

Where the Right to Resist Went Wrong

A Critique of Dworkin's Theory of Disobedience

Juan N. Pava

New York University

Ronald Dworkin's aim in Chapter 4 of *A Matter of Principle*, "Civil Disobedience and Nuclear Protest," is to evaluate a series of German anti-nuclear protests by developing a *working-theory* of civil disobedience, that is, a theory of permissible lawbreaking. However, Dworkin also makes the case, albeit implicitly, for civil disobedience as a limited right which can be justified in certain circumstances, even when there is disagreement about the rightness of the law. The aim of this paper is to show that Dworkin's argument for a right to civil disobedience is internally inconsistent. More precisely, I will challenge the compatibility of some of his methodological assumptions with his conclusions.

In section §1 I flesh out Dworkin's argument in favor of a right to civil disobedience by outlining the three kinds of civil disobedience enumerated by him. In section §2 I present two plausible objections to his position zeroing in on the incompatibility of his working-theory with its goals. Lastly, in section §3 I show how Dworkin might try to vindicate his theory and section §4 ends with some concluding remarks.

§1. Dworkin and the Right to Civil Disobedience

In order to recount Dworkin's argument for a right to civil disobedience, we must first define what civil disobedience is. First and foremost, it involves a breach of the law – hence disobedience – but unlike ordinary crime which is often motivated by personal gain, civil disobedience entails a moral or political motivation (Dworkin 1985, 105). Thus, the intent is a preponderant factor in determining its status as civil disobedience. Likewise civil disobedience does not go as far as revolutionary activity – also politically motivated – because it does not challenge authority in a fundamental way.¹ We can think of this as the 'civility' aspect of civil disobedience. That means, at least in the context of democratic authorities, that civil disobedience must be compatible with the majority-rule principle that underlies democracy: that once a law or policy is set by the majority, the minority is obliged to comply (Dworkin 1985, 111). With these two distinctions we can define civil disobedience under democracy as *a morally or politically motivated breach of law that recognizes the legitimacy of democratic authority*.

But how is it ever justified to break the law under a legitimate authority which, is owed a duty

¹ See Dworkin 1985, 105. This is what Candice Delmas and Kimberley Brownlee term "fidelity to law" in their article, "Civil Disobedience" (Delmas and Brownlee 2021) and John Rawls also defends in his *A Theory of Justice* (Rawls, 1971, 322).

of obedience by definition?² Say, if U.S. democracy, assuming it legitimate, judged conscription and the Vietnam War equally justified how can desertion be permissible? That is precisely the fundamental problem a theory of civil disobedience attempts to solve. A tentative and common answer is to argue that if the law or policy is evidently wrong then civil disobedience is justified. Hence, according to this line, the rightness of draft card burning would have ultimately hinged on whether the Vietnam War was justified or not. But, as Dworkin points out, a theory that justifies civil disobedience in this way is ‘useless’ because it presupposes precisely what is being disagreed about: the rightness or wrongness of the law or policy (Dworkin 106). Hence, on whether the Vietnam War was justified – the majority thought so, dissenters did not. For that reason, Dworkin proposes a *working* theory of civil disobedience: one that justifies civil disobedience without referring to the ‘soundness’ of the disobedient’s justifications, that is, without invoking to the wrongness of the law (Dworkin 106). Therefore, as a corollary, civil disobedience is justified under Dworkin's working theory given the dissenter's convictions and in light of substantial disagreement.

Dworkin identifies three kinds of civil disobedience: (i) integrity-based, (ii) justice-based and (iii) policy-based. Integrity-based disobedience, also known as conscientious objection, applies when an agent breaks the law because their personal integrity or conscience forbids them to obey (e.g., Muhammad Ali's refusal to be drafted for the Vietnam War) (Dworkin 107). Justice-based disobedience applies when an agent breaks the law to oppose an unjust policy, particularly one of oppression of the minority by the majority (e.g., passbook burning under Apartheid). And lastly, policy-based disobedience applies when agents break the law because they deem it unwise or dangerously wrong for everyone, including the majority. Dworkin claims that the German anti-nuclear protests fit within this category (Dworkin 107) Moreover, the last two, justice-based and policy-based disobedience, can be further characterized by the strategies they employ. On the one hand, they can pursue a *persuasive* strategy where lawbreakers aim to convince the majority to change the law by forcing them to start a dialogue (e.g., Gandhi's satyagrahic fasts). On the other hand, they can employ a *coercive* strategy aiming to change the law by imposing costs on the majority (e.g., the Montgomery bus boycott) (Dworkin 109). Whereas the former appeals to the majority's power of deliberation, the latter attempts to interfere via force or threat with the power for deliberation by limiting its choices. In sum, there are five types of civil disobedience: (i) integrity-based disobedience, (ii) persuasive justice-based disobedience, (iii) coercive justice-based disobedience, (iv) persuasive policy-based disobedience and lastly (v) coercive policy-based disobedience.

Dworkin lists necessary conditions of justification for each kind of civil disobedience. It is important to keep two things in mind. First, note that Dworkin’s claim that some cases of lawbreaking

² See Joseph Raz's *The Morality of Freedom*. The important claim from Raz for our purposes is the claim that, at the very least, if an authority is legitimate then its right to rule is justified and so in this way the authorities “are owed a duty of obedience.”

are *justified* or *right* given the dissenters' convictions refers not just to how *they* think they should act *tout court* but how *we* think they ought to act given their convictions even if *we* may disapprove of their judgment – otherwise it comes close to triviality. That is, we are not *endorsing* their choice. We may reject some kinds of disobedience from within the dissenter's point of view. Second, it is important to disambiguate the two senses of 'justification.' To say that an act of disobedience is *justified* could mean (i) the cause it seeks to promote is right or (ii) the act of disobedience should to some extent be tolerated (whether the cause it promotes is right or not). So *justified* is not interchangeable with "it is right" *tout court*, but with "it is right *for the dissenter*".

Integrity-Based Disobedience

According to Dworkin, integrity-based disobedience, if not violent, is compatible with democratic authority because it does not challenge a program, policy or institution at all. It simply asks for an exception given the profound moral distress obeying a particular law would cause. Thus, Dworkin argues, integrity-based disobedience is uncontroversially justified given the dissenter's convictions.

Persuasive Justice-Based and Policy-Based Disobedience

Persuasive civil disobedience, be it justice-based or policy-based, needs more stringent requirements than non-violence. Both justice-based and policy-based disobedience pursue certain goals and must be therefore conscious of the consequences – at the very least they must make sure that their actions are not counterproductive. Moreover, because these types of civil disobedience are not urgent – as some cases of integrity-based disobedience might be – they require the dissident must exhaust the political process before breaking the law (Dworkin 108-109). Nonetheless, persuasive strategies of civil disobedience remain compatible with democracy because they respect the majority's deliberative capacity and its moral right to have its laws enforced. Hence, conditional on being wary of their consequences and having exhausted the political process, persuasive justice-based and persuasive policy-based disobedience are both justified, given the dissenter's convictions, in Dworkin's account.

Coercive Justice-Based and Policy-Based Disobedience

For coercive *justice*-based disobedience, because it interferes with deliberation, even more stringent requirements are called for. Besides satisfying the requirements that justify persuasive civil disobedience, coercive justice-based disobedience requires that the dissenter also believes she is protesting a program which is dangerously unjust and without any hope of being reversed by the normal political process. Also her strategy can't be counterproductive. However, like the previously mentioned types of civil disobedience, this one is also, albeit indirectly, compatible with democratic

authority because justice-based disobedience appeals to a well-known exception to democratic authority (Dworkin 111): the right of the majority to have its laws enforced is constitutionally constrained by requirements of justice, and justice-based disobedience aims at enforcing these constraints. Therefore, it is ultimately justified.

Yet, this is also the reason why coercive *policy*-based disobedience is *unjustified* according to Dworkin (Dworkin 111). It is coercive thus it interferes with the majority's power of deliberation but the fact that it is *policy*-based, rather than justice-based, means that it cannot appeal to any justice-based constraints to democratic authority that would otherwise compensate for this interference. Whereas requirements of justice provide well-understood exceptions to the majority-principle, requirements of competence do not. The majority is forbidden from making unjust decisions but is certainly allowed to make dumb ones.

A Right to Act from Being Right to Act

According to Dworkin's *working theory*, despite serious dispute about the legitimacy of the law, there can be a right to civil disobedience. We need to understand what a 'right to act' amounts to. Joseph Raz defines a right to an action Φ as an entitlement to Φ even when Φ -ing is wrong (Raz 1978, 266).³ A good example is that the right to freedom of speech enables us to express ourselves in disrespectful ways or that we have a right to spend the money we have earned won in all forms of unhealthy albeit legal excesses such as gambling (Dworkin 1978, 188). That is another way of saying that a right to Φ is an entitlement to Φ irrespective of Φ 's rightness or wrongness. Further, it would be wrong for others to interfere with an action to which I am entitled. Our rights of freedom of speech cannot be interfered with, unless their exercise violates others' rights as in slander.

May governments interfere with acts of civil disobedience? In his earlier essay, "Taking Rights Seriously", Dworkin proposes a distinction between a *strong* and *weak* right to break the law, at least in the case of civil disobedience; a person has a *strong* right to break the law when it would be wrong to punish or interfere with their acts, just as we saw above in reference to Raz. A person has a *weak* right to break the law when:

1. she is not duty-bound to refrain; and
2. she is motivated by a sincere conviction her act is right; and crucially,
3. it would not be wrong to punish or interfere with her act (Dworkin 1978, 189).

For clarity, let us imagine the case of Winnie, a prisoner of war. Winnie has been captured by the enemy forces and is planning her escape. Dworkin claims that it is right for Winnie, given her convictions, to try to escape, independent of judgment about whether her convictions are right. That is, regardless of which side of the war is ultimately justified, Winnie is right, given her convictions, to escape. Yet at the same time, we wouldn't want to say that Winnie has a *strong* right to escape so that

³ This definition echoes Jeremy Waldron's notion of having a right to do wrong (Waldron 1981, 21-39).

it would be wrong for a warden to stop her. The opposite is the case, in fact; wardens have a responsibility to stop Winnie even if her escape is justified. Winnie, the POW, has a weak right to escape, and so the warden would not be wrong to stop her.

Dworkin wants to say that dissenters have a weak right to break the law if they are justified in disobeying given their convictions. This right can mitigate penalties, or even remove them entirely, without taking away the government's right to impose them. So if in order to protect my integrity, to pursue a persuasive strategy, or to counter injustice, I opt to break the law – assuming satisfaction of the conditions listed above – the government may have a good *pro-tanto* reason to be lenient. Such is the nature of my weak right to disobedience.

§2. Difficulties in Dworkin's View

The Limits of a Working-Theory of Disobedience

The issue with Dworkin's working theory of civil disobedience is that it seems incompatible both with coercive justice-based disobedience and with any kind persuasive strategy of disobedience – most forms of civil disobedience justified by Dworkin. The objection goes as follows.

For Dworkin, as noted above, a working theory of civil disobedience refers to a theory where the rightness of the decision to disobey does not depend “on which side is right in the underlying controversy” (Dworkin 1985, 106). According to Dworkin, this thought is based on the pervasive disagreement that underlies the rightness of any law or policy, where civil disobedience is simply another manifestation of this disagreement. That means that we cannot invoke the rightness of the law under question because this is precisely the issue being raised by the dissenter. However, and here is the key question and problem in Dworkin's argument, what should our attitude be towards the principles of justice or morality on which such a law may be founded? If we are to bracket the rightness or wrongness of a law in light of disagreement, there seems to be no good reason why we should not be equally agnostic regarding the principles of justice that ground it according to the theory. Civil disobedience seems not solely concerned with challenging clearly delineated policy but also with challenging systemic practices, institutions and, pointedly, our understanding of fundamental principles of justice. Hence, it seems that these, too, are compromised by the same pervasive disagreement that justified bracketing the soundness of a law in the first place. In other words, insofar as a working theory is unable to appeal to the rightfulness or wrongness of a law to justify civil disobedience, it is also unable to invoke those principles that constrain democracies – because whether they hold or not may be what is at issue.⁴

Yet that is precisely what coercive *justice*-based disobedience does. Coercive justice-based

⁴ In fact, Dworkin himself seems to agree with this, albeit in passing, when claiming that the underlying presumption of his theory is the “substantive disagreement about the wisdom *or justice* of the law being disobeyed” (my emphasis) (Dworkin 1985, 106).

disobedience (e.g., the Montgomery bus boycotts) is only compatible with democracy because it appeals to requirements of justice that already constrain democratic authorities (e.g., the constitutional right for equality under the law). However, if the precepts of justice are beyond our reach, bracketed by Dworkin's theory, they can't justify coercive justice-based disobedience. So it seems either that (a) coercive justice-based disobedience is unjustified or that (b) Dworkin's working-theory is a mistaken approach. Though, in section 3, I will explore how Dworkin might defend immunizing justice from disagreement and why this attempted solution is ultimately undesirable.

But now, let us explore why this working theory might also be incompatible with a *persuasive* strategy of civil disobedience. As discussed in section §1 the agent who partakes in persuasive civil disobedience must have previously used up all legal means to convince the majority of her views and has failed to do so. But now we might wonder: what is her justification for using illegal means when the legal ones failed? Persuasive civil disobedience is justified solely because it appeals to the majority's power of deliberation. But by breaching the law after exhausting all legal means, a dissenter is not only arguing that the majority's deliberation was wrong in setting a law or policy but that it also deliberated wrongly in rejecting her views. Hence, by breaking the law rather than appealing to it dissenters who have exhausted the normal political process and have had their position rejected, seem closer to *disregarding* the majority's deliberation. The dissenters not only believe that the majority wrongly rejected their views but appear to expressly dismiss the majority's ability to take their (legally expressed) dissent into account; that calls into question whether the dissenters are truly acknowledging the legitimacy of democratic authority.⁵ If (a) the dissenters' arguments were justified and (b) they truly acknowledged the majority's capacity to grasp this, viz. the majority's power of deliberation, the dissenters would not have exhausted the political process in the first place. Hence, if their argument fails to pass through legal means and they turn to illegal ones, even if persuasive, they must have found the majority's exercise of their power of deliberation unsatisfactory and are acting against it.

There is a way in which a dissenter can and does avoid this dilemma, namely by showing that the process of political participation is flawed or unjustly limited in some way. But this is impossible under Dworkin's working theory of civil disobedience which brackets the rightness *and* justice of the law. And so the civil disobedient has her toolkit reduced to the point that she cannot justify her actions by appealing to the requirements of justice even in this case.

In the end, this shows that Dworkin's working theory is inconsistent with the kinds of civil

5 "There has been a remarkable coalescence of opinion around the proposition that authority and authority relations involve some species of 'surrender of judgment' on the part of those who accept submit or subscribe to the authority of persons or a set of rules and offices." Flathman argues a considerable chorus of theorists "have echoed the refrain that the directives . . . of authority are to be obeyed by B irrespective of B's judgments of their merits." (Flathman, 1980, as cited in Raz, 1986, 38) Thus, dissenters appear to be submitting themselves to the majority's judgment only to then discard it if it conflicts with their own.

disobedience it is supposed to justify: persuasive and justice-based. I now turn to some possible ways in which Dworkin might respond to these allegations.

§3. Dworkin's Reply

There are a few retorts available for Dworkin to justify that the requirements of justice are not bracketed by his working theory of civil disobedience. There are two ways in which he can motivate this claim.

First, insofar as fundamental issues of justice fall under the jurisdiction of the judicial branch, they do not come under the same type of disagreement that underpins other, more directly democratic, institutions and hence Dworkin's working-theory of civil disobedience. That is to say that Dworkin's working theory only brackets the rightness or wrongness of democratically issued laws. Second, Dworkin could claim that disobedience is only justified if it appeals to *widely shared* principles of justice (e.g., those that are at least minimally accessible to every rational agent or those embedded in the constitution) and hence, to some extent, are free from disagreement. For instance, though one may disagree with a pro-life activist's sabotage of abortion clinics it is their appeal to a widely shared principle of justice (i.e., the right to life) which justifies their coercive justice-based disobedience. This account would also justify a similar action by a pro-choice activist in light of their appeal to the right of personal autonomy. Illuminatingly and irrespective of their disagreement, both activists could still find the other's disobedience justified where they to place themselves in each other's shoes and yet neither would be necessarily exempt from interference nor punishment by the government.

In this way, principles of justice can still be appealed to for justifying civil disobedience. If any of these two hold then a dissenter may still refer to justice as a justification for their disobedience, henceforth remaining compatible with democracy and thus justifying justice-based disobedience.

The issue with these responses is that they exclude cases where the principles of justice are not (nor should be) free of controversy even when constitutionally determined or widely shared. This type of account would rule out disobedience that is motivated by progressive ideals that are not yet widely shared or might be at odds with the constitution. Disobedience that was motivated by abolitionism in the past (as with the Fugitive Slave Clause), or by cosmopolitanism now, are good examples. This problem is particularly salient given that civil disobedients are often at the forefront of a society's critical assessment of its own notions of justice e.g., in relation to the treatment of the environment or animals, which points to an additional issue. Looking at Dworkin's taxonomy of civil disobedience we may wonder why "x is unjust" (where x is a law) may justify disobedience whereas "x is harmful" cannot – given how the former may flow, in time, from the latter such as with animal ethics? If it is because justice and not harm is a ready-made constraint on democracy, couldn't disobedience oppose such distinction? Dworkin thus threads a fine if not impossible line by trying to

distinguish between a law's, policy's or program's justice but not its rightness.

§4. Conclusion

Ultimately, this paper has done two things. First, it showed that the right of civil disobedience is a weaker kind of right than other types of rights, perhaps not even a right as defined by Joseph Raz. Second, I've argued that Dworkin's working-theory of civil disobedience has inherent inconsistencies requiring further qualification. Dworkin is unable to trace a line between rightness and justice that would allow him to bracket one and not the other. I have criticized some possible ways in which Dworkin could argue that justice should be excluded. Regardless, I must grant that integrity-based disobedience has not been challenged at any point in the discussion, which means that, even if my challenge holds, there may be a right, though weak, to integrity-based disobedience. And thus, that there is a right to this kind of disobedience might also explain why conscientious objection has commonly been placed into a different category than civil disobedience.⁶

Works Cited

- Delmas, Candice and Kimberly Brownlee. "Civil Disobedience." *The Stanford Encyclopedia of Philosophy* (Winter 2021 Edition). <<https://plato.stanford.edu/archives/win2021/entries/civil-disobedience>>.
- Dworkin, Ronald. "Civil Disobedience and Nuclear Protests." *A Matter of Principle*. Cambridge: Harvard University Press, 1985.
- Dworkin, Ronald. "Taking Rights Seriously." *Taking Rights Seriously*. Cambridge: Harvard University Press, 1978. 184-206.
- Goodin, Robert E. "Civil Disobedience and Nuclear Protest." *Political Studies* 35.3 (1987): 461-466.
- Rawls, John. *A Theory of Justice*. Cambridge: Harvard University Press, 1999.
- Raz, Joseph. "A Right to Dissent." *The Authority of Law*. Oxford: Oxford University Press, 1979.
- . *The Morality of Freedom*. Oxford: Oxford University Press, 1986.
- Waldron, Jeremy. "A Right to Do Wrong." *Ethics* 92.1 (1981): 21-39.

⁶ Brownlee and Delmas "Civil Disobedience," §2.3