

CONSCIENTIOUS OBJECTION AND CIVIL DISOBEDIENCE

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[Forthcoming in *The Routledge Companion to the Philosophy of Law*. Andrei Marmor (ed.)]

Introduction

Dissent and disobedience are ancient practices that can excite reverence and resentment in seemingly equal measure. They are undoubtedly valued practices, but often they seem to be valued more in the abstract or in retrospect than in the moment. On the one hand, praise is generally lavished on that unnamed hero – the dissenter – who shows her humanity in her independent-minded, faithful counsel and conduct. Poet Archibald MacLeish (1956), for one, writes, “the dissenter is every human being at those moments of his life when he resigns momentarily from the herd and thinks for himself.” More fulsomely, John Stuart Mill (1859) observes that, “In this age, the mere example of non-conformity, the mere refusal to bend the knee to custom, is itself a service.” And George Bernard Shaw’s Jack Tanner writes in *Maxims for Revolutionaries* (1903) that “disobedience is the rarest and most courageous of the virtues.” Praise is also sometimes lavished on named dissenters. For instance, Albert Einstein says of Mahatma Gandhi that “generations to come will scarce believe that such a one as this ever in flesh and blood walked upon this earth” (1950: 240). And similar tributes have been paid to such historical and literary dissenters as Socrates; Sophocles’s Antigone; Aristophanes’s Lysistrata; Jesus; Galileo Galilei; Thomas More; the colonial participants in the Boston Tea Party; and the suffragettes.

On the other hand, however, there is also no shortage of resistance against, and demonization of, people who dissent or disobey. The personal histories of some of the figures just listed and of other icons, such as Emmeline Pankhurst, Martin Luther King Jr., Nelson Mandela, Aung San Suu Kyi and Liu Xiaobo, highlight the majority’s tendency to shoot the

dissenter in the act and to celebrate her only much later, if at all. Historian J. B. Bury (1913) observes simplistically, though perhaps not inaccurately, that, wherever prevails the belief that the welfare of a state depends upon rigid stability, “novel opinions are felt to be dangerous as well as annoying, and any one who asks inconvenient questions about the why and the wherefore of accepted principles is considered a pestilent person.” In addition to the patterns of negative reaction to dissent and disobedience, there is a host of familiar aphorisms and catchphrases that warn us against nonconformity. Some are injunctions: “Don’t rock the boat,” “Mind your Ps and Qs,” “Respect your elders,” “Don’t upset the apple cart.” Some are declarations of fact: “A chain is only as strong as its weakest link,” “A house divided against itself cannot stand.” And, some are thinly veiled condemnations of behavior: “He wants taking down a peg,” “She’s going against the grain.”

Perhaps such content-insensitive distrust of dissent is more a reaction to the threat of disobedience of formal norms than an intolerance of contrary positions as such. Perhaps it is when dissent manifests itself in a breach of law or a direct refusal to adhere to lawful requests that the specter of righteous indignation tends to arise and expose the strength of the conformist pressures that we can and do exert upon each other. Yet, as Mill notes, sometimes social pressures, not legal pressures, can be the most stringent:

[Society] practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from

them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own (1859, ch. 1).

The force of such conformist pressures, whatever their source, may explain in part how a general reverence for celebrated dissenters can arise concomitantly with a revilement of the actual dissenter on our street or in our office, who tests our patience and threatens social harmony.

The purpose of this chapter is to consider two types of dissent that are generally described as *conscientious*, namely, civil disobedience and conscientious objection, both of which raise pressing normative questions not only about the proper parameters of dissenters' rights and duties within a reasonably good society, but also about both the scope of legitimate toleration of assertions of conscientiousness and the appropriate legal and political responses to conscientious disobedience. In what follows, I begin by outlining the conceptual territory of *civil disobedience* and *conscientious objection*. I then offer a qualified endorsement of the moral justifiability of these two practices before examining both the scope and legitimacy of their status as moral rights and their grounds for legal defensibility. Among other things, I challenge the dominant liberal position that, in relation to both moral rights and legal defenses, a more compelling case can be made on behalf of private conscientious objection than on behalf of civil disobedience.

Conceptions of civil disobedience and conscientious objection

Civil disobedience

Henry David Thoreau coined the term “civil disobedience” in an 1849 essay to describe his refusal to pay the state poll tax to protest against the Mexican War (1846–1848) and the

Fugitive Slave Law. In defense of his law breaking, Thoreau maintained that it was imperative that he not lend himself to the wrong he condemns. In his view, only a very few people – heroes, martyrs, patriots, reformers in the best sense – serve their society with their consciences in this way, and necessarily resist society for the most part, and often are treated by it as enemies. Numerous subsequent dissenters have proudly identified their own deliberate, communicative, cause-driven breaches of law as acts of civil disobedience, paying the legal and social price for nonconformity while often acting as catalysts for social change through their condemnation of existing laws or policies. Whether these dissenters may credibly apply the generally laudatory label of “civil disobedience” to their breaches of law is a further question that depends in part upon how narrowly we specify the concept of civil disobedience.

John Rawls defines “civil disobedience” very narrowly as a public, nonviolent, conscientious yet political breach of law typically done with the aim of bringing about a change in laws or government policies (1971: 364ff). For Rawls, the *public* nature of civil disobedience takes a distinctive *ex ante* form. Civil disobedience is never done covertly or secretively, but only openly in public, and only ever with advance notice to legal authorities. In Rawls’s view, such publicity is one mark of disobedients’ civility and willingness to deal fairly with authorities. Another mark of their civility is their nonviolence. Rawls states that violent acts likely to injure are incompatible with civil disobedience as a mode of address: “any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one’s act.” A third mark of civility is disobedients’ willingness to accept the legal consequences of their actions, including punishment. In Rawls’s view, these features together show that, unlike revolutionary actors or militant protesters, civil disobedients have a fidelity to law at the outer edge thereof. Their disobedience is a political act, but it is a conscientious and sincere one that invokes the commonly shared conception of justice that underlies the

political order, which in the case of Rawls's just or nearly just society is a conception that centers on his two principles of justice.

One detraction of Rawls's conception of civil disobedience is that it implicitly excludes many acts that commonsensically are seen as civil disobedience such as the nonviolent protests of Gandhi, who had no fidelity to British rule in India. Yet, the worry that Rawls's conception cannot accommodate a case such as Gandhi may be allayed somewhat by the fact that Rawls did not develop his account for an imperialistic political order such as British India, but for his ideal, just or nearly just society, in which fidelity to law might be more credible. The cost, though, of confining the analysis to this ideal context is that it leaves unsettled whether Rawls's account of civil disobedience could be applied without radical alteration to less just, and more realistic, societies.

Another difficulty concerns Rawls's overly restrictive conditions of publicity and nonviolence as signifiers of civility. Publicity can detract from or undermine persons' attempts to communicate through civil disobedience since announcing an intention to break the law provides both political opponents and legal authorities with an opportunity to abort those communicative efforts, which does no favors to the dissenter's cause even though that cause may be a just one (Smart 1991: 206). For this reason, unannounced or (initially) covert disobedience can be preferable. Disobedience carried out covertly in the first instance to ensure that the act is successful may nonetheless be taken to be open and communicative when followed by an acknowledgment of the act and the reasons for taking it (Raz 1979).

Turning to violence, the presumed incivility of violence is problematic for several reasons. First, a commonsense conception of *violence* – as the likelihood or actuality of a person or group causing injury to someone or damage to something – will include not only a range of acts and events, major and minor, intended and unintended, that *cause* damage or injury, but also a range of acts and events that *risk* but do not necessarily *cause* damage or

injury, such as catapulting stuffed animals at the police or shooting into the sky. Given that a range of elements can be counted as violence, it is implausible to hold that any instance of violence in the course of disobedience, however modest or noninjurious it may be, is, by definition, uncivil. Second, focusing attention upon violence draws attention away from the presumptively more salient issue of harm. As Joseph Raz notes, many nonviolent acts and many legal acts can cause more harm to other persons than do violent breaches of law (1979: 267). His example is that of a legal strike by ambulance workers, which will in all likelihood do far greater harm than, say, a minor act of vandalism. Moreover, sometimes the wrong or harm done by a law or policy is so iniquitous that it may be legitimate to use violence to root it out. Raz observes that such violence may be necessary to preserve or to reestablish the rights and civil liberties that coercive practices seek to suspend. Such observations about harm and violence are consistent with the view that nonviolent dissent is generally preferable because it does not encourage violence in other situations where violence would be wrong, something that an otherwise legitimate use of violence may do. Moreover, as a matter of prudence, nonviolence does not carry the same risk of antagonizing potential allies or of cementing opponents' antipathy, or of distracting the public's attention, or of providing authorities with an excuse to use harsh countermeasures against disobedients.

The above objections to Rawls's conception coalesce around a more general concern that it anticipates the normative evaluation of civil disobedience. By restricting civil disobedience to nonviolent, public breaches of law taken by persons who have a fidelity to the legal system and are willing to accept its punishments, Rawls leads us too easily to the conclusion that most, if not all, civil disobedience is morally justifiable (Brownlee 2004). The evaluation of civil disobedience as a deliberate, communicative breach of law carried out in both liberal and illiberal regimes requires careful, impartial reflection that does not predetermine its moral status through overly idealistic stipulations that are at odds with

practical realities.

A broader conception of civil disobedience, offered by Raz, characterizes it as any “politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one’s protest against, and dissociation from, a law or a public policy” (Raz 1979: 263). This conception does not rule out the possibility of either violent or covert civil disobedience, and it does not anticipate the normative evaluation of this practice. It also acknowledges more explicitly and consistently than Rawls’s conception does that civil disobedience can be either direct or indirect. Direct disobedience is the breach of the law that is actually opposed. Indirect disobedience is the breach of a law that is not opposed in order to communicate one’s objection against the law, rule, norm, or policy that is opposed. Trespassing onto a U.S. military base with a spray-paint can and carrying out acts of vandalism in order to protest against an ongoing war is an example of indirect civil disobedience.

However, Raz’s conception may be faulted since, first, it excludes from the class of civilly disobedient acts those breaches of law that protest against the decisions of nongovernmental agencies such as trade unions, banks and private universities (1979: 264). This exclusion is arbitrary because the policies and practices of nongovernmental institutions – such as the University of Mississippi’s initial refusal to admit African American student James Meredith – are matters of law as the lawfully accepted practices of legally recognized institutions. In condemning such policies and practices, civil disobedients challenge, amongst other things, the legal framework that accepts these policies and practices as lawful.

A second objection to Raz’s definition is that it misrepresents civil disobedience by describing it in terms of *expression* of protest and not *communication* of protest. Whereas expression need not be directed toward other people, communication is necessarily an other-directed activity that involves the engagement of a “speaker” with a “hearer” to bring about

the hearer's understanding of what the speaker conveys. Civil disobedience is an intentional breach of law that aims to *communicate* to a relevantly placed audience, usually society or the government, in ways that typically have both forward-looking and backward-looking aims. The backward-looking aims are to communicate both a disavowal of, and dissociation from, a given law or policy and the reasons for that disavowal. The forward-looking aims are to draw attention to the issue and to the reasons for the protest so as to persuade the relevant audience to accept the disobedient's position and, thereby, to instigate a lasting change in law or policy. A parallel may be drawn between the communicative aspects of civil disobedience and the communicative aspects of lawful punishment by the state since, like civil disobedience, the state's use of lawful punishment is associated with a backward-looking aim to communicate condemnation of certain conduct as well as a forward-looking aim to bring about a lasting change in that conduct (Brownlee 2004).

As a vehicle for communication, civil disobedience has much to be said for it. It can often better engage with society and the state than legal protest can since the added sensationalism of civil disobedience, even when suitably constrained and modest in form, tends to garner greater publicity than do lawful defenses of minority views. Sometimes civil disobedience serves primarily to inform and to educate the public about an issue; other times it confronts the majority with the higher costs of retaining a given law or policy in the face of continued, focused opposition.

A final criticism of Raz's conception of civil disobedience is that it identifies no particular features that could signify or explain the *civility* of this practice. In my own view, the civility of civil disobedience lies in the conscientious motivations of its practitioners. Civil disobedience involves not just a communicative breach, but a conscientious communicative breach of law motivated by steadfast, sincere and serious (though possibly erroneous) moral convictions. This combination of conscientiousness and forward- and

backward-looking communicativeness places constraints upon how a civil disobedient may promote her cause because, to bring about a lasting positive change in law and to be true to the sincerity of her convictions as a reasoned position, she must avoid being overly radical in her communication. That is, she has reasons to seek rationally to persuade others of the merits of her view rather than merely to coerce them to make changes, partly because the appeal of her communication may be lost if it is drowned out by overly coercive tactics, and partly because the appeal rests upon treating her audience as interlocutors with whom she can engage in a rational and moral discussion. Thus it is in such self-restraint and reason-based sincerity that we find the civility of civil disobedience, although this does not entail that civil disobedience can never be violent or partially covert, or revolutionary, or partly coercive. It can be provided that such properties are adequately constrained by, and consistent with, backward- and forward-looking communicative conscientiousness.

Conscientious objection

The second practice under consideration here is conscientious objection. The term came into common usage first in the late 1890s and then during the First World War to describe pacifist resistance to military conscription. Although the term is sometimes still associated with pacifism, it applies more generally now to any person's principled refusal to follow an injunction, directive or law on grounds of steadfast personal conviction. Contemporary contexts in which such refusals occur, in addition to military service, include healthcare provision, civil service, retail work, criminal justice, family law, education and personal attire in public. Common cases include the pharmacist who refuses to prescribe an emergency contraceptive pill; the religious patient who refuses a blood transfusion or an inoculation; the religious parents who refuse to take their child to see a doctor for a life-threatening but curable disease; the civil servant who refuses to perform same-sex civil-partnership

ceremonies; the religious grocery store employee who refuses to shelve or process the sale of alcohol; the doctor or nurse who refuses to participate in the provision of abortions; the judge who refuses to hear gay couples' applications for adoption; and the religious person who refuses to wear or not to wear legally regulated clothing or ornaments in public, at work or at school.

This conception of conscientious objection as a principled refusal to follow an injunction, directive or law on grounds of steadfast personal conviction, contrasts with some other conceptions in the literature. Conscientious objection is sometimes conceived of more narrowly as necessarily a violation of the *law* motivated by the dissenter's belief that she is morally prohibited to follow the law because the law is either bad or wrong, totally or in part (Raz 1979: 276). The conscientious objector may believe that the general character of a law is morally wrong (as an absolute pacifist would believe of conscription) or that the law extends to certain cases that it should not cover (an orthodox Christian would regard euthanasia as murder) (ibid: 263). In Raz's view, "Conscientious objection is a private act, designed to protect the agent from interference by public authority...[The conscientious objector is] an individual asserting his immunity from public interference with matters he regards as private to himself" (ibid: 276). In one sense, this definition is too narrow since it does not acknowledge that acts of conscientious objection need not be breaches of law.

A slightly less narrow conception of conscientious objection is given by Rawls, who views it as an act of conscientious refusal or noncompliance with a more or less direct legal injunction or administrative order, such as Jehovah's Witnesses' refusal to salute the flag (Rawls 1971: 368). In Rawls's view, *conscientious refusal* is distinct from a related species of conscientious objection, namely, *conscientious evasion*. Whereas conscientious refusal is undertaken with the assumption that authorities are aware of the breach of law, order or injunction, conscientious evasion is undertaken with the assumption that the act is covert, as

in the case of the devout person who continues to practice her banned religion in secret.

Like “civil disobedience”, the term “conscientious objection” has a conventionally laudatory connotation; it identifies a sphere of personal conviction around which a liberal society and its laws tend to tread with some care. There is considerable overlap between these two practices in that both are forms of sincere and serious dissent that involve some kind of principle-governed nonconformity or disobedience. Indeed, in some cases, a single act can be described as both civil disobedience and conscientious objection, such as the selective, communicative objection – draft dodging – engaged in by many U.S. national guard members during the Iraq War.

However, despite the overlap between these practices, their paradigmatic forms do differ. First, whereas civil disobedience is paradigmatically a deliberate breach of law, conscientious objection is not. It may not be a breach of law at all. It may instead be a breach of a directive, order or norm that falls short of law. In the case of military conscription, for instance, some legal systems regard conscientious objection as a legally legitimate ground for avoiding frontline military service. And, in the context of healthcare, civil service and retail, there is a growing number of legal accommodations for persons who refuse to perform parts of their job on grounds of personal (religious) conviction. Moreover, even when conscientious objection is a breach of law, it is not necessarily deliberately so; it may be only incidentally illegal.

Second, whereas civil disobedience can be either direct or indirect, conscientious objection can only be direct. It is necessarily a direct refusal to carry out all or part of a given order, injunction or law.

Third, whereas paradigmatic examples of civil disobedience can be either individual or collective, paradigmatic examples of conscientious objection are individual. The grounds for the conscientious objection may be collective when they are based in the individual’s

familial or religious community commitments; but the conscientious objection itself is usually an individual act.

Fourth, although *conscientiousness* is an important notion for both civil disobedience and conscientious objection – partly because it identifies one conceptual and evaluative difference between these practices and ordinary acts of offending (when conscientious objection is illegal), which are not motivated by deep conviction – conscientiousness nevertheless takes a different form in each of these two practices. As noted above, the conscientiousness of civil disobedience takes a communicative form. Disobedients aim not only to communicate to others their concerns about perceived injustices in law or policy, but also to dissociate themselves, and to be seen to dissociate themselves, from the law or policy they condemn. By contrast, although conscientious objectors also distance themselves from the law or rule that they regard as wrong, they do not do it with an eye to remedying that perceived wrong through engagement with their society. Rather, they merely wish to act without interference in ways consistent with their own convictions. To the extent that they do communicate, or seek to communicate, at all, they communicate that the law should not interfere with them in this domain. Such communication is incidental or secondary to their purposes, though it does indicate that, to some extent, their act is a *political* act of asserting their immunity from certain laws of their community. A conscientious objector may, of course, see her nonconformity as a measure of last resort, to which she must turn if the law or directive is not legally abolished, and if legal exemption is not granted to her. The question then is whether she has sought to play any role in society's deliberations about the law at issue; if she has, then her efforts may be better characterized in terms of civil disobedience.

The differences between the aims and motivations of communicative and noncommunicative disobedients reveal a difference in the quality of their conscientiousness. The civil disobedient alone may claim to recognize that when we judge some conduct to be

seriously wrong we must not only avoid such conduct ourselves to the best extent that we are able, but also judge such conduct in others to be wrong and *ceteris paribus* be willing to communicate this judgment. As Antony Duff has noted in a different context, to remain silent can cast doubt on the sincerity of our conviction (2001: 28). This implication of the difference in motivation leads us into the evaluation of the respective moral merits of these two practices.

Moral justifiability

Examination of the moral justifiability of civil disobedience and conscientious objection often proceeds against the background assumption that, in a broadly liberal regime, there is either a general pro tanto moral obligation to follow the law or at least a general presumption in favor of following the law. Within this framework, the conditions for the justifiability of civil disobedience tend to include both a content-sensitive constraint on the moral merits of the dissenter's cause and consequence-oriented constraints aimed at limiting the negative effects of the disobedience. The latter constraints include the following. The disobedience must be undertaken, first, as a last resort only when lawful efforts have repeatedly shown the majority to be immovable or apathetic to the dissenter's efforts; second, in coordination with other minority groups to ensure a general regulation of overall dissent that lessens the likelihood of self-defeat (Rawls 1971: 374ff); third, nonviolently (as explored above); and fourth, with a high probability of producing positive change through the disobedience. Only this can justify exposing others to both the divisiveness of civil disobedience and the risks of it encouraging either copycats or a general disrespect for the law.

Although plausible at first glance, many of these conditions can ultimately be rejected. Concerning coordination, there will be occasions in which there is no time or opportunity to coordinate with other minority groups or, even if there is, those groups will be

unable or unwilling to coordinate, which would give other minorities a veto over the moral quality of a dissenter's civil disobedience if coordination were required for justifiability. Concerning harm, the empirical claims that civil disobedience is necessarily divisive and encourages more disobedience can be doubted. But even if those claims were credible, it would not follow that it is inexorably a bad thing if civil disobedience had these consequences. Finally, concerning the likelihood of success, intuitively, civil disobedience is most justifiable when the minority's situation is most desperate and the government refuses to attend to more conventional forms of protest. Even when general success seems unlikely, civil disobedience may be defended for any reprieve from harm that it brings to victims of a bad law or policy.

As these comments indicate, the general presumption in favor of following the law is impervious to the context-sensitive, broadly non-codifiable nature of persons' genuine moral obligations. Certainly there are ordinary moral reasons to follow the law in a reasonably just society and there are moral obligations to follow those particular laws that track genuine moral prescriptions against murder, robbery, rape, etc., but in general the moral merits of actions lie in their character and consequences, not their legality. It is by these measures that civil disobedience and conscientious objection are to be assessed.

The gap between codified law and non-codifiable morality is easily discerned in difficult situations where conformity to formal norms rightly elicits condemnation. For example, in a recent case, two British community support police officers (CSOs) endeavored to save a child drowning in a pond not by attempting a rescue, but by radioing for a trained emergency crew to come to the scene. In the intervening time, the child died. The officers were praised by their superior for following proper procedure, but censured by both the community and government officials, one of whom stated that, "What was appropriate in this circumstance for a uniformed officer would be appropriate for CSOs as human beings, never

mind the job” (BBC 2007). Similar condemnation may rightly be elicited when judges sentence convicted offenders to death, or when police or intelligence officers use extreme interrogation techniques, or when doctors oversee executions by lethal injection, even though in each of these cases the law may well have demanded the conduct. As Joel Feinberg observes, what morality requires of a person in morally difficult circumstances is not something to be mechanically determined by an examination of the person’s office or position. An individual must on some occasions have the courage to rise above all that and obey the dictates of (good) conscience (2003: 16). And this truth is not restricted to lower-level officials or ordinary citizens. Raz rightly observes that, “Sometimes 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” (Raz 1994: 328).

The point here is not simply that a reasonably just or liberal society should make provision for persons to excuse themselves from adhering to formal demands that are especially onerous for them. Certainly, in many cases, it should do that. Rather, the point is that society should strive as well as it can to avoid setting up institutional frameworks to address important concerns which place overly weighty moral burdens on any would-be occupants of those institutions. For instance, in states such as California, doctors have justifiably refused to carry out the function of overseeing executions by lethal injection because their assigned function is not just to reduce the condemned person’s suffering, but to intervene to facilitate death if the person wakes up. This task deeply conflicts with doctors’ responsibilities as healers and carers to promote people’s well-being. As a result of doctors’ refusal to perform this function, a moratorium was imposed on capital punishment in California (Gels 2006). A similar objection can be raised against prison doctors’ function of treating offenders in high-security prisons whose conditions are often marked by brutality,

degradation and deprivation, thereby requiring doctors to oversee punishments highly detrimental to offenders' well-being.

It does not follow from these observations that a society may never ask its members to engage in morally problematic conduct. A society may legitimately ask a civil registrar to conduct civil partnerships for homosexual couples irrespective of her personal convictions in order to ensure nondiscriminatory provision of a secular alternative to religious marriage. Similarly, a society may legitimately ask its medical professionals to provide adequate, nondiscriminatory healthcare services irrespective of their convictions about the moral merits of lawful procedures and medications. And, in those rare times of genuine crisis, a society may legitimately call upon its citizens to go to war. The general principle behind these cases is that society must pay close attention both to the institutional structures that it sets up to address important community concerns and to the specification of the offices that comprise those institutions, so as to minimize the genuine moral burdens that it imposes upon its members, and thereby to reduce the occasions in which nonconformity is the only morally acceptable course of action (Brownlee 2010).

Even though, in the three cases just given of healthcare, civil service and war, refusal of performance is *ceteris paribus* not morally legitimate, there is the further possibility that such refusals are protected by a moral right of conscientious disobedience. The question is: when a person mistakenly believes that a law or directive is morally wrong, should her refusal to adhere to it be regarded as an exercise of a moral right of conscientious disobedience? And, if so, what implications does this have for how her act should be viewed by the law?

Moral rights and legal defenses

Often political philosophers explore the idea of a moral right to civil disobedience separately

from a moral right to conscientious objection on the grounds that these practices are sufficiently disparate that, if they are protected by moral rights, they are protected by different moral rights. One by-product of this approach is the proposal that the moral right to civil disobedience is regime sensitive. The claim here is that, while there may well be a moral right to civil disobedience in illiberal regimes, there is no such moral right in liberal regimes because in such regimes there is adequate protection for ordinary forms of political participation and, thus, the only forms of illegal protest that the society must be expected to tolerate are those that are defensible on their merits (Raz 1979; Green 2003). Where there is fair access to participation, there is no right to civil disobedience. In response to this view, it may be argued that, even in liberal regimes, persistent and vulnerable minorities are, by nature, less able than majorities to make their views heard before decisions are taken and laws are made. There is inherent comparative unfairness in the imbalance of political power between majorities and vulnerable minorities and, therefore, the scope for participation should accommodate some suitably constrained civil disobedience by vulnerable minorities, as this rectifies the imbalance in meaningful avenues for political participation (Lefkowitz 2007).

Putting aside this debate about the scope for participation in different regimes, there are reasons to consider civil disobedience and conscientious objection together in the debate about moral rights. Given both their intersection and their respective assertions of conscientiousness, these practices are most fruitfully considered in relation to a single proposed right to conscientious disobedience (where *disobedience* is construed broadly since not all conscientious objection is in breach of law) to determine which, if either, practice has the best case for claiming protection as a right.

The most compelling ground for a moral right to conscientious disobedience is society's duty to honor human dignity. The principle is one of humanism, that is, respect for

the conscientious dissenter's deep conviction and the overly burdensome pressure that the law places upon her when it coerces her to act against those convictions. Thinkers such as Raz (1979: 286) and Jeremy Horder (2004) maintain that this humanistic principle lends modest protection to private conscientious objection. Taking the case of fighting in war as an example, Raz argues that the killing and subjugation of other peoples must never be viewed lightly, even in unfortunate cases when such acts are necessary and justified. "Whatever the justification, undeniably the readiness to kill or to participate in oppression have profound significance for the one who carries out such acts. Hence, the right to conscientious objection to such acts takes precedence over the legal obligation to take part in them" (Raz 2003). In a similar spirit, Horder argues that a plausible legal defense on the grounds of personal conviction arises from an appreciation that disproportionate emphasis is placed on law abidance when society insists that a person always sacrifice her beliefs in order to comply with legal demands no matter how trivial those demands may be. Horder argues that accommodation must be made for individuals' private moral commitments and nonmoral goals and projects that are constitutive of their identity. When these commitments clash with the demands of the law, these offenders can show that they had reason to believe they had undefeated reasons to act as they did.

In opposition to Raz and Horder, I maintain that the humanistic principle lends modest protection principally to civil disobedience for the reason outlined above, that, unlike private "conscientious" objectors, civil disobedients are willing to risk being seen, and thus held to account, for their conscientious disobedience. As such, their acts do not raise the specter of doubt that conscientious objectors' acts can raise that their conviction is too shaky to accept the risks of communication. In my view, the draft dodger is most plausibly protected by a right of conscientious disobedience not when he is out to seek a personal exemption or keep his own hands clean, but when he is willing to be seen to dissociate

himself from the order to go to war, and to bear the risks of communicating and defending that decision to his society.

The opponents of my view stress that civil disobedience is a strategic and political act, but conscientious objection is not. The claim is that, although civil disobedients often act from deep moral conviction, their motives are at least partly political and strategic; they challenge the democratic legislature's supreme right to take strategic decisions for the whole community. Hence, their conduct falls outside the scope of the humanistic principle. By contrast, the private conscientious objector does not seek to challenge the state's right, through law, to make decisions on behalf of the entire community. She does not choose (for purely strategic reasons) the laws to be disobeyed (Horder 2004: 224).

This strategic-action objection has some force against indirect civil disobedience because the person breaches a law that she does not oppose and, hence, acts strategically. Yet sometimes it is not so much strategy as necessity that forces dissenters to engage in indirect civil disobedience. Indirect action can be more justifiable than direct action when it causes less harm or, in addition, is a more efficacious way to redress perceived injustices.

The strategic-action objection is not forceful against direct civil disobedience because this objection under-appreciates the importance of reasoned communication for conscientiousness. Paradigmatically, civil disobedience involves principled disobedience undertaken by persons who appreciate the importance for integrity and self-respect of communicating their views in certain contexts. And the objection assumes, mistakenly, that politics and strategy do not figure into conscientious objection. Breaches carried out in secret with the aim of remaining secret are strategic acts, especially when the acts are chosen with calculation to preserve liberty from coercive interference from the law. For these reasons, civil disobedience should not be ruled out from the humanistic principle on the basis of motivation.

The strategic-action argument might be re-presented as a concern that modest protection of civil disobedience would provide a (strategic) reason for other would-be protestors, whether or not like minded, to engage in the law-breaking conduct to further their political aims. This would undermine the authenticity of the claim to legal defensibility and may give rise to further unwelcome follow-on threats to common goods, such as a greater willingness amongst protest movements at large to forego a preference for law-abiding protest in favor of rights violations (Horder 2004: 224). In reply, when dissenters use suitably constrained civil disobedience, they have not necessarily foregone a preference for law-abiding protest in favor of rights violations because it is not inevitable that civil disobedience violates rights, and their acts may often serve to secure or restore rights that the government is abusing or neglecting. Moreover, the worry that a legal defense would create a strategic reason for nonconscientious, would-be protestors to break the law appeals to a mistaken slippery slope since the protection would not be available to those who engaged in more radical forms of protest. And burdening conscientious agents in order to deter widespread dissent uses those agents merely as a means to prevent other types of conduct, which, unlike their own conduct, are not suitably constrained and conscientiously motivated. Punishing civil disobedients in order to restore deterrence levels disrespects civil disobedients as autonomous persons who contribute to collective decision making in tolerable ways.

Another argument against limited protection of civil disobedience turns on the idea that, in a liberal democracy, the legislature is better placed than individual citizens to account for all of the reasons that bear upon the right guidance to follow (Horder 2004: 224). This assertion is dubious on empirical grounds. It is doubtful that legislatures are invariably better placed than, say, environmentalists or soldiers to account for all of the reasons whether and how to protect the environment or to go to war, particularly when legislatures must contend with well-funded lobbying groups with opposing views. Moreover, even if the legislature

were best placed in all cases to assess the relevant reasons, it could still benefit from pointed minority opposition to ensure that it remains alive to all of the salient reasons for and against a given policy.

There is a distinctive social value in conscientious dissent and disobedience. These practices contribute centrally to the democratic exchange of ideas by forcing the champions of dominant opinion to reflect upon and defend their views. Following Mill, it may well be that, if there are persons willing to contest a received opinion, we should thank them for it, open our minds to listen to them and rejoice that there is someone to do for us what we otherwise ought to do ourselves (Mill 1859, ch. 2). And when their causes are well founded and their actions justified, these dissenters serve society not only by questioning, but by inhibiting departures from justice and correcting departures when they occur, thereby acting as a stabilizing force within society (cf. Rawls 1971: 383). In performing such services, society's dissenters and disobedients may prove to exemplify truly responsible citizenship and civic virtue. Richard Dagger argues that:

To be virtuous...is to perform well a socially necessary or important role. This does not mean that the virtuous person must always go along with the prevailing views or attitudes. On the contrary, Socrates and John Stuart Mill have persuaded many people to believe that questioning and challenging the prevailing views are among the highest forms of virtue (1997: 14).

It is in this spirit that we should understand the best of conscientious dissent and disobedience (Brownlee forthcoming).

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Further reading

For further reading, see: H. A. Bedau, ed. (1991) *Civil Disobedience in Focus*, London: Routledge (reproduces several seminal pieces on civil disobedience); R. Dworkin (1977) *Taking Rights Seriously*, London: Duckworth (outlines a theory of compliance with the law that, amongst other things, addresses theoretical questions about civil disobedience); K. Greenawalt (1987) *Conflicts of Law and Morality*, Oxford: Clarendon Press (analyzes the conflicts between the foundations of law and morality and the challenges they raise for lawmakers and potential lawbreakers); B. Medina and D. Weisburd, eds. (2002) *Refusals to Serve – Political Dissent in the Israel Defense Force*, special issue, *Israel Law Review*, 36 (3) (examines the theoretical issues that underpin the debate over refusals to serve in the Israeli Defense Force); A. J. Simmons (2003) “Civil Disobedience and the Duty to Obey the Law,” in *Blackwell Companion to Applied Ethics*, R. G. Frey and C. H. Wellman, eds., Oxford: Blackwell (provides an overview of the conceptual and normative issues surrounding civil disobedience and legal obligation); and C. Sunstein (2003) *Why Societies Need Dissent*, Cambridge, Mass: Harvard University Press (an accessible examination of psychology

studies of group behavior and cases of conformity and group polarization in American politics, law, and society).