

Should We Ever Disobey the Law? *Stephen Grant*

Introduction

There are times when all of us find a particular law to be wrong and we would welcome that law being changed or repealed. In some states, this may apply to a wide range of laws which we find to be so abhorrent that the state as a whole comes to be seen as unjust, and in need of fundamental reform. Obvious examples of such states from the last century would be Nazi Germany or South Africa during the apartheid era. In such cases it is not simply that we feel under no obligation to support such states, we may even feel under a positive obligation to resist government policy. But there is a more difficult problem we face in cases where we feel the state within which we live is fundamentally just, but there are individual laws which ought to be changed. In such cases, can we ever be justified in disobeying the law?

What is Civil Disobedience?

The specific question I wish to consider here is whether or not we can justify what has been called 'civil disobedience'. To begin with, it will be helpful to contrast what is meant by this with other closely related terms. Civil disobedience is flanked by two further forms of political action. The more extreme form of action is revolution, which involves an attempt to overturn the state as a whole, with the aim of replacing existing forms of authority with a differing or improved set institutions, often organised according to an alternative set of political ideals. Revolution usually involves political violence – acts violence committed with a specifically political aim. The less radical alternative is political protest, which usually involves opposition to a specific law or policy, such as the introduction of university tuition fees or the invasion of Iraq. Crucially, protest takes place within the law, and is often organised with the full knowledge and co-operation of the state. Civil disobedience lies between these two forms of action in the sense that it is generally more limited in its aims and methods than revolution, but it contrasts with protest on the grounds that it falls outside the law.

John Rawls, arguably the most important political philosopher of the twentieth century, has provided perhaps the most influential account of the nature of civil disobedience.¹ For Rawls, the need for such actions arises when we have a state in which the fundamental institutions embody just principles, but where there are individual laws which do not reflect those principles. The kind of example which certainly influenced Rawls was the plight of blacks in the southern states in the 1960s. The US constitution guaranteed equality for all, but individual states segregated black and white children within the schooling system, and introduced criteria for voting which made it all but impossible for black people to register. In such circumstances, Rawls argued we have an obligation to obey the state, but it is morally permissible to break the law in order to right specific injustices.

He clearly envisages something like a modern constitutional democracy, where the constitution states the principles of justice which must guide the making of individual

laws, and where legislatures create laws which should be consistent with those principles. It is an unfortunate fact of political life that some laws will fail to achieve this, but such laws can be changed where a community with a sense of justice can be moved by the actions of oppressed groups, and thereby forces their political representatives to strike down bad laws. One way of understanding this problem is that Rawls believes that we have a 'natural duty' to uphold just institutions, and such duties exist independently of any voluntary action. Other examples include a duty to help others when they are in distress, and a duty not to harm others. It is natural duty which explains why we are obligated to show allegiance to constitutions which embody such fundamental moral obligations.

Having set out this general background, Rawls then identifies eight criteria for identifying an act as one of civil disobedience, and I shall explain each of these in turn.

There must be clear injustice. A just state will be one which guarantees, amongst other things, equal liberty for all. If there is an individual law which restricts the liberty of a specific group from voting based on their ethnic background, then this will clearly violate one of the fundamental principles of justice. In such clear cases, it also becomes clear the precise law which needs to be changed.

The law must be broken. A key factor which distinguishes civil disobedience from protest is the brute fact that the actions undertaken are illegal.

The law which is to be overturned need not be the one which is broken. In many cases it will be impractical or ineffective to try to break the law one objects to. For example, it may be difficult to directly break laws which make it difficult for certain people to vote, and in such cases it makes sense to engage in illegal activities such as mass sit downs in major thoroughfares in order to draw attention to the perceived injustice.

It must be a public act. One essential feature of civil disobedience is that it tries to communicate to the wider community the injustice of a particular law. The publicity of the act is therefore necessary in order to make communication practically possible. Only in this way is it possible to appeal to the majority to change the law.

It must be non-violent and non-threatening. The civil disobedient is attempting to appeal to the 'sense of justice' of the majority. In making such an appeal, the use or threat of violence is incompatible with the practice of a reasoned appeal to one's fellow citizens intended to move them to change a law. The actions are intended to be articulate and reasonable, as against a means of coercing or frightening others into conforming to one's wishes.

The perpetrator accepts the penalties for her illegal actions. Although civil disobedience involves breaking the law, it is done for moral rather than selfish reasons, and the willingness to accept arrest is proof of the integrity of the act.

The actions must not threaten the stability of the state. Rawls emphasises that the context in which civil disobedience is morally permissible is one where there is a limited number of unjust laws which are the focus of opposition, but where there is a

fundamentally just set of principles against which those laws can be deemed to be unjust. To threaten the stability of the state as a whole is to go beyond opposing the individual laws, and to challenge the just principles which underpin the state. He sees this as unacceptable.

The actions are carried out within 'fidelity to the law'. The civil disobedient does not object to the rule of law as such, and may well accept as just the great majority of laws to which she is subject. Crucially, the aim is to change a specific law or set of laws precisely because it is at odds with those just laws which she respects, and will claim that the repeal of the unfair law(s) in question will strengthen the overall system of laws by making it more consistent with the principles they should reflect.

Problems for Rawls

Rawls' theory answers many of the key questions in this area of debate. He provides us with a clear account in defence of the intuition that breaking the law in a just state is sometimes morally acceptable. We are told the reasons which must motivate the civil disobedient, thereby distinguishing her from an ordinary criminal or a revolutionary. We are given certain restrictions, notably the proscription of violence. And we are given an explanation of how such acts might be compatible with the view that the state is fundamentally just.

The objections to Rawls may come in several forms. One might argue that if the state is just then one must never disobey the law, and the most famous example of this is usually taken to be that of Socrates, who claimed that as he had always taught respect for the law it would be wrong for him to evade punishment even if the law he has broken was one he believed to be unjust. He therefore spurned the opportunity to escape from the city state of Athens, and voluntarily drank the hemlock he was given to fulfil the court's imposition of the death penalty.² The opposite extreme is the position occupied by the philosophical anarchist who argues that no state is legitimate, for it always constitutes an imposition on the autonomy of the individual. As such, no law is just, and so there can never be any reason to obey it unless it happens to coincide with what is just. Civil disobedience therefore ceases to become a moral problem, as individuals need only be bound by the laws of morality, as against the laws of the state.³

These positions are of considerable interest in their own right, but the objections stem from a deeper philosophical dispute with Rawls. The belief that one should always obey the law in a just state is closely associated with conservatism. Conservatives have a generally pessimistic view of human nature, and fear that any attack on the rule of law risks damaging the fragile foundations of the state. Without the laws which hold us in check we risk descending into conflict and division, with the frightening prospect of the state as a whole falling apart, thereby returning us to a state of nature, 'a war of all against all' as Thomas Hobbes famously put it. Anarchists in the tradition of Godwin take the opposite view, claiming that humans are essentially harmonious beings who will co-exist in harmonious communities if only the state, the real source of division, could be removed.

Rawls is a philosophical liberal whose views can be traced back to Immanuel Kant. Rawls believed that the state is justified on the grounds that it is an effective means of

communities regulating the conduct of their members in accordance with the demands of reason. A state can be organised such that its institutions are just, thereby offering each individual the opportunity of living autonomously. As such, a state can be constituted by just institutions, which places Rawls in direct opposition to the anarchist who flatly rejects this. And it can be legitimately opposed if it fails to conform to the standards of justice which a rational individual would choose, which places him at odds with the conservative.

The extent to which one sympathises with these criticisms of Rawls is likely to depend on the extent to which one accepts the rival philosophical positions, and there is not space here to discuss the liberal responses to these concerns. Instead, I wish to consider some separate concerns which have come from another liberal thinker, Kai Nielson, who suggests a series of possible counter examples to the kind of position Rawls has taken. Firstly, Nielson asks if the civil disobedient ought to accept the punishment if the aim of the activity is precisely to demonstrate against that punishment. For example, let us say that there is a state where smoking marijuana is punishable by twenty years in prison. If someone lights up a joint in front of the town hall having informed the media beforehand of what she intends to do, must she allow herself to be arrested in order for this to be a legitimate act of civil disobedience? A second example concerns that of a doctor who is passionately committed to the view that women have the right to abortion, and carries out abortions in a state where this is illegal. Imagine she writes anonymously to her local newspaper to say what she is doing and why. Could this not be considered an act of civil disobedience despite that fact that she tries to evade arrest?

On a wider scale, let us say that someone is convinced that a particular law is not just unfair, but fundamentally at odds with the just principles on which the laws are theoretically based. Such a position confronted many civil rights activists in the United States, in that they often agreed with the principles of equality embedded in the constitution, but found it obvious that laws which prevented black people from gaining equal access to education or healthcare were so egregious that it was essential to change them by illegal means if necessary. Again, is the refusal to accept arrest and punishment by evading the police who try to arrest you on an illegal march banned by the very people whose laws you are trying to overturn an unacceptable form of civil disobedience? A related question concerns Rawls' proscription of violence. Let us say one of the civil rights marchers in Alabama in the 1960s punctured the tyres of a police car which was carting off her fellow marchers who faced the real prospect of being beaten by racist police officers. Must we rule this out as morally unacceptable, or describe it as the sort of action which strays over the line between civil disobedience and revolution?

The supposed challenge to Rawls hinges on whether or he has provided us with a necessary set of conditions to which actions must conform if they are to be acts of civil disobedience. The thought is that Rawls is overly prescriptive and fails to take account of the enormous complexity of the types of situation we are confronted with in the course of our dealings with the state. As a result, he tries to set out criteria which are overly precise and therefore opens himself up to the types of counter example presented by Nielson. But it is far from clear that Rawls is open to this sort of criticism.

Let us start with the cases of the marijuana smoker and the pro-choice doctor. Rawls is clear that the act of civil disobedience need not involve breaking the specific law to which one is opposed. His advice to the marijuana smoker would simply be that he could conform to the full set of criteria for civil disobedience by breaking laws which carry a far lesser penalty, such as illegally blocking traffic, and publicly stating his reason for doing so in court. A Rawlsian is likely to be suspicious of anyone who insists upon breaking the specific law he is opposed to, and avoiding capture. It looks entirely unnecessary to break only that law, and therefore raises serious doubts about the integrity of the person. True civil disobedients are often extremely imaginative in their choice of law-breaking, with one famous, recent group being Fathers for Justice, who were demanding changes to laws which allow mothers to restrict the access of fathers to children. Their activities usually centred around dressing up as superheroes and illegally occupying highly public places such as Buckingham Palace.⁴ Unless the person could offer further justification as to why he had no option but the breaking of that specific law, it is far from clear that the person has acted with the moral integrity of the true civil disobedient.

The case of the doctor is more complex, partly because two separate issues are being run together. One issue concerns changing what is perceived as an unjust law, which could certainly be approached through acts of civil disobedience which do not involve carrying out abortions. The second issue is the obligation to come to the assistance of those in perceived distress, which may require carrying out (illegal) abortions, and if the doctor is the only practical source of help for women in the area, there may even be an obligation to avoid capture in order to continue to provide this service. This second case raises a distinction between what Paul Graham has called civil disobedience and 'conscientious refusal'.⁵ The latter involves a much more personal sense of simply being unable to perform or omit certain actions, regardless of the consequences. Such views are often much more inward looking, depending far more on a sense of personal, moral commitment, and therefore less concerned with the idea of an appeal to the sense of justice of the majority.

This does raise a serious tension with the position Rawls has argued for, and in the final instance he may be forced into saying that the doctor should act in order to change the law, but should not carry out abortions unless he is prepared to accept arrest and punishment. One defence might be that we cannot endorse law-breaking on the grounds of deep moral commitment for fear of allowing fanatics who act with moral integrity to engage in activities which reflect their genuinely held convictions. Ultimately, we must have faith in the underlying principles of justice in a state where the majority accept those principles, and allow for the operation of democratic and constitutional procedures to bring about changes. To endorse systematic law-breaking whenever one believes with conviction that the law is wrong would pose a far greater threat to a generally just state, threatening its very stability. As such, it looks as if Rawls may have to rule out the permissibility of the doctor carrying out the abortions either as an act of civil disobedience, or as one demanded by conscience.

The cases of the civil rights protesters denied the right to march, and who puncture the tyres of police vehicles raise very similar issues to those already considered, but we should start by making clear that Rawls avoids making the straightforward identification between the idea of a liberal democracy with a constitution on the one hand, and the idea of a just state on the other. That is to say, he recognises that not all

constitutional democracies are just, and many such states are guilty of crushing the liberties of certain groups. Rawls' criteria apply where there is a general pattern of the just principles which underlie the fundamental institutions of state being reflected in the practices with which the state deals with its citizens. This means that it must be possible for a principle such as the offices of state being open to all being reflected in the reality of how the state operates. If this does not occur, such as in cases where people are systematically barred from taking up certain opportunities based on gender or ethnicity, then this raises serious questions as to whether or not this can reasonably be described as a just state. A state with a democratic system which has popular laws which seriously violate the liberties of certain groups may be more unjust than a non-democratic system which treats all of its citizens with equal respect.

The question now becomes what kind of state we are living in. If it is a state which is fundamentally just in terms of its basic principles and constitution, but has certain unjust laws which can be changed by persistent appeal to the fundamental principles, then civil disobedience will be the most radical form of action which is consistent with morality. But if there is only the appearance of justice, perhaps through a rhetoric of equality and equal liberty for all, and the reality is of deep-rooted prejudice which is immune to the ideals which are expressed by the constitution and the majority of citizens, then this casts serious doubt as to whether the state really is one which would conform to Rawls' conception of a just one. Justifying some of the more radical actions of civil rights activists in the deep south of the 1960s would require an answer to this question, and once again it may be that Rawls is in some difficulty here. He rarely identifies specific states as ones which he has in mind when setting out his theories, but his discussion of civil disobedience in *A Theory of Justice* makes explicit reference to Martin Luther King Jr.,⁶ and it seems likely that one example of a fundamentally just state with some unjust laws would be the United States of that era. As such, his theory of civil disobedience would have to rule out the actions of those civil rights activists engaging in even mild acts of violence.

How serious are these problems for Rawls? I suggest that Nielson needn't be seen as providing devastating counter examples to Rawls, but merely as having highlighted that there are hard cases to deal with when one comes to consider the question as to whether or not a state is just. This in turn means that there are times when it becomes more difficult both to identify certain acts as civil disobedience, and to assess their moral acceptability. Rawls theory is therefore problematic at the margins, when we find it difficult to come to a confident judgement as to whether or not we are facing injustice which is the exception or the rule.

If this is right, then Rawls can be interpreted as providing us with a reasonable set of criteria for what is to count as civil disobedience in a just state, but as acknowledging that there may be cases where states which appear to be just on the surface are nevertheless guilty of appalling injustice towards some or even all of its citizens. In such cases, actions which do not conform to his criteria may be justified in light of the extreme circumstances which obtain. In the case of states which the principles of justice are embedded in both the institutions and the general practices of the state, then Rawls' criteria still seem like a reasonable set of constraints. One obvious objection is that it may be difficult to draw the line between just and unjust states, but this needn't count as an overwhelming objection to Rawls. The dividing line may well be difficult to draw at the margins, but there are some states we do recognise as

just, and if we are to find a way of both describing what civil disobedience is, and the moral limits to it within a just state, then Rawls can still be seen to have given us a plausible set of criteria. The ultimate weakness which his theory faces is that many of us have the intuition that it is morally permissible to go beyond the limits set out by Rawls in certain instances. There may be fundamentally just state, with certain laws which require change, and where it seems right to engage in at least mild acts of violence or avoid arrest. It is not yet clear how this intuition can be reconciled with Rawls' position.

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Further Reading

Rawls most influential work, which includes the material referred to in this article, is *A Theory of Justice*, Oxford: Oxford University Press. 1972.

Vinit Hasker, *Civil Disobedience, Threats and Offers: Gandhi and Rawls*, Oxford: Oxford University Press, 1986, provides a book length treatment of the entire issue, as well as specific discussion of Rawls' work.

A chapter length discussion of Rawls' theory can be found in Chandran Kukathas and Phillip Petit, *Rawls: a Theory of Justice and its Critics*, Cambridge: Polity Press, 1990, chapter ten.

An excellent brief introduction can be found in Paul Graham, *Rawls*. Oxford: Oneworld Publications, 2007, chapter seven.

¹ The following material is drawn from his article 'The Justification of Civil Disobedience', reprinted in Tom L Beauchamp ed. *Ethics and Public Policy*. New Jersey: Prentice-Hall, 1975. pp 132-145.

² This event and the surrounding discussion are set out in Plato's *Apology*, reprinted in *The Dialogues of Plato*. Eds. Hamilton E. and Cairns H. Princeton: Princeton University Press. 1971.

³ For one example of this line of thought, see Peter Marshall ed. *The Anarchist Writings of William Godwin*. London: Freedom Press. 1986.

⁴ For an account of this group's activities, see <http://news.bbc.co.uk/1/hi/uk/3653112.stm>

⁵ Paul Graham, *Rawls*. Oxford: Oneworld, 2007. 114-115.

⁶ John Rawls, *A Theory of Justice*, Oxford: Oxford University Press. 1972. 1975. p 364 FN