

Session 11 Rawls, “The Justification of Civil Disobedience”

What distinguishes civil disobedience from other ways of disobeying the law? And what, if anything, justifies civil disobedience?

Some examples of civil disobedience:

- *Thoreau* refusing to pay his poll tax to protest the funding of the Mexican-American war, and slavery.
- *Rosa Parks* refusing to sit at the back of the bus.
- *MLK* engaging in the “Birmingham Campaign” to protest segregation.
- *George Wallace* blocking the door to the school to protest *integration*.
- *Sit-ins* to protest the Vietnam War.
- *Operation Rescue* protestors trespassing to block access to abortion clinics.
- *Environmental activists* trespassing to prevent the cutting down of forests.
- *Supporters of ACT UP* blocking traffic to protest lack of government action on AIDS.
- *Occupy Wall Street* protesters taking over public land to protest economic inequality

What do these examples have in common? How do they differ?

Alternatives to civil disobedience: legal protest, rule departures by those in authority, conscientious objection, radical protest, revolutionary action...

Defining Civil Disobedience

Rawls: civil disobedience is a politically-motivated, public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies. *Is this definition too narrow? Is it more easily or less easily justified than other ways of disobeying the law?*

- On the one hand, acts of civil disobedience are not only more likely to undermine the effectiveness of the law, but are often *intended* to do just that. (One mitigating factor with respect to ordinary violations of law might be that – as in our stop sign in the desert case – the actions of disobedience might never be discovered and so may do no harm.)
- Also, the public nature of acts of disobedience makes them particularly clear cases of rejecting the outcome of the democratic process.
- On the other hand, acts of disobedience, by their nature, selflessly rather than selfishly motivated.
- And they’re often undertaken with the political community’s best interests in some sense at heart.
- Also, they’re only ever undertaken in the face of *unjust* laws (or laws perceived to be unjust).

Features of civil disobedience:

- (1) *Conscientiousness*: acts of civil disobedience are undertaken out of sincere moral conviction, and not out of self- or group-interest. They're often undertaken with the best interests of society at heart.
- (2) *Political motivation*: According to Rawls, only certain conscientious motivations qualify a disobedient act as an act of *civil disobedience*. In particular, the motivations must be "political" in nature – on Rawls' view, agents engaged in civil disobedience must be appealing to a "common conception of justice" that establishes the conditions of fair and equal social cooperation, and that underlies the constitution.
 - *Can civil disobedience be religiously motivated (think of the case of King)? Can it fail to appeal to a common or shared conception of justice? Does the intent of the dissenter always matter?*
- (3) *Aimed at changing the law*: civil disobedience, according to Rawls, must aim at changing the law. In this way it is a method of political engagement: its goal must be to bring the law into conformity with the requirements of justice.
 - *Is disobedience with the aim of voicing disagreement, but with no hope of changing the laws, not a case of civil disobedience?*
- (4) *Publicity*: This follows from the second and third features of CD: dissent cannot be addressed to the conception of justice of the majority or aim at changing the law unless it is public.
- (5) *Non-violence*: acts of protest that are violent are not, on Rawls view, cases of civil disobedience (though they may, nonetheless, sometimes be justified).
 - *What distinguishes cases where violent dissent is justified from cases where it is not? Why think violent disobedience never qualifies as civil disobedience? It could conceivable meet Rawls' other conditions for what counts as CD – even justified CD...*
- (6) *Expectation and acceptance of arrest and punishment*: Dissenters engaged in civil disobedience want to communicate conscientiousness and sincerity, and also fidelity to law, in general. After all, on Rawls' view, acts of CD aim to defend the principles of justice that establish the conditions for fair and equal social cooperation, of which the law is supposed to be a manifestation.
 - Think again of King – his CD is partly aimed to persuade local governments and businesses to *comply* with desegregation laws, so it was particularly important to him to communicate fidelity to law.

Justifying Civil Disobedience

Rawls' four conditions of justified civil disobedience:

- (1) *All other ordinary avenues towards changing the law have been closed off.*
 - But consider King's "Letter from Birmingham Jail":

Frankly, I have yet to engage in a direct-action campaign that was “well timed” in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word “Wait!” It rings in the ear of every Negro with piercing familiarity. This “Wait” has almost always meant “Never.” We must come to see, with one of our distinguished jurists, that “justice too long delayed is justice denied. (p. 233)

Isn't there always another non-disobedient avenue to be explored? A new administration to appeal to? Does Rawls' first condition set the bar too high?

- Also, if the dissenter is dissenting in part because he feels he cannot in good conscience follow a particular law (consider, e.g., the fugitive slave laws, or maybe dismissing a soldier under DADT, or maybe refusing to recite the pledge of allegiance in school), then requiring that he comply with the law while pursuing legal avenues to change it may seem to require him to compromise his integrity.

(2) *Acts of civil disobedience should usually target only substantial and clear violations of justice – particularly violations of equal liberty and equality of opportunity – and not just any bad law.*

Why does Rawls think this?

- One reason might be that otherwise, civil disobedience would be too widespread, and would undermine the function of government.
 - ... But the third condition seems designed to address that worry.
 - ... Also, the grave costs of engaging in civil disobedience will likely effectively deter most people from doing so.
- Another consideration might be the *publicity requirement*: civil disobedience cannot effectively address the sense of justice of the majority if the law it protests does not clearly conflict with that sense of justice.
 - ... But can't civil disobedience sometimes appropriately aim at revising the majority's sense of justice, to bring it more in line with the conception of justice that establishes the conditions of fair and equal social cooperation?
- It seems like Rawls has a more than merely pragmatic limitation in mind here...

Here it's helpful to think about why Rawls thinks we should generally obey unjust laws issued by a just society. He thinks there can be no possible just society that never issues unjust laws. The best political procedures (democratic ones) are at best examples of *imperfect procedural justice*, and so will necessarily leave open the door to bad laws; no just political procedure could ensure that unjust laws will never be passed. So we generally are obligated to obey unjust laws, because they are a necessary result of just political procedures, which we have an obligation to support.

We are justified in disobeying unjust laws only when their injustice reflects a betrayal of the principles governing fair and equal social cooperation.

- ... But is there any true generalization we can make about what kinds of violations of justice are likely to be substantial and clear?
- ... Also, can acts of civil disobedience be justified even when they aren't appeals to the sense of *justice*, but rather to other moral principles (e.g. protests against cruelty to animals, against nuclear testing, against environmental policy, aids policy...)
- ... Why does Rawls think civil disobedience shouldn't be used to protest violations of his second, distributive principle of justice? (Consider OWS protests...)

(3) *Acts of civil disobedience should be restricted to those cases where the dissenter allows that anyone else subjected to similar injustices would have a right to disobey in a similar way (and only when such general disobedience would have acceptable consequences).*

Rawls argues that civil disobedience, if it is engaged in only when justified, will be a *stabilizing* force on society. Its aim is to make that society more just, and justice is a stabilizing influence. This thought informs his views about when civil disobedience is justified.

(4) *Any act of disobedience meeting the first three conditions is one a dissenter has a right to engage in. But, says Rawls, a dissenter should exercise this right only when dissent is likely to be an effective means of achieving his ends. Effectiveness of protest does not establish the right to protest, but once that right is independently established, protest should be engaged in only if it will be effective.*

Consider King again: protest clearly designed with effectiveness in mind (timed for Easter shopping period).

Rawls also suggests at one point that civil disobedience appropriately targets only "internal policy". Think, in this context, also of King's response to the accusation that he is an "outside agitator."

- Must CD be directed only at domestic policies? Only at our own community's laws? Why or why not? (Consider King: "*Injustice anywhere is a threat to justice everywhere.*" (p. 231))

Alternative accounts of justification:

(1) *Civil Disobedience as part of the democratic process...*

A worry about civil disobedience: In a democratic state, it seems countermajoritarian – the actions of a minority trying to impose its personal political preferences on the majority – almost a form of autocracy.

Is civil disobedience best understood as underscoring the limits of majority rule? An assertion of fundamental rights in the face of overreaching majorities? As a check on democracy?? (Consider, e.g., the Civil Rights Movement; but also, again, the OWS protests: "we are the 99%!")

Why think that justified civil disobedience is limited to serious infringements of the principles of equal liberty and equality of opportunity, as Rawls suggests? Why think it would be inappropriate to engage in civil disobedience to protest/try to change laws that are “merely” bad in other ways (say, imprudent, ineffective, or foolish)? While the Civil Rights Movement epitomized the kind of disobedience Rawls thought justified, subsequent prominent cases of civil disobedience look much less like this: e.g., Vietnam War protests, protests against nuclear proliferation, perhaps anti-globalization protests today... It’s hard to make the case that prosecution of the Vietnam War, nuclear proliferation and testing, or free trade policies involve the government in overstepping the bounds of its political authority – as opposed to merely making bad decisions (as Rawls says, “the right to make law doesn’t guarantee that the decision is rightly made” (p. 260)).

Perhaps we can justify civil disobedience differently – not as a check of democracy or a way of limiting the dangers of democracy, but rather as an integral part of democracy and of democratic expression... a way of enhancing democracy. Can disobedience of democratic laws really enhance democracy? (D. Markovits¹) (This seems, again, to be part of the aim of OWS.)

(2) Utilitarian justifications for disobedience

Punishing Civil Disobedience:

Should we punish justified civil disobedience:

- on grounds of desert?
- On grounds of deterrence?
- Might dissenters engaged in CD *want* to be punished?
 - ... to communicate fidelity to law.
 - ... to draw attention to the cause.
 - ... Think of King – the police in Mississippi were reluctant to arrest King and wanted him to be released on bail (set it low.)

A useful distinction:

Direct v. Indirect Civil Disobedience

Direct CD disobeys the very law it is protesting (e.g. King, Parks, Thoreau?).

Indirect CD violates a different law, in order to change the law it is protesting (e.g. the ACT UP demonstrators).

- Perhaps punishment of *indirect civil disobedience* is more justifiable than punishment of *direct civil disobedience*?

¹ See “Democratic Disobedience,” *Yale Law Journal*.

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