

Responsibilities of Criminal Justice Officials*

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ABSTRACT: In recent years, political philosophers have hotly debated whether ordinary citizens have a general *pro tanto* moral obligation to follow the law. Contemporary political philosophers have had less to say about the same question when applied to public officials. In this paper, I consider the latter question in the morally complex context of criminal justice. I argue that criminal justice officials have no general *pro tanto* moral obligation to adhere to the legal dictates and lawful rules of their offices. My claim diverges not only from the commonsense view about such officials, but also from the positions standardly taken in legal theory and political science debates, which presume there is some general obligation that must arise from legal norms and be reconciled with political realities. I defend my claim by highlighting the conceptual gap between the rigid, generalised, codified rules that define a criminal justice office and the special moral responsibilities of the various moral roles that may underpin that office (such as guard, guardian, healer, educator, mediator, counsellor, advocate, and carer). After addressing four objections to my view, I consider specific contexts in which criminal justice officials are obligated not to adhere to the demands of their offices. Amongst other things, the arguments advanced in this paper raise questions about both the distribution of formal discretion in the criminal justice system and the normative validity of some of the offices that presently exist in criminal justice systems.

Introduction

This paper focuses upon the moral responsibilities of criminal justice officials. I take as my starting point Joseph Raz's claim that there is a difference between how courts should decide cases according to the law and how courts should decide on the cases that come before them. Raz says:

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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.¹

While the term ‘civil disobedience’ does not necessarily well describe what judges or juries do when they conscientiously decide cases against the law (since their conduct is not necessarily illegal and since it typically does not expose them to the threat of state punishment), the claim that sometimes they should conscientiously decide against the law points to a more general question about legal officials and, for my purposes, criminal justice officials: In a reasonably just criminal justice system (assuming that such a system could exist), should an official, irrespective of her position, sometimes conscientiously act against the legal rules and lawful orders that shape her office?² Should a police officer sometimes decline to detain or to arrest a known offender even though instructed to arrest her? Should a prosecutor sometimes conscientiously dismiss a charge, or routinely dismiss a certain type of charge, even though there are sufficient legal grounds to proceed to trial? Should a jury sometimes acquit an obviously guilty person or routinely acquit persons with certain backgrounds and circumstances? Should a prison officer occasionally or routinely decline to impose a lawful sentence of incarceration?

The claim that sometimes the only morally acceptable course of action for a criminal justice official is not to adhere to the dictates of her office³ seems difficult to defend when made against the background assumption that the institutional framework is reasonably just in the sense that 1) the institutions are founded upon morally legitimate principles and values that 2) function, by and large, as intended, and 3) those legitimating principles and values are standardly thought to trump whatever principles or values inform non-adhering actions. Even so, affirmative answers to the first two questions just posed may seem relatively uncontroversial, or certainly less controversial than affirmative answers to the latter two questions, since there are generally recognised notions of police and prosecutorial discretion (in common law systems), but not of jury

¹ Raz, Joseph (1994), *Ethics in the Public Domain*. Oxford: Clarendon Press, 328.

² The label ‘official’ applies here to all members of a community who assume, however briefly, some official position within the institutional structures of the criminal justice process. Thus, this term applies to jurors as well as judges, prosecutors, police officers, defence attorneys, and prison officers, amongst others.

³ The notion of *non-adherence* will be spelled out in Section 6 as the combination of 1) not acting in accordance with the reason that one is directed to act (non-conformity) and 2) not acting *for* the reason that one is directed to act (non-compliance).

discretion or prison officer discretion. One might think, therefore, that only when the demands of one's office are underdetermined, as in the case of police officers and prosecutors, should one employ first-order moral reasoning about how best to act; when one's office grants one little or no formal discretion, non-adherence to directives in all but the most extreme cases would constitute a threat to the valuable institutions of which one's office is a part. Or, relatedly, one might think that officials lower down the institutional ladder are more likely to make mistakes, as they have limited access to relevant information and less time to make relevant decisions, because their offices are not constructed to allow them to make certain kinds of judgements.⁴ But, the recognised distribution of formal discretion can be questioned, as can assumptions about people's relative access to relevant information. Also, even for those whose offices do grant them some discretion, the question remains whether sometimes they ought to step beyond what that discretion formally licences them to do or, indeed, disdain to do what that discretion licences them to do.

Taking a different view of discretion, one might think that persons who are higher up the institutional ladder or persons who are most visible within the criminal justice system have the most stringent duty to 'follow orders'. Non-adherence by these officials, unlike that of less scrutinised officials, may seem to threaten valuable institutions by undermining people's confidence in the workings of those institutions. Joel Feinberg observes that the high court judge is not protected by the same degree of secrecy as the mere juror. Nor can she so easily escape sanctions afterward, being subject to impeachment and subject to social pressure to give an account of each judicial decision and mode of argument.⁵ But, these potential costs of non-adherence for the

⁴ I thank Zofia Stemplowska for noting this point.

⁵ Joel Feinberg argues that: 'The conscientious judge's situation is quite different [from that of the ordinary citizen or the juror], especially when he is a judge in the nation's highest appellate court...the judge does not have legal power of the same degree of effectiveness as that of the ordinary citizen or the juror. Paradoxically, the higher we climb in the court system, the less effective power to breach official duties do we find. I suspect that is because the duties themselves, at that level, are regarded with awe and thought to be of maximum or supreme stringency.' Feinberg, Joel (2003), *Problems at the Roots of Law*. Oxford: Oxford University Press, 17. Michelle Madden-Dempsey has observed in conversation that Feinberg's view may conflate strong discretion with weak discretion. Although, contra Dworkin, judges may exercise strong discretion (in determining standards of reasonableness, for example), they nonetheless may lack weak discretion to be the final arbiter on a case; social pressures will limit a judge's weak discretion to say whether some conduct satisfies a given standard.

judge and perhaps for people's confidence must be weighed against other costs that arise through general adherence (including costs that should weaken people's confidence).

The claim defended in this paper is that a conceptual gap exists between the dictates of normatively valid offices, be they high or low, and the special moral responsibilities of the occupants of those offices.⁶ The morally acceptable course of action for a criminal justice official, regardless of position, often may deviate from the rules and orders governing her office even in a reasonably just system. When it does, she ought not to adhere to those rules or orders. My claim is not an 'all things considered' claim. Put simply, I hold that, given the conceptual gap between office-dictates and role-related moral responsibilities, there is no general, content insensitive, *pro tanto* moral obligation for criminal justice officials to adhere to the demands of their offices.⁷ This claim not only departs from a commonsense view, but also differs from views commonly found in legal theory and political science debates about officials, which either seek to reconcile moral norms with legal norms by subsuming the former under the latter⁸ or seek to defend a space for moral wrongdoing – dirtying one's hands – in the name of public good.⁹ In both cases, there is a presumption that, irrespective of what we may say all things considered, officials operating within a normatively defensible regime such as a liberal democracy have a *pro tanto* obligation to follow the rules of their offices. This is what I deny.

The discussion proceeds by examining, first, the notion of a *role*, which is distinct from a formal office, and second, the nature of morally legitimate roles, which provide the moral foundations for any normatively valid public offices we establish. Morally legitimate roles generate special moral responsibilities for their holders, which can diverge for various reasons from the expectations of formal offices even in a reasonably just system; the most notable of those reasons is that, given the rigidifying and generalising nature of formal

⁶ The debate that concerns me is, in many ways, an ancient one. (C.f. Aristotle, *Nicomachean Ethics*, Book V, Chapter 10.) Yet, it has received comparatively little attention from political philosophers in recent years who have devoted much more attention to the arguments for and against a *pro tanto* moral obligation for ordinary citizens to follow the law. The principal contemporary discussions of the obligations of public officials have been pursued by legal scholars, political scientists, and ethicists.

⁷ I use the terms 'obligation' and 'duty' interchangeably.

⁸ C.f. Kadish, Mortimer R., and Sanford H. Kadish (1973), *Discretion to Disobey: A Study of Lawful Departures from Legal Rules*. Stanford University Press; and Luban, David (1988), *Lawyers and Justice: An Ethical Study*. Princeton University Press.

⁹ C.f. Walzer, Michael (1973), 'Political Action: The Problem of Dirty Hands' in *Philosophy and Public Affairs*, 2:2, 160-180.

institutions, even in a reasonably just system criminal justice officials will be called upon to engage in morally problematic practices as a matter of course. Briefly, since the defence for establishing such offices rests upon the morally legitimate roles those offices aim to embody there is no *pro tanto* moral obligation to adhere to the demands of the offices when those demands depart from the responsibilities of the moral roles underpinning them. There are at least four seemingly weighty objections to this thesis, which concern consent, competence, democratic processes, and valuable institutions. After responding to these objections, I examine some contexts in which a person is obligated not to adhere to the demands of her criminal justice office, and which form of non-adherence – from covert rule-departure to thwarting the process, to resigning¹⁰ – would be morally most acceptable. Despite the general nature of the above claims, it is difficult to argue in general terms about the moral obligations of persons whose situations differ as greatly as do those of various criminal justice officials.¹¹ Thus, it will be possible only to draw modest general conclusions about the moral acceptability of certain forms of non-adherence by different officials.

1. Formal Demands and Special Responsibilities

A 'role' is defined in the *Oxford English Dictionary* (current online edition) as 1) The typical or characteristic function performed by someone or something; and 2) The behaviour that an individual feels it appropriate to assume in adapting to any form of social interaction; the behaviour considered appropriate to the interaction demanded by a particular kind of undertaking or social position. Note that the descriptive appropriateness of a certain kind of behaviour as part of a recognised role says nothing about the moral merit of that behaviour. The behaviour that is descriptively appropriate to the role of serial killer or assassin, for example, is not morally defensible as a general form of conduct. The behaviour that is descriptively appropriate to one who obsessively counts grass blades *ceteris paribus* is morally neutral

¹⁰ One might question whether resignation is a form of non-adherence because resigning may seem to cancel the reasons that applied to one when one held a certain position. As I argue in Section 6, unless one resigns with due notice and makes adequate provision for someone else to fulfil the moral responsibilities one had, the reasons that apply to one are not cancelled by one's resignation.

¹¹ Although somewhat neglected in practical philosophy and criminal justice theory, criminal justice officials' responsibilities are interesting because typically officials both claim authority, some of which in a just regime they have, and are subject to claimed authority, some of which may be legitimate.

or trivial. The roles of assassin and grass-counter do not pick out moral reasons that apply, in virtue of their content, to the holders of those roles. Morally legitimate roles, by contrast, pick out the fact that particular, if not unique, moral reasons apply to their holders. More specifically, when one assumes or otherwise comes to hold a morally legitimate role, this affects one's moral responsibilities in various ways. Some reasons come to apply to one which did not apply to one before; some reasons that may have applied to one before as ordinary reasons now apply as categorical mandatory reasons (duties), and vice versa.¹² Borrowing Raz's example, the moral reason to respect one's child applies, in virtue of its content, only to one who is a parent.¹³ Other moral reasons apply in virtue of their content only to pregnant women or to trained lifeguards, or to trained medical practitioners, or to the adult children of elderly parents. Whereas some morally legitimate roles have clear labels, precise features, and fairly well-defined responsibilities (e.g. parent, friend, etc.), other morally legitimate roles pick out general categories of moral responsibility (e.g. carer, healer, protector, advocate, mediator, etc.) with less well-defined features. There are various ways in which one can come to hold a given moral role, such as voluntarily or non-voluntarily, formally or informally, individually or collectively, immediately or over time from continued behaviour and developed expectations. Constrained by space, I shall not articulate fully the features of any particular morally legitimate role, but appreciate that such an articulation is necessary for a complete understanding of the range of moral reasons that apply to one who has that role.

In a reasonably just criminal justice system, the principal offices that comprise that system are structured so as to embody as well as possible within its particular institutional framework and legal tradition the various morally legitimate roles that are necessary for both the reasonable prevention of serious wrongdoing and a justifiable response to such wrongdoing. There is a plurality of ways in which a society may endeavour to realise such important roles as protector, public spokesperson, advocate, mediator, counsellor, healer, and educator, through the creation of certain professional offices in a formalised web of interlocking expectations. Given the plurality of legitimate ways in which a system may be structured, the chosen structure of a particular system will shape to some extent the special moral responsibilities of its officeholders. For example, morally legitimate roles such as mediator and educator, which amongst other

¹² Michelle Madden Dempsey discusses some of these changes in relation to prosecutors in (2009) *Prosecuting Domestic Violence*. Oxford: Oxford University Press.

¹³ C.f. Raz, Joseph (2004), 'Incorporation by Law' in *Legal Theory*, 10, 1-17.

things underpin the formal office of Judge, will be fleshed out by the parameters of this office as it exists within a given system. Put differently, the specific actions required of judges and of other officials to honour the special responsibilities of these moral roles will vary somewhat according to the institutional structures of the system.

These special moral responsibilities do not, however, reduce to a *pro tanto* content-insensitive moral obligation to adhere the demands of a formal office. An official may have an obligation to do as her office demands in a given case, but not necessarily because her office demands it. The reason for this is that, even in a reasonably just system, both the generalising and rigidifying nature of formal institutions and the contingencies of practical operations create a conceptual gap between the dictates of a formal office and the special responsibilities of the moral roles that underpin that office. Let me articulate three ways in which formal institutions of criminal justice, by their nature, create this gap.

First, even in a reasonably just system, criminal justice officials will be called upon to do morally problematic things as a matter of course, such as detain people, charge people with offences, dismiss charges,¹⁴ make judgements on people's guilt, sentence people to be punished, impose those punishments, deprive people of certain resources, and perhaps, in extreme cases, incarcerate people or otherwise incapacitate people. Second, even in a reasonably just system, instances will arise where the understanding or expertise of a given official clearly is greater than that reflected in the formal demands upon her. A prison official, for example, may much better understand both the actual severity of incarceration (particularly upon certain persons such as young persons) and the likely effects of incarceration upon both offenders and the community than do either the legislators who enact its lawful use or the judicial officials who sentence its imposition. Third, even in a reasonably just system, there remains the possibility for error (such as false positives), for improper bias in officeholders, and for non-institutional social injustices in people's social situation, personal circumstances, and resources, which can filter into people's experience before the law.¹⁵ Officials often can be stymied in their good faith efforts to act justifiably by the errors and prejudices of other

¹⁴ Non-pursuit actions such as dismissing charges or not charging are morally problematic in cases where, for example, a putative offender is clearly dangerous. C.f. Madden Dempsey (2009).

¹⁵ An important question, not addressed here, is whether the normative validity of a criminal justice system can be affected or undermined by substantial social injustices in other domains that filter into the criminal justice process.

members of their professions. For example, a judge cannot control the fact that black persons may be far more likely to come before her for a given offence than white persons despite comparable levels of offending.

As these three points indicate, the realities of formalised structures are such that, although the moral values that fully legitimate particular office-dictates are the same as those that entail the special moral responsibilities underlying that office, those values do not legitimate the codification of such office-dictates. In other words, the codified office-dictates that those values are presumed to entail are not entailed by those values in some contingent circumstances.¹⁶ This is not to deny that there are values and principles, such as procedural norms and norms of generality and predictability, that can at least partially legitimate the codification of some dictates. But, those norms are distinct from, and indeed subordinate to, the substantive, context-sensitive, and non-codifiable principles and values that generate the special moral responsibilities of morally legitimate roles, because these procedural norms (often grouped together under the heading 'rule of law') are compatible with a substantively unjust system, and thus cannot block codified office-dictates from deviating from what is morally acceptable.¹⁷

As a consequence, when morally problematic factors infect other criminal justice officials' decisions, this can modify a given official's special moral responsibilities. This is because her morally legitimate roles will not make it her special responsibility to do what is morally indefensible, such as proceed against a person who has been the victim of grave social injustice or imprison an innocent person whom others have lawfully convicted. If her office demands such acts under some more general directive, then the morally acceptable course is non-adherence. (What form that non-adherence should take will be discussed below.) Similarly, in more mundane cases, where an official clearly has greater understanding and appreciation for the character and consequences of a given order or rule than that reflected in the order or rule itself, this too can modify her moral responsibilities and lead her to act other than as directed.

The thesis underlying the above view is the following: No morally legitimate role makes it the general responsibility of the holder to forbear from engaging in first-order moral reasoning about demands made of her. Put more positively, morally legitimate roles make it the holder's responsibility actively to engage in first-order moral reasoning.

¹⁶ I thank Hillel Steiner for helping to clarify this point.

¹⁷ See Raz, Joseph (1979), 'The Rule of Law and its Virtue' in *The Authority of Law*. Oxford: Clarendon Press.

To add some rhetorical flourish to this thesis, let me quote Henry David Thoreau, who spiritedly denounces those who would purport to serve their society by routinely not engaging in moral reasoning:

The mass of men serve the state thus, not as men mainly, but as machines, with their bodies. They are the standing army, and the militia, jailers, constables, posse comitatus, &c. In most cases there is no free exercise whatever of the judgment or of the moral sense; but they put themselves on a level with wood and earth and stones; and wooden men can perhaps be manufactured that will serve the purpose as well. Such command no more respect than men of straw or a lump of dirt. They have the same sort of worth only as horses and dogs. Yet such as these even are commonly esteemed good citizens. Others – as most legislators, politicians, lawyers, ministers, and officeholders – serve the state chiefly with their heads; and, as they rarely make any moral distinctions, they are as likely to serve the Devil, without *intending* it, as God. A very few, as heroes, patriots, martyrs, reformers in the great sense, and *men*, serve the state with their consciences also, and so necessarily resist it for the most part; and they are commonly treated as enemies by it.¹⁸

Thoreau's diatribe condemns those who would 'serve' chiefly with their bodies, such as the British community support officers (CSOs) who endeavoured 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. The officers were praised by their superior for following proper procedure, but censured by the community and by government officials such as former Home Secretary David Blunkett who stated that, 'What was appropriate in this circumstance for a uniformed officer would be appropriate for CSOs as human beings, never mind the job.'¹⁹ Thoreau also condemns those who would 'serve' chiefly with their heads, such as prosecutors, judges or juries, who, we could say, put themselves on a par with computers when they fail to reason morally about the decisions they make and the demands they face. Along the same lines, Feinberg argues that, what morality requires of a person in morally difficult circumstances is not something

¹⁸ Thoreau, Henry David (1991), 'Civil Disobedience' in *Civil Disobedience in Focus*. Hugo Bedau (ed.), London: Routledge. Original italics.

¹⁹ 'Blunkett Criticises Pond Officers' BBC News 22 September 2007. Retrieved from: http://news.bbc.co.uk/2/hi/uk_news/england/manchester/7008077.stm

to be mechanically determined by an examination of the person's office. An individual must on some occasions have the courage to rise above all that and obey the dictates of (good) conscience.²⁰

My thesis, while not restricted to 'morally difficult circumstances' as such, may be restricted in non-morally-difficult circumstances to occasions where an official *clearly* will better act as the reasons that apply to her would have her act when she attends to those reasons directly and not to the rules and orders governing her office. The reasons that apply to a law enforcement officer, for example, include, amongst other things, a reason to protect society from dangerous persons, to communicate the appropriate community condemnation and disavowal of a given act of wrongdoing, to promote both the restoration of victims and reconciliation amongst all affected parties, and to enhance people's confidence in the non-arbitrariness, transparency, and predictability of the criminal justice system. Where attending to these reasons directly clearly will better enable her to conform to them, she should attend to them directly even though this may lead her to depart from the general rules of her office.²¹

The distinction between special moral responsibilities and formal office-demands has widespread implications. At all times, officials must reflect upon the moral merits of the demands of their offices and the moral merits of the nature and parameters of any formal discretion they are granted. The police officer must reflect on the merits of the call to use certain interrogation techniques; the prison guard and parole officer must reflect on the merits of the order to imprison a given person; the prosecutor must reflect on the merits of the charges brought forward by police. If following a directive or exercising formal discretion will lead a person better to conform to the reasons that apply to her in virtue of her morally legitimate roles, then her judgement should lead her to accept the directive as authoritative. But, if a directive is substantially unjust, or if, in some other cases, an official clearly will not better conform to the moral reasons that apply

²⁰ Feinberg (2003), 16. Both Thoreau and Feinberg use the term 'conscience' in a normative sense. In previous writing, I've used the terms 'conscience' and 'conscientiousness' descriptively to refer to persons who are serious and sincere in their convictions, but who may be mistaken about the merits of those convictions. My claim here is that a person should act on the basis of conscience when the demands of her conscience are well-founded.

²¹ Raz's normal justification condition for authority states that the person subject to the putative authority would better conform to reasons that apply to her anyway if she intends to be guided by the directive than if she does not. See Raz, Joseph (2006), 'The Problem of Authority: Revisiting the Service Conception' in *Minnesota Law Review*, Vol. 90, 1003-1044. We may assume that, in a reasonably just system, Raz's independence condition – that [an official's] judging for herself how to act is not more important than conforming to reason – is satisfied.

to her by following orders, then her judgement should lead her not to act on the directive.

Despite these wide-ranging implications for the occupants of formal offices, the offices and institutions of a reasonably just criminal justice system retain normative importance because they identify broadly the limits of persons' spheres of responsibility when the system is functioning well. Morally legitimate roles that are formalised as well as can be into public offices are structured such that, together, they embody, in principle at least, the various morally important roles necessary both to prevent the occurrence of significant wrongdoing and to respond justifiably to wrongdoing when it occurs. When the occupants of these offices honour their moral responsibilities largely as they should, then the occupants must respect the efforts of their colleagues and not seek to do others' jobs. When, however, one person or several people do not fulfil the moral responsibilities that are theirs in virtue of the roles they have, this affects the nature of the moral responsibilities of other officials, and indeed of non-officials. It widens the gap between office-dictates and genuine responsibilities discussed above.

Before considering the space this gap opens up for specific types of non-adherence with official demands, I shall consider four objections to the view I have outlined. These objections can be labelled as follows: the Voluntarist Objection, the Incompetent Official Objection, the Democratic Procedure Objection, and the Coordination Objection.²²

2. *The Voluntarist Objection*

A critic might advance the voluntarist line that a person who assumes an official position in a reasonably just system has a *pro tanto* content-insensitive moral obligation to adhere to the dictates of her office

²² One possible objection that I will not discuss in detail concerns the left-leaning nature of my examples of morally defensible non-adherence. A critic might object that consistency requires me to defend the official who punishes an offender who is wrongly acquitted and the official who extends an otherwise too lenient sentence. I do not find this proposal troubling since, although in principle such forms of non-adherence could be accommodated by my view, I doubt that, in anything other than an extreme circumstance, morality would require (or permit) an official to punish an offender who has not been found guilty through formal channels. The forms of non-adherence that are genuinely morally defensible, I believe, are those that take the criminal justice process away from retribution toward restoration.

because she has sworn, consented, or otherwise committed herself to carry out the functions of that office.

In reply, first, a voluntarist argument does not straightforwardly apply to officeholders either who are conscripted into service, such as jurors, or who inherit their office and for whom extricating themselves from that office would be particularly difficult, such as monarchs or peers. Second, the voluntarist critic presumes that promise-keeping has a general application and trumps other kinds of moral duty even when the conduct promised entails the performance of deeply objectionable actions. Third, it is no defence for general adherence by officials to point out (conscripted aside) that a person need not assume a particular office and is, in most cases, at liberty to resign her office. Similarly, it is no defence to make provision for an official to excuse herself in cases where adhering to the demands of her office would be especially onerous for her.²³ The reason is that, when a society establishes a given office within a set of institutional structures and defines the core functions of that office along particular parameters as part of society's response to important concerns, society asks that some member fulfil that office. And, when an office, despite its moral imperfections, provides a key way or the only way to address certain concerns or to honour certain values in that society, then there exists a moral reason for an appropriately qualified member of the society to assume that office.²⁴ Furthermore, the space that a society makes for a person to excuse herself when adherence to the demands of her office would be onerous reflects that society's appreciation for how she should be treated as a person; it does not reflect a change in society's demands upon her.²⁵

However, societies sometimes have (and should have) considerable difficulty finding persons willing to assume offices that have these features because the offices exact too high a moral price from any would-be occupant. In some US states, for example, a moratorium on capital punishment has resulted from doctors refusing to oversee executions by lethal injection.²⁶ In jurisdictions where such executions are performed, doctors have genuine moral reasons to be present at

²³ For an examination of related issues, see Tasioulas, John (2003), 'Mercy' in *Proceedings of the Aristotelian Society*, 103: 2, 101-132.

²⁴ For a discussion of some related issues, see Green, Leslie (2007), 'The Duty to Govern' in *Legal Theory*, 13, 165-185. Green observes, for example, that 'however we understand "necessary tasks," they are likely to carve out a duty to govern that is much narrower than the claims of modern states or the scope of legitimate governance.'

²⁵ For brief comments on this point, see Estlund, David (2007), 'On Following Orders in an Unjust War' in *The Journal of Political Philosophy*, 15: 2, 213-234..

²⁶ Gels, Sonya, 'California puts Execution off' after Doctors Refuse to Help' *Washington Post*, 22 February 2006.

the executions to endeavour to reduce the suffering of the condemned person. But, the functions of this overseeing office, which are to intervene and to facilitate death if the person wakes up, deeply conflict with doctors' special moral responsibilities as healers and carers of people's well-being. The substantial gap between the demands of this office and the moral responsibilities of those qualified to assume it casts doubt on the claim that execution could ever form part of a reasonably just society's response to serious offending.²⁷ A similar argument holds against many, if not all, forms of incarceration where prison doctors oversee punishments that are highly detrimental to offenders' well-being.²⁸ Doctors have moral reasons to work in such institutions and to heal offenders who live in such conditions, but the office of prison doctor deeply conflicts with doctors' special moral responsibilities.

It does not follow from these observations about special moral responsibilities that a society may never ask its members to engage in morally problematic conduct. (Borrowing a case from outside criminal justice, a society may ask a registrar to conduct civil law partnerships for homosexual couples, for example, even when such relationships clash with her religious beliefs.²⁹) Rather, it shows that such requests

²⁷ An office whose principal purpose is to kill someone as a form of punishment is not an office whose core functions track moral reasons. Just as there is no moral reason related to assassinating that applies to the person who becomes a hit-man, so too there is no moral reason related to executing offenders that applies to the person who becomes an executioner. Note, however, first, that this does not mean that neither an execution nor an assassination could ever be justified. But, the justifiability of a single act must be distinguished from the justifiability of regularly performing that kind of act as one's office. In many cases, the justifiability of a single act may rest upon a value or set of values that differs from and outweighs whatever value might justify the regular practice. Second, the above claim does not imply that there can be no moral reasons for a person to assume the role of executioner; the desperately poor man who cannot feed his family, for example, may have moral reasons to assume this office, but there is nothing in the office itself that gives him moral reason to assume it.

²⁸ C.f. Gawande, Atul (2009) 'Hellhole: The United States holds tens of thousands of inmates in long-term solitary confinement. Is this torture?' *New Yorker*, 30 March 2009. Retrieved from: http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande

²⁹ For a comment on the case of Lillian Ladele, a Christian registrar in whose favour an industry tribunal ruled after she requested to recuse herself from conducting same-sex civil partnership ceremonies, see Sanderson, Terry, 'Paying to be Discriminated Against' in *The Guardian* 11 July 2008. Retrieved from: <http://www.guardian.co.uk/commentisfree/2008/jul/11/gayrights.religion>. The tribunal ruling was overturned by the Employment Appeals Tribunal on appeal by the Islington Council. I thank Claire Grant for this example.

from society of its officials, while morally problematic, must nonetheless be morally justifiable. Close attention must be paid both to the institutional structures set up to address important community concerns and to the specification of the offices that comprise those institutions, so as to minimise the moral burdens those offices impose upon their holders, and thereby to minimise the occasions on which non-adherence is morally obligatory or permissible.

3. The Incompetent Official Objection

A second possible objection concerns the competence or incompetence of particular officials. A critic might object that I have over-intellectualised the requirements for acquitting oneself well in one's official capacity. The objection would be that, for many officials, given the nature of their office or the limits of their own reasoning abilities, their circumstances are such that they would better conform to the reasons that apply to them if they do not engage in first-order reasoning, but routinely act on and for the reason that they are directed to act.³⁰

In reply, I acknowledge that, in a reasonably just system, the incompetent or improperly biased official would better conform to the reasons that apply to her if she routinely adheres as closely as possible to the dictates of her office and acts for the reason that she is directed so to act than if she gives primacy to her own judgement. But, I also note that what she does by routinely adhering to those dictates often may fall well below what she morally ought to do, and so, in failing to reason well about the merits of the demands upon her, she does not act as she ought, even though she acts better than she would if she attended to her own judgement directly.

The Incompetent Official objection might be re-presented in terms of a concern for equality that requires the competent official not to arrogate to herself licence to follow her own first-order reasoning about how best to act when her colleagues, given their circumstances or limited access to information or limited reasoning abilities, are not in a position to do the same. In response, this re-presentation of the objection has the counterintuitive implication that, unless all persons are able to act morally as well as each other, the demands of equality require that those persons who are able to act better than others not morally outperform persons less well placed to act as they morally

³⁰ According to the normal justification thesis, one is a practical authority when following one's demands would better enable the follower to conform to reasons that apply to her than if she followed her own best judgement on the matter. C.f. Raz, Joseph (1988), *The Morality of Freedom*. Oxford: Oxford University Press, 53.

ought to act. Given this counterintuitive implication, we may put this objection aside. Concerns about equality can, however, be put more forcefully in terms of democratic decision-making procedures.

4. The Democratic Procedure Objection

This objection concerns the nature and value of democratic institutions. On the assumption that a reasonably just criminal justice system would be embedded within a liberal and democratic regime, a critic might challenge non-adherence by officials on the grounds that such conduct improperly disregards the value and importance of democratic decision-making procedures, and does so much more than do citizens who assert a right to protest through suitably constrained means such as civil disobedience. In relation to ordinary citizens, the objection against a moral right to civil disobedience is that disobedient citizens improperly arrogate to themselves license to disregard the law in defiance of democratic processes; the slogan for the objection is 'No man is above the law.' When applied to officials the objection may seem more forceful on the grounds that public officeholders improperly arrogate to themselves license to intervene and to interfere in democratic decision-making processes in ways that are more serious and significant than those typically available to ordinary citizens.³¹

Although my decision to focus this paper on criminal justice officials does not readily complement the reply I wish to make to this objection, the substance of my above arguments does complement it. Briefly, I believe that the division this objection sets up between ordinary citizens and public officials is a false one or at least an overdrawn one since all persons, irrespective of their powers and formal responsibilities, are subject to morality. (I comment further on this point at the end of the paper.) If I am correct that the distinction between ordinary citizen and official is overdrawn, then the objection against officials not adhering to legal demands is no more forceful than that objection against ordinary citizens. And, my response to the latter objection is that civil disobedients often play a vital role in democratic processes. Rawls, for one, observes that (justified) civil disobedience can act as a stabilising mechanism in a society by ensuring that injustices are identified and addressed.³² Similarly, Daniel Markovits notes that civil disobedience sometimes can correct a democratic-deficit where discussion on a particular issue has stalled or been

³¹ I thank Jeremy Waldron for sketching out this objection.

³² Rawls, John (1971), *A Theory of Justice*. Cambridge: Harvard University Press.

silenced.³³ In the same vein, David Lefkowitz argues that people's rights to engage politically should extend to suitably constrained acts of public disobedience because bad luck and minority status can hamper people's ability to present their views fully to the community before some official decision must be taken.³⁴ People's right to continue to challenge democratically taken decisions through such means after the votes are counted is not an attack upon democracy; it is reflective of democracy.

(It is worth noting that even if the distinction between ordinary citizens and officials can be sustained, we can question whether individual criminal justice officials are routinely in a position to interfere in democratic processes in more serious ways than ordinary citizens are, and if so, whether their doing so is morally problematic when what they do is more just than that which their offices would have them do).

5. The Coordination and Preservation of Valuable Institutions Objection

A related objection concerns the preservation of valuable institutions irrespective of whether they have democratic foundations. A critic might argue that non-adherence by at least some criminal justice officials poses a threat to necessary and valuable institutions and public goods. A similar charge is levelled in just war theory debates against those who argue that soldiers should refuse to fight in an unjust war and should refuse to follow unjust orders in an otherwise just war. Jeff McMahan's responses to the charge are worth summarising, as they apply *mutatis mutandis* to other political contexts such as the more mundane domain of the criminal justice process.

It is often suggested that if some soldiers or draftees refuse on moral grounds to fight in an unjust war, this could compromise the efficient functioning and perhaps even threaten the survival of valuable institutions to which these people would rightly be committed. But even if this is true, those who create, serve, and are served by valuable institutions must themselves bear the burdens when those institutions malfunction, thereby causing or threatening unjust harm to others. It would be unjust to impose the costs of their own mistakes or wrongdoing on others.

³³ Markovits, Daniel (2005), 'Democratic Disobedience' in *Yale Law Journal*, 114, 1897-1952.

³⁴ Lefkowitz, David (2007), 'On the Moral Right to Civil Disobedience' in *Ethics*, 117, 202-233.

Moreover, McMahan continues:

...the consequences for just institutions of people refusing to fight in unjust wars are unlikely to be calamitous...Victory in an unjust war may serve the national interest but is likely on balance to have a corrupting effect on just institutions...those who refuse to fight in an unjust war might in the long term actually benefit their country's institutions by setting a precedent that would help to deter those in positions of authority within the institutions from initiating further unjust wars. It is also possible that those who refuse to participate in an unjust war could prompt the institutions to shield themselves from the instability that such challenges can cause by adapting themselves to anticipate and accommodate instances of conscientious refusal to fight. The enhanced institutional flexibility would almost certainly be healthy and would presumably involve more generous provisions for conscientious refusal to fight.³⁵

In the less morally extreme context of the criminal justice process, analogous arguments apply to those who conscientiously do not adhere to unjust demands. But, the particular form their non-adherence takes is relevant to an assessment of its moral merits. Let us examine, therefore, how officials may best honour their special responsibilities and preserve valuable institutions when they depart from the demands of their offices.

6. The Merits of Non-Adherence

Before proceeding, it is necessary to examine more fully the notion of *non-adherence*, which I conceive of as a combination of non-conformity and non-compliance. We can define 'non-compliance' in terms of not acting *for* a given reason, such as not acting for the reason that one is directed to act. We can define 'non-conformity', by contrast, in terms of not acting in accordance with a given reason, such as not acting as one's office would have one act. On this reading, each could occur without the other: *non-compliance* would apply to an official who does as her office would have her do, but who does not do it for the reason that she is directed to act. And, *non-conformity* would apply to an official who acts *for* the reason that she is directed to act, but who fails to act in

³⁵ McMahan, Jeff (2004), 'The Ethics of Killing in War' in *Ethics*. 114, 693-733.

accordance with that reason. The latter picks up John Gardner and Timothy Macklem's observation,

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.³⁶

Thus, an official could comply with a reason to act as her office dictates, but fail to conform with that reason by failing to do as that reason would have her do. Although discussions about official action tend to dwell upon non-conformity, both non-conformity and non-compliance are important notions in this context since both the action one takes and the reasons for which one takes it are central to the determination of the justifiability of one's action. An official's conscientious decision in a reasonably just system not to adhere to a directive of her office involves both non-compliance and non-conformity (since the fact that there is a reason to do as directed does not mean that there is an obligation to do as directed).

There are various ways in which an official might not adhere to her office when it makes demands at odds with her special moral responsibilities. The following is not an exhaustive list. Many of the examples given here and above could fit under more than one description. Also, some of the forms of non-adherence described here typically would be acts of non-adherence when taken by one kind of official, but accepted acts of discretion when taken by another, which again raises questions about the distribution of recognised discretion:³⁷

1. An official might conscientiously fulfil only part of a demand, assuming it admits of partial fulfilment. For example, if an excessive prison sentence is imposed upon a person, a prison officer might detain the person for whatever period, if any, is morally defensible, but release her well before the end of the allotted sentence.
2. An official might conscientiously refrain either openly or covertly from fulfilling any part of a demand (this is often

³⁶ Gardner, John, and Macklem, Timothy (2002), 'Reasons' in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Jules Coleman and Scott Shapiro (eds.), Oxford: Oxford University Press, 458.

³⁷ Several of the following types of conduct are noted in passing by Estlund (2007).

described as ‘rule departure’). For example, a prosecutor might decline to enforce sodomy laws, or a prosecutor might routinely dismiss solicitation charges against prostitutes on the grounds that it is unjust for the police to target these persons whilst never arresting their ‘clients’, and that the prostitutes are not culpable for any actual wrongdoing.³⁸

3. An official might seek conscientiously to thwart the fulfilling of a demand by herself or anyone else. For example, a criminal justice official may take so-called ‘go slow’ days; many low level administrators who oversee the capital punishment process in the US deliberately have ‘go slow’ days much of the time.³⁹ For another example, a prison officer might release a convicted person, thereby ensuring that (if the person is not recaptured) no replacement official could carry out the order.
4. An official might endeavour conscientiously to contest a demand and/or to reform the structures and practices that give rise to it (and where that process of contestation or reformation fails she then must decide whether to fulfil, partially fulfil, refuse to fulfil, or thwart the fulfilling of the demand). For example, a prosecutor might dismiss charges under a law that she has reason to believe should be declared unconstitutional.

³⁸ I thank Michelle Madden Dempsey for this example.

³⁹ In a recent paper, Bernard E. Harcourt states ‘Another important but rarely discussed factor that promotes abolitionist reforms are ordinary acts of resistance by those who are either knowingly or unconsciously uncomfortable with capital punishment or truly opposed to the death penalty. These men and women—a clerk at the county courthouse, an employee at the local police department, a secretary in the prosecutor’s office, sometimes even a judge or law clerk—slow death penalty cases down and effectively undermine the machinery of death...In several death penalty cases that I have been involved as a litigator, I have encountered more than just inertia— more than just laziness or distraction. I have experienced almost intentional or deliberate delay by men and women in all categories of life who take it upon themselves to stall a death penalty prosecution by ignoring it. It is these acts of resistance—one could say unconscious minor acts of sabotage—that render the death penalty simply ineffectual in many states. The deliberate resistance of doctors to participate in the mechanics of capital punishment is the conscious and public manifestation of these forms of resistance, but the phenomenon tends to be far more unconscious and, as a result, pervasive.’ Harcourt, Bernard E. (2008) ‘Abolition in the U.S.A. by 2050: On Political Capital and Ordinary Acts of Resistance’ in John M. Olin Program in Law and Economics Working Paper Series: <http://www.law.uchicago.edu/Lawecon/index.html>

Or, a judge might declare the law to be other than she believes it to be.⁴⁰

5. If she has the power, an official might conscientiously remove herself from a particular decision process. For example, the anaesthesiologists in the capital punishment case of Michael Morales recused themselves at the eleventh hour from their agreed role of overseeing the execution.⁴¹ Similarly, a judge might recuse herself from hearing a case where the minimum sentence is severe and a finding of guilt by a jury seems likely.
6. An official might resign her office with immediate effect so as to avoid fulfilling a demand. For example, a prison official might resign so as not to imprison an innocent person or so as not to oversee processes of imprisonment. A judge might resign so as not to uphold expansive anti-terrorism laws.
7. An official might resign with due notice to avoid facing similar demands in future and then, in the intervening period before she leaves her office, adopt one of the first five responses listed above (or a response not listed here) to the demand before her.

One reason for listing resignation with due notice separately from immediate resignation is that these acts can have different effects. Whereas immediate resignation often can delay and sometimes can abort a process, resignation with due notice is less likely to have those effects if one conducts oneself in certain ways prior to leaving office.

A second reason for listing resignation with due notice separately is that, when certain conditions are met, it is not a form of non-adherence. In most cases, when one resigns from a socially necessary or valuable office, one leaves (and, for all practical purposes, one must leave) the moral responsibilities of one's morally legitimate roles to be carried out by other people. When one both resigns with due notice and makes appropriate arrangements for another person to carry out those responsibilities, then *ceteris paribus* the reasons that applied to one in those roles no longer apply. When one does not do those two things, however, the reasons that apply to one are not cancelled by one's resignation, and thus one's action is a form of non-adherence.

In cases where the demand upon an official is for various reasons morally objectionable, her resigning with due notice can be criticised

⁴⁰ See Feinberg (2003), 21 on 'cheating' and nullification.

⁴¹ Gels, Sonya, 'California puts Execution off' after Doctors Refuse to Help' *Washington Post*, 22 February 2006.

for helping to ensure that that demand may be carried out by someone else. But, resignation with immediate effect also can be criticised unless one's resignation will bring to a halt an morally objectionable practice. As Feinberg observes, a judge who resigns in order to retain his integrity makes a poor hero. While his action may require considerable moral courage, it is of little help to those who suffer under the institution in question that he has distanced himself from it unless his participation in that institution is necessary for its continued operation.⁴²

There is, however, a contrasting view of resignation which has some force, namely, that a person should neither support a practice nor benefit from a practice that violates other persons' basic rights; and it is only when her participation in that practice is unavoidable that she should focus on reforming the practice or institution from within instead of distancing herself from it. Some of these general worries about the nature of legal institutions are moot in the context of a reasonably just framework, but even there particular cases of moral difficulty will arise and will press the question of whether resignation is a morally defensible response.

Concerning the other forms of non-adherence noted above, I cannot fully consider here the moral merits of each form in relation to each of the many offices that might comprise a reasonably just criminal justice system. It is sufficient to show that the moral defensibility of any particular form of non-adherence will depend upon at least two things: 1) the special moral responsibilities of that particular person's morally legitimate roles, and 2) the likely costs of non-adherence for both individuals and the community. Let us consider some examples.

In most cases, it would be more morally defensible for police officers to contest the demands made of them by political agents than it would be for them to resign immediately because the latter decision, particularly when taken on a large scale, would leave a society without a well-functioning security system. The moral responsibilities of the roles of protector, guard, guardian, investigator, and so on, shape the morally permissibility of the responses a police officer can make to unjust or ill-informed directives. By contrast, it would be more morally defensible for doctors either to resign or to refuse to assume offices in some detention facilities than it would be for them simply to contest administrative decisions about those facilities and, when that contestation fails, to adhere to the demands of the office. Here again,

⁴² Feinberg (2003).

the reason relates to the moral responsibilities of the roles of healer and carer as well as the likely impact of resignation. This comparative judgement is contingent upon the circumstances surrounding doctors' resignation being such that their resignation would not result in substantially more suffering for those who are incarcerated or due to be executed. Where it would result in more suffering, this speaks against resignation and in favour of other, perhaps more radical, forms of non-adherence such as thwarting the process.

Similarly, conscientious covert nullification of a judge's instructions by a jury would on balance be more morally defensible than open disregard for a judge's instructions since covert nullification does less damage than overt nullification to the reasonably just institution of fair and responsible trials. In a similar vein, given a detention officer's moral responsibilities, it would be more morally defensible for her covertly to release a convicted innocent person than it would be for her to disregard openly a judge or jury's decision. That said, even in cases where covertly releasing a convicted person would be morally acceptable, releasing that person nonetheless may not be what the prison officer ought to do all things considered since, if the convicted person will never be exonerated, releasing her will sentence her to a life on the run.

These examples support the two conditions identified above. It is worth noting that, in some cases, no ranking of the acceptability of various forms of non-adherence is possible or necessary; sometimes any conscientious departure from the demands of an office will be morally obligatory and preferable to adherence to a specific directive given the objectionable character and negative consequences of such adherence.

7. Concluding Remark

In this discussion, I have argued that, even in a reasonably just system, a criminal justice official's special moral responsibilities can diverge from the demands of the office that arises from those responsibilities and that makes those responsibilities her responsibilities. I then examined briefly the relative moral merits of particular forms of non-adherence by criminal justice officials. The view underlying this account of non-adherence takes officials' obligations to society to be shaped by the same considerations that shape ordinary citizens' obligations to society, which include importantly the exercise of first-order moral judgement in determining how best to act. This account assesses persons' conduct on the basis of its character and consequences and denies that officials have a general, content-insensitive *pro tanto* obligation to adhere to legal norms and lawful rules. Although nothing has been said directly about civil society in

this paper, much of what has been said implies a conception of civil society and ordinary citizens that does not view them in contrast to 'the state' and agents of the state. This paper seeks to challenge the general practice of depersonalising discussions about authority and governing. The terms 'the law', 'the state', 'the government', and 'authority' all downplay the extent to which the formal institutions of a society are organised and administered by people, who face conflicting demands, and whose actions call for justification as the actions of ordinary persons subject to morality.