment must be imposed for the offender to demonstrate the sincerity of her repentance. For a discussion of mercy and repentance see Tasioulas, 2003, 2006.

be justified in the same way that civil disobedience sometimes may be justified when an authority is unresponsive. To satisfy the Kantian requirement of treating an offender as a responsible and rational agent, authorities simply must mete out punishments that they *could* justify to her as the appropriate response to her conduct.[16] So, even though this offender does not listen and does not alter her conduct, the punishment may be justified as an attempt to engage in moral dialogue with someone who deserves censure. But, in other contexts, it may be the law and not the offender's position that should undergo revision. Moreover, when deciding how to respond, authorities should be sensitive to the fact that an offender may be defiant toward certain responses, but not toward others. The defiant offender's apparent unreceptiveness may be due to the modes of communication that the authority has adopted to address her. If her reasons for being unreceptive are well-founded, and she would be receptive to other, perhaps non-punitive responses, then it is necessary to consider whether such responses would be more appropriate than punishment is.[17]

In summary, I endorse a communicative theory of punishment in relation to the punishing of civil disobedients. This version of the theory gives preventative concerns only a modest supportive role in the justification of lawful punishment, and recognises the relevance of repentance (and defiance) to the final decision on whether and how much to punish since such recognition involves treating people at all stages of the process as rational, reflective creatures capable of both deliberating about moral matters and providing reasons for their actions and positions.

The confrontation

When a disobedient is justified in her conduct, censure of that conduct would seem to be undeserved and punishment unjustified. But the story is more complicated than this. The reasons justifying an act of civil disobedience must confront the reasons justifying lawful punishment of offenders. On the communicative conception I have outlined, both civil disobedients and authorities seek to communicate disapprobation to each other for certain practices and to persuade each other of the opposing view through ''transparent persuasion'' (as Duff describes it when referring to punishment), that is, persuasion which appeals to the very reasons which justify the attempt to persuade. Whereas a deterrent system of punishment aims at prudential persuasion (giving people prudential reasons relating to the prospect of punishment to follow the law), a desert system or communicative system aims at transparent persuasion: the moral reasons it offers to obey a given law are the same moral reasons which justify the claim that citizens should obey this law. (Duff, 1998: 166n)[18] Similarly, the moral reasons a civil disobedient offers an authority to change

[16] The notion of justification does not require that those who legitimately demand it actually must be satisfied by the explanation given. Rather the justification must be such that similarly placed people who reflected upon the explanation would be satisfied by it.

[17] It is unlikely, for example, that a career-dissenter would be responsive to a ban placed on her being in the proximity of political protests. Moreover, judges should consider the likely costs for the disobedient of having such a ban imposed upon her. C.f. Potter, 2001.

[18] Duff uses the phrase ''rational persuasion'' to describe the kind of persuasion that I have labelled ''prudential persuasion''. ''Rational persuasion'' is an ill chosen term here since deterrence theories are criticised for not treating offenders as rational agents capable of responding to the moral reasons they have to follow this law.

certain policies are the same moral reasons, which justify her claim that the authority should change those policies. Broadly speaking, civil disobedience can be contrasted with more radical disobedience which, like a deterrence system of punishment, gives people a prudential reason relating to the prospect of harm to follow orders.[19] Since the law, like the civil disobedient, may have good reasons for its persuasive aims, we must find some way of accommodating each within the moral dialogue that purportedly exists between the parties to these practices.

The picture I wish to sketch of the interrelation of the justification of lawful punishment and civil disobedience both contrasts and overlaps with the picture offered by Lord Hoffman. Drawing upon Ronald Dworkin's *Taking Rights Seriously*, Hoffman suggests that,

> [33]...while the demonstrator or objector cannot be morally condemned, and may indeed be praised, for following the dictates of his conscience, it is not necessarily unjust for the state to punish him in the same way as any other person who breaks the law. It will of course be different if the law itself is unjust. The injustice of the law will carry over into its enforcement. But if the law is not otherwise unjust, as conscription is accepted in principle to be, then it does not follow that because his objection is conscientious, the state is not entitled to punish him. He has his reasons and the state, in the interests of its citizens generally, has different reasons. Both might be right.
> [34] That is certainly the view we would take of someone who, for example, refused to pay part of his taxes because he felt he could not conscientiously contribute to military expenditure, or insisted on chaining herself to a JCB because she thought it was morally offensive to destroy beautiful countryside to build a new motorway. As judges we would respect their views but might feel it necessary to punish them all the same. Whether we did so or not would be largely a pragmatic question. We would take into account their moral views but would not accept an unqualified moral duty to give way to them. On the contrary we might feel that although we sympathised and even shared the same opinions, we had to give greater weight to the need to enforce the law. In deciding whether or not to impose punishment, the most important consideration would be whether it would do more harm than good. This means that the objector has no right not to be punished. It is a matter for the state (including the judges) to decide on utilitarian grounds whether to do so or not. As Ronald Dworkin said in *A Matter of Principle* (1985) p 114: ''Utilitarianism may be a poor general theory of justice, but it states an excellent necessary condition for a just punishment.''
> Sepet and another v Secretary of State for the Home Department, [2003] UKHL 15, [2003] 3 All ER.

Hoffman is right to note that both sides have their reasons and both sides may be right (to a certain extent and from different perspectives), and that the law may be justified in punishing although it sympathises with disobedients' views. Where a particular act of civil disobedience is wrong in some respect but justified, punishment of that disobedience is also likely to be wrong in some respect but justified (justified to the extent it censures that part of the disobedience which is wrong and wrong to the extent it censures that part of the disobedience which is justified). The justifi-

[19] In practice, the contrast between civil disobedience and radical disobedience as well as that between desert systems and deterrence systems will not be as clear-cut as this.

cation each side has for its action contributes to the rightness of that action. Depending on how complete the justification is, it may make the action alright all things considered.

In my view, Hoffman is mistaken, however, in the reasons he gives for why the law may be justified in punishing justified disobedience. First, Hoffman cites the justness of the law at issue, arguing that, when the law is not otherwise unjust, the state is entitled to punish the conscientiously motivated offender in the same way as any other person who breaks the law. But this assumes that political and non-political offences are comparable. While, as Kent Greenawalt (1987) puts it, ordinal proportionality might seem to recommend a uniform application of legal prohibitions, nevertheless, I would argue, punishment (or at least punishment comparable to that appropriate for ordinary offenders) may be inappropriate for civil disobedients who act with justification since they are unequal in relevant ways to offenders who should be censured. One might argue for the reduced culpability of such disobedients on the ground that adherence to the law is more than usually onerous for them. For example, when Sikhs protest the legal requirements to wear helmets while motorcycling and to wear hardhats while doing construction work, the law has reason not punish them given their reasons for offending, which distinguish them from ordinary offenders. The law may be deemed morally problematic in extending to their case. Also, as noted above, justice is not the only concern which could render a law morally problematic in some respect. Other concerns not reducible to justice which Hoffman does not consider such as trust, transparency, security, integrity, and so on could render a law morally problematic. Second, Hoffman cites the need to uphold the law, a consideration which does not in fact determine how judges morally ought to decide cases. As Raz (1994: 328) observes, we should distinguish between how courts should decide cases according to the law and how courts should decide on the cases that come before them: ''Sometimes'', he says, ''courts ought to decide cases not according to the law but against it. Civil disobedience, for example, may be the only morally acceptable course of action for the courts.'' Third, Hoffman cites pragmatic considerations of utility. Such considerations, however, play only ever a subordinate role in the justification of punishment on the desert theoretic approach endorsed here. Also such considerations would make inappropriate necessary conditions for punishment since they would allow that the case for punishing an offender is defeated, assuming no person is deterred, when society would be happier to have the offender—a celebrity say—back in circulation and the utility of this outweighs the benefits of punishment.[20]

The considerations that Hoffman should have cited relate to the key question of punishment, which is whether punishment is deserved. Judges must appreciate (particularly when they sympathise and even share dissenters' opinions) that justified disobedience is disobedience grounded upon deeply and conscientiously held values and commitments which, quite rightly, make it very hard for their holders either to follow laws which contravene those values or to refrain from communicating in effective ways their objections to laws and policies that they cannot breach directly. Given this, we must appreciate that sometimes it would be inappropriate to demand repentance from offenders. Demanding repentance from justified disobedients would attack values which the state and society themselves should advocate. There is

[20] I thank John Tasioulas for noting this point.

in fact no ground for mercy in these cases since there is nothing, in these disobedients' goals at least, for them to repent.

However, although disobedients' defence of genuine values does not warrant punishment, the mode of civilly disobedient communication they employ may deserve censure if, for example, it has significant negative effects for individuals or society (some of which might not be foreseeable). Hoffman could have argued that, although such offenders do not deserve punishment for their civil disobedience as such, they deserve punishment to extent that they intentionally, knowingly or recklessly brought about harmful consequences through their chosen action. How much weight these considerations should be given will depend upon the facts of the particular case.

Some argue that punishment of justified disobedience is always justified given both how difficult it is to identify accurately which acts of disobedience are really justified, and how inappropriate it is for officials to make such judgments. Greenawalt (1987: 273) states that,

> Any principle that officials may excuse justified illegal acts will result in some failures to punish unjustified acts, for which the purposes of punishment would be more fully served. Even when officials make correct judgments about which acts to excuse, citizens may draw mistaken inferences, and restraints of deterrence and norm acceptance may be weakened for unjustified acts that resemble justified ones.

But, we may accept Greenawalt's main point about the difficulty in identifying justified disobedience without endorsing his further point about the social drawbacks which might result even when authorities are lenient only to justified disobedients. That civil disobedience may encourage other disobedience is not in itself either an objection to civil disobedience or a reason to punish it. One must show that such general disobedience has negative effects for people and society greater than those generated by the law, effects for which the disobedients may be held liable. As Dworkin (1977: 206) observes, there is no evidence that society will collapse if it tolerates some disobedience.

Also, the fact that not proceeding against justified acts may result in some failure to punish unjustified acts does not make punishment the right response to justified disobedience. The difficulty in distinguishing justified disobedience from unjustified disobedience should lead judges to be cautious, not extravagant, in their assessments of deserved censure. Moreover, as suggested in my comments on restorative justice, the communication of society's adherence to certain values need not always take the form of traditional punishment in cases involving justified civil disobedience. Samuel Scheffler (2003: 76) observes that,

> Even if punishment is an institution that gives public expression to reactive responses that are constitutive of treating people as responsible agents, it does not follow that the institution is justified. There are many different ways of giving public expression to such responses, and the mere fact that a particular institution serves that function does not mean that it is justified. That will depend on what its other features are.

Although punishment can serve the various communicative aims of a society, it is not the only response that can do so. That said, sometimes the only forms of permissible communication for the state are those involving hard treatment. However,

these forms of communication have the potential to be less severe or impersonal than more traditional forms of punishment are. The inappropriateness of imposing customary sanctions in some cases does not leave the state speechless because there are other responses that the state can make to justified civil disobedience.[21]

As Gardner (2002) observes, there are many types of normative consequences for breach of law apart from liability to punishment, such as a duty to show regret, to apologise, to make restitution, and to provide reparation. These actions may be required of disobedients even when whatever wrong they do is also justified. All legal systems, continues Gardner, presuppose that even fully justified wrongdoing has at least one normative consequence: it makes it the offender's job to offer up what justification she can as a responsible agent who answers for her own wrongs. In the case of justified civil disobedience, this answering comes almost automatically. Through their effort to engage in a moral dialogue with authority, such disobedients offer justification for their actions in the form of an account of their values and their reasons for disobeying the law.

This discussion has focused on the interaction between the law and justified civil disobedients. I have said nothing directly about how the law should respond to unjustified (or not fully justified) civil disobedience. That is the topic for another paper.

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References

Ashworth, A., & von Hirsch, A. (2005). *Proportionate sentencing: Exploring the principles*. Oxford: Oxford University Press.

Brownlee, K. (2004). Features of a paradigm case of civil disobedience. *Res Publica, 10*(4), 337–351.

Duff, A. (1998). Desert and penance. In A. Ashworth & A. von Hirsch (Eds.), *Principled sentencing: Theory and policy*. Oxford: Hart Publishing.

Duff, A. (2003). Punishment. In H. LaFollette (Ed.), *Oxford handbook of practical ethics*. Oxford: Oxford University Press.

Duff, A. (2001). *Punishment, communication, and community*. Oxford: Oxford University Press.

Dworkin, R. (1977). *Taking rights seriously*. London: Duckworth.

[21] During the 2005 British Columbia Teachers Federation's (BCTF) illegal strike, BC Supreme Court (trial court) Justice Brenda Brown chose not to adopt the customary strategy of imposing heavy fines on the union, but chose rather to freeze the union's strike fund, preventing the union from paying its members their daily strike-pay. In this precedent-setting decision, Justice Brown argued that the BCTF acts through its members to commit the contempt of the court order that required them to return to work and that the BCTF is using its assets to facilitate the continuing breach of that order in part by paying teachers. Her response to the union was to impose a punishment of sorts in denying members their strike pay, but not the traditional punishment of a fine that the union had expected (and that it received a week later after it continued to act in contempt of the court order). In making this judgment, Brown stepped around the union and addressed teachers directly. Many teachers took the judgement as a challenge to them to show the strength of their convictions, that is, to show whether they would continue the strike without their strike-pay. See *BC Public School Employers Association v BC Teachers Federation* [2005] BCSC 1446.

Feinberg, J. (1994). The expressive function of punishment. In A. Duff & D. Garland (Eds.), *A reader on punishment*. Oxford: Oxford University Press.
Gardner, J. (2002). In defence of defences. Flores Juris et Legum: Festskrift till Nils Jareborg. Uppsala: Iustus Forlag. Retrieved 3 October 2003 from http://users.ox.ac.uk/~lawf0081/biblio.htm.
Gardner, J., & Macklem, T. (2002). Reasons. In J. Coleman & S. Shapiro (Eds.), *Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University Press.
Greenawalt, K. (1987). *Conflicts of law and morality*. Oxford: Oxford University Press.
Mill, J. S. (1999). *On liberty*. Peterborough, Ontario: Broadview Press.
Potter, W. (2001). The new backlash: From the streets to the courthouse, the new activists find themselves under attack. Texas Observer, 14 September. Retrieved 10 October 2005 from http://www.texasobserver.org/showArticle.asp?ArticleID=420.
Raz, J. (1994). *Ethics in the public domain*. Oxford: Clarendon Press.
Raz, J. (1979). *The authority of law essays on law and morality*. Oxford: Clarendon Press.
Russell, B. (1998). *Autobiography*. London: Routledge.
Scheffler, S. (2003). Distributive justice and economic desert. In S. Olsaretti (Ed.), *Desert and justice*. Oxford: Oxford University Press.
Soper, P. (2002). *The ethics of deference: Learning from law's morals*. Cambridge: Cambridge University Press.
Tasioulas, J. (2003). Mercy. *Proceedings of the Aristotelian Society, 103*(2), 101–132.
Tasioulas, J. (2006). Punishment and repentance. *Philosophy, 81*, 279–322.
von Hirsch, A. (1998). Proportionate sentences: A desert perspective. In A. Ashworth & A. von Hirsch (Eds.), *Principled sentencing: Theory and policy*. Oxford: Hart Publishing.