

Civil Disobedience, Moral Authority and Law

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Abstract

Civil disobedience is the violation of law in public that does not result in the loss of life or damage to property. The aim of civil disobedience is political change. John Rawls, Jurgen Habermas, Richard Rorty and Sheldon Wolin have separately differentiated civil disobedience; nevertheless they emphasize the "civil" dimension of civil disobedience over the "disobedience" one. This paper interrogates the "disobedience" dimension of civil disobedience and asks: (1) to what extent an individual may incite civil disobedience within a democratic state? And, (2) when does it become morally defensible to disobey a law? The paper reveals the Kantian associations, explains the relationship between morality and authority and moral authoritarianism, and analyses these concepts in terms of US law.

Keywords: Civil disobedience; Liberal democracy; Moral authority; Philosophy

Introduction

Civil disobedience in the literature

Disobedience is a state of deliberate refusal to follow a regulation or law. Disobedience may refer to State or religious laws and tenets. Disobedience may be moral or immoral and is contextually determined. Civil disobedience is a deliberate act that involves an illegal public act that does not result in the loss of life or damage to property with the aim of changing laws through violent or non-violent means. Self-immolation or hunger strikes are examples of civil disobedience only when they are done in public and for political causes. Public suicide does not count towards civil disobedience because of the loss of life. When a State law or religious tenet is perceived to be problematic, inappropriate or unsuitable to a person, that person's moral conscience is activated. The moral conscience drives the spirited person to protest through civil disobedience as a form of communicative action in the public sphere (after Habermas) or when "moral law defines moral right" [1] is a dystrophic form of communicative action [2]. The absence of trust in government will result in moral arguments being raised in private and public spheres against the immoral state [3]. The works of John Rawls, Jurgen Habermas, Richard Rorty and Sheldon Wolin reveal the Kantian principles underpinning civil disobedience [2,4-6].

The Kantian principles of civil disobedience link the law, moral authority and rationality. Hence Kant persuaded himself to re-create the moral foundations of that logical connection between morality and man through rationality and reason via the categorical imperative. Thomas Huhn's exceptional "The Kantian Sublime and the Nostalgia for Violence" remind us that there were two main kinds of judgments for Kant, one of taste and the other of the sublime [7]. Similar categories do not appear in the civil disobedience literature despite what Foot argued so convincingly in 1972 [8].

Intention

This paper addresses the bases of moral rights in civil disobedience and explains the moral assumptions made in sustaining such rights in modernity. It hopes to prove that there are moral bases of civil disobedience and that these moral bases determine the extent to which a person may or may not disobey the law in a public manner that does not result in damage to property or the loss of life.

Morality and Liberal Democracy

Morality is about right and wrong and taking a stand over what is good or bad. Authority is about the power to control, enforce, coerce, influence or determine outcomes for individuals, groups, communities and states in public and private spaces. Authority may be legitimate or illegitimate. But moral authority is always perceived as just, fair and rightful. To possess moral authority is to be in a position of power.

Moral authority is about taking action or making decisions based on moral rights. Moral rights may be biased towards particular belief systems. Such moral rights exist in liberalism, realism, classicism, critical theory, democracy or socialism.

The moral rights of a liberal would differ from the moral rights of a socialist even if both begin with different assumptions (even to the extent of holding that one person's moral right is his opponent's moral wrong) and premises but end with similar goals or consequences. When a liberal acts or behaves in a prescribed manner according to her or his own moral bases, she or he adopts a prescribed moral posture, a moral position, to make a moral claim, or to act in defence of moral rights. To live in a society where one is forced to accept the moral determinants of the majority is enslavement. That itself gives the moral slave the right to civil disobedience. The basis for rightful moral action (moral rectitude) is contingent on the kind of society in which such moral action takes place. If the moral society is democratic then specific kinds of moral behaviour emerge. Moral rights in a democracy that exist in opposition to moral wrongs within the same democracy for example are intolerant towards certain moralities but tolerant of others inasmuch as the moral toleration within a socialist state would object or cancel liberal democratic norms.

Most of the writers so far come out of the individual rights corner of the ring. But the reader should realize by now that the arguments that they have variously raised are part of the condition of modernity, and the experience of what it means to be alive in a democracy today as argued so eloquently by Hans Blumenberg in the *Legitimacy of the Modern Age* [6,9]. Within the domain of a liberal democracy, an individual whose right to freedom of speech is contravened or compromised by another may choose to incite civil disobedience against the state or society wherein such contravention had taken place. Scholars have forgotten that civil disobedience is not merely taking illegal public action. Civil disobedience also entails legal and moral obligations. Indeed this is why moral autonomy exists in civil disobedience. The individual dissenter within liberal democracies takes an autonomous moral stand when she or he makes a moral claim by being disobedient. Different Schools of Thought in political science view civil disobedience differently. A neoMarxist for example would argue that to disobey the state is to disempower the workers and to empower the agencies that extract the surplus value of labor [10]. A neoliberal would support punitive measures against civil disobedience [11,12]. Civil disobedience for liberals and libertarians would contend with libertarians about the moral “what” for the legal “which”, *quid pro quo* [13]. The literature on authoritative moral action itself is replete with examples in authoritarian states as well as liberal democratic ones. This is made possible because of the assumption that individual rights and civil liberties are inalienable and hence universal regardless of the type of state or the nature of its society. This is a characteristic of political ideology, that is to say, all moral claims made by ideologies are universal by nature and that a claim made on behalf of the one is a moral claim made on behalf of the whole. This is why a universal moral claim always appears smaller than the sum of its parts.

Opposing the Majority

To what extent then can an individual disagree, oppose or challenge the majority views in a liberal democracy? The answer is to the extent of not merely disagreeing, opposing or challenging the majority views but also questioning the social norms and legal assumptions of such a society. The logical extension to this line of questioning would be questions seeking whether the individual, regardless of state or society, possess rights to civil disobedience and if so what are the bases of such rights? The first one that we have seen is the ideological basis of moral claims. A liberal democrat would state that the inalienable human right to freedom of expression extends such rights beyond time, space and politics. As well as no end to the question of political ideology's persistence into late modernity. This is why there can be no end to the question of moral suasion within liberal democratic politics. This brings us to an important but neglected debate in moral philosophy, which is the distinction between moral authority and moral authoritarianism.

Moral Authority versus Moral Authoritarianism

The distinction between moral authority and moral authoritarianism is that the former refers to a legitimate right while the latter refers to an ideological imposition. Moral authority is the right to effect such courses of action, such as civil disobedience against authoritarian states or a state that imposes legitimate punishments for those who impede on the freedom of the next person to express their opinions (for example).

Moral authority cannot be legislated outside the democratic process, and neither can it be assumed to be an inalienable human right. This is

because the political space provided within democratic societies are created out of sets of ideals coming together to form porous democratic boundaries. Such spaces allow for the kinds of debates that arise within the politics of social order literature such as the one raised by Gerald Gaus and critiqued by Steven Wall.

Wall suggests that Gaus' the Order of Public Reasons and Gaus' concept of “public reason liberalism” that is founded on the premise where the former is grounded in the moral authority of public morality. He concludes that it is a quixotic quest to attain moral authoritarianism in modernity:

“Gaus has worked harder than anyone else to show how political arrangements in a modern society could be imposed without adopting the authoritarian stance. The failure of his efforts provides some reason for concluding that the quest for a thoroughly non-authoritarian politics, at least for the modern world, is misconceived” [14].

However, the agents of moral authoritarian are the first to reject allegations of moral dictatorship based on ideological grounds. Gaus' admission about idealistic attempts to attain a non-authoritarian ethos in modernity is a philosophical red herring designed to distract from the rancid Hegelian dichotomy in his thesis. Wall provides an accurate diagnosis of Gaus' public reason liberalism and its weaknesses but himself does not provide an alternative recourse to his own criticism.

The Nuremberg Trials present certain prosecutions where Wasserstrom observed that there might have been situations in which there were obligations to disobey the law [15]. One assumes that Wasserstrom was either taking the side of former Nazi officers who were wrongly prosecuted at Nuremberg, or taking the stance that these officers ought to have rejected or at least resisted regulations requiring the killing of Jews. The ambiguity of his writing was itself a testament to the emotion and fear that constituted the moral suasion of the period.

The evidence for understanding the location of morality in civil “disobedience” is in case law. Let us first examine the link between civil disobedience, morality and law.

Civil Disobedience and American Intelligence

Civil disobedience may be argued to be the “personal right to violate the law out of moral obligation” [16]. Dworkin's treatment of civil disobedience in 1968 provides three possible outcomes. Firstly, there are a minimum of two dimensions in civil disobedience: the legal dimension and the moral dimension. Secondly, social norms provide for the expectation that all laws will be equally applied to all persons, citizens, aliens and illegal aliens alike, within the sovereign United States. Thirdly, the Vietnam War experience related by Dworkin adds to the moral repugnance resulting from political interference into foreign states.

What right does the American state have to impose its political ideology on foreign states? It is a self-claimed moral right that arises out of the American desire to question the unquestionable, to put things right, and to ensure political change. One way was through the politics of intelligence.

The CIA was the result of various intelligence requirements that had been catalyzed by the successful Japanese attack on Pearl Harbor and Pearl City in Hawaii. Since the end of WWII, the CIA and its parent, the National Intelligence Agency (NIA) conducted many intelligence operations. These covert operations include Operation Mockingbird;

Operation Ajax and the post-Anglo-Iranian Oil Company (AIOC) scandal (1948-1953) with British MI6; "CIA Covert Operations in the Congo"; Operation Mongoose; the mechanisms behind the fall of the Shah of Iran from right-wing Islamicists led by the Ayatollah Khomeini. The CIA is documented for their intelligence and other operations (water-boarding and rendition operations that involve the illegal and secret transfer of prisoners from one location to another with the complicit cooperation of foreign states, for example, Singapore and Thailand). The CIA was also involved in supporting or destabilizing the following regimes: Sukarno; Marcos; the assassination of President Ngo Dinh Diem of the Republic of Vietnam (South Vietnam, 1968); the fall of the Shah of Iran (1948-1979); the loss of the U-2 Spy Plane over the Soviet Union; Bay of Pigs; El Salvador; Chile; the Church Investigations; Angola; Nicaragua approved by President Ronald Reagan; Guantanamo Bay Naval Base; Bagram Detention Centre, Afghanistan; and Abu Ghraib prison, Afghanistan for example [17-21]. When President Nixon was being vilified for the Watergate scandal, one of his comments was that "When the president does it that means that it is not illegal" [22]. In 1974, President Gerald Ford was asked by American reporters if it was alright to destabilize a constitutionally-elected government to which he replied that if it is done it is always done in the best interest of the country. In a series of hot wars across the globe, the US government and the US military has contravened many UN declarations, violated the human rights of foreigners, declared war without Presidential consent, propped up corrupt foreign governments, and experimented with drugs. American presidents like George Bush Junior in cahoots with UK Prime Minister Tony Blair misled the world and all their allies when they coined the phrase, weapons of mass destruction (WMD). Ironically, despite the US government's moral outrage with China's human rights records, it had forgotten that the bombs dropped on Hiroshima and Nagasaki was WMDs. Had the US government not bombed those two Japanese cities, thousands of Southeast Asian people and foreigners would have died. Japan needed to be punished in order to stop the war that they had begun. America was also trying to prevent the Soviet and Chinese enlargement of global communism. This might be one explanation that liberals provide for the American involvement in the Cuban Missile Crisis and the Bay of Pigs fiasco, the Korean War (1950) and the Vietnam War (1955-1975). How does one account for the abuse of legal and moral dimensions in these wars? How has the US government accounted for the atrocities to the American taxpayers? It is clear that had the US not intervened, the world might be in much worse shape – ideologically and economically – today than 60 years ago at the time of the Portstown Conference. Does the US only answer to a higher moral law or a greater universal calling that absorbs its actions in the Middle East, the Pacific, and all across the globe? How about the Japanese, Okinawan, Philippine, Thai and other women raped by US servicemen? Is there any ground for moral recourse? It is not true that the US is the only government that has committed moral, physical and other atrocities. It is part of the human condition that motivates it towards political violence. So it is not unique to the US. But the US has a moral duty to itself and to the world as the only Superpower today. Just like Political Theory has to take a stand and criticize the State for its swath of moral sins rather than hiding behind convoluted theoretical arguments that tend to centre on the works of brilliant but dead White men. Not every illegal act in public is civil disobedience [23]. Bedau goes on to explain that illegal acts that end in "endangering life and limb", destruction of property, and inciting to riot are not acts of civil disobedience.

More Disobedience

Civil disobedience is a form of protest in which protestors deliberately violate a law. Examples of civil disobedience include the conscientious objectors to the Vietnam War Draft [24], the Gulf War draft, and other so-called just wars perpetrated by American hawks [25,26]. Civil disobedience is considered an act that occurs in public but is a non-violent but deliberate breaking of the law with the view towards bringing about political change as demonstrated by John Rawls' Theory of Justice. Even though Rawls insists that justice is the first virtue of political society, he does accept the important place for morality and rational thought. However, for our purposes, the morality is the first virtue of the polity. Not justice or freedom. This is because without morality, justice, freedom, liberty and authority will all diminish over time. In 1966, Rucker criticized Prosch's 1965 account of the limits of civil disobedience – where he refers to African Americans as Negroes – as well as points to the so-called "subtle distinction between civil disobedience and defiance of the law (after Plato's *Crito* and *Apologia*)" [27], which for purposes of this paper is one and the same. Rawls defends civil disobedience within constitutional democracies as long as it supports his thesis on justice as fairness. He believes that it is a form of political action that when done with the aim of addressing the concerns of the majority eventually raises deeper questions about the social contract [28]. Almost thirty years earlier, in 1961, Bedau declared in the *Journal of Philosophy* that: "all civil disobedience involves illegal activity ... that such acts could not receive legal protection [and] there is no logical reason why every law could not have a rider to the effect that anyone who violates it on grounds of conscientious grounds shall be exempted from prosecution and penalty ... but the fact that no government is likely even to consider such a provision ... does not show any purely logical defect in extending this sort of legal protection to civil disobedience" [23].

Had Bedau considered the moral dimension of civil disobedience in his 1961 paper it may have made his argument convincing. This is especially clear when viewing the examples of moral-based or moral-driven acts of civil disobedience such as *Cherokee Nation vs. Georgia* as well as in *Worcester vs. Georgia*. In *Worcester*, Chief Justice John Marshall argued that there was a nation-to-nation relationship between the Indian Nations and the United States that included the right to deal with the Indian nations in North America to the exclusion of any other European power without the right of possession or political dominion over their laws. Such individual acts lead to important community or people power movements. Georgia law was unconstitutional because it prohibited Worcester (a non-Native American) from residing on Cherokee (Native American soil). Yet it was not so much that it was a case of civil disobedience that the Indian Nations had occupied lands that did not belong to them. Rather it was a moral consequence of the US Federal Law and the criminal justice system and Marshall's interpretation in *Worcester vs. Georgia* that was in question when Worcester broke the law in public, without loss of life, and for a rational reason as a frontiersman. In other words, it was a case in support of civil disobedience.

Equal Protection for Equal Rights

Equal Protection Clause of the 14th Amendment represents another large moral enshrined within the Constitution. All persons living within the laws of a state must treat all individuals in the same manner as others in similar conditions and circumstances. Equal Protection under the law has a moral basis. This is why it is applicable across a wide swath of state and federal laws. Equal protection refers to equality

of access, as well as equality of opportunity. The Constitution demands that not only do all persons have equality of opportunity but also equality of access to such opportunities. It is a moral good for states to provide equal protection under the law and a moral bad to not do so. Therefore, the Equal Protection Clause of the 14th Amendment also presents a case in support of Civil Disobedience if and only if an unconstitutional act such as the non-provision of equal protection by a state to an individual results in that individual taking public action against state laws in a rational manner than does not result in the loss of life or damage to property. The failure of the Equal Protection Clause to be borne out through the murky legal substrate would eventually be illustrated with *Plessy vs. Ferguson*.

Separate but inferior: The case of American law

Although ending in failure before the middle of the 20th century, *Plessy* did lay the groundwork for *Brown vs. Board of Education of Topeka*. *Plessy* appeared to have been created so that *Brown* could overturn that judgment. The overturning of *Plessy* unveiled a racial debenture that had been buried too deeply in early American culture (since before 1776) to have otherwise gone unnoticed. The *Brown* decision revealed the grossly inadequacy of the “separate but equal facilities” was inherently flawed from the onset. For example, in 2006, Birzer and Ellis argued that the *Brown* may have appeared to look like a case of racial segregation in the face of the Supreme Court’s “Separate but Equal doctrine”; but in reality, the case brought to light the immoral racial epitaph of *Separate and Inferior* inasmuch as there were separate toilet and bathing facilities for Blacks and Whites in the US Army pre-Korean War (1950) as well as separate living quarters for African American army officers from their non-African American counterparts. While Birzer and Ellis raise that important issue of racial segregation (as have many other scholars), they have ignored the moral dimension (like the other legal scholars). The “Separate but Inferior doctrine” was not merely about keep an inferior race apart and away from their social betters and their racial superiors. It was also about having to reconcile with a formerly slave community of racial inferiors who were believed to deserved inferior treatment, inferior food, healthcare and public resources. The critical envelop that was left out a decade ago by Birzer and Ellis was the moral basis of the *Separate but Equal* doctrine that would have demanded the importance of raising the issue of “Separate yet Inferior” argument to highest political levels [29].

In the pre-*Roe vs. Wade* era, when the state determined the morality of pregnant women, the basis for a religious person confronted with a decision about pregnancy would not be to obey the law but to obey the religion. A radical feminist from the same era or a non-believer in any universal religion (Judaism, Christianity, or Islam) would face a moral dilemma. If the radical feminist keeps her fetus her action may be interpreted as obeying the law which is a position that many feminists may not abide. But if the feminist decides to abort the fetus she would be in defiance of the law and would have to bear the legal consequences of disobedience not only for herself but also for the unborn child. She would also have to accept the social consequences of abortion especially when confronted with those who perceive that “a fetus is a person” [30].

The legal concept of Equal Protection Before the Law is again raised in *Roe*. The Supreme Court ruled that there was a Constitutional guarantee of access to abortion procedures for first trimester pregnancies. The case also raised questions about privacy, moral conscience, and abortion [31]. By the end of the hippy era, radical

feminists and any woman for that matter might find themselves in impossible circumstances; and subsequently condemned to suffer the consequences of their decisions. Official US surveys show that about 193,000 legal abortions were carried out across the country in 1971. Four years in 1977, the total number of legal abortions was 1.3 million. The impact was much larger than had been expected [32,33] and traversed well beyond feminist boundaries or conservative public policy resolutions [34-36]. *Roe vs. Wade* was only one of many Constitutional challenges that the Supreme Court faced in the 1970s.

Conclusion

This paper addressed the bases of moral rights in civil disobedience and explained the moral assumptions that were made in sustaining such rights in modernity. Moral bases of civil disobedience do exist and determine the extent to which a person may or may not disobey the law in a public manner that does not result in damage to property or the loss of life. Therefore the importance of civil disobedience is not merely an exercise in civil rights or an expression of personal rights against State wrongs but also the advertisement of the immoral bases of the laws that are being vilified and hence to muddy up conservative, still political waters. The point being made here is that civil disobedience is not defiance for the sake of rebellion or insubordination but for the sake of practicing democratic politics. For this reason, and for this reason alone, we can hypothesize that civil disobedience is potentially justifiable in a liberal democracy. And that laws or legislation based on questionable moral bases can and must be disobeyed.

But one needs first ask the question of whether a good law – such as a law ruling against rebellion – a law that holds the values and embraces the norms of the majority can ever become immoral, unjust and irrelevant? The answer to all three parts of that question is yes. Good laws can turn bad inasmuch as good intentions can turn sour. The “Separate but Equal” doctrine attempted to reconcile the importance of the equality of all men – and hence all rights held to be inalienable by all men in non-exclusive terms – with the political correctness and sensitivities of the day, i.e., the majoritarian view that while all men regardless of color had the same rights, it was the majority view that the two main races ought to be kept “separate” but “equal”. The civil libertarian view to this racial epithet of the 1950s and 1960s (it did not end there) was the that the “Separate but Equal” doctrine stood for equality of rights, and the separation of ethnicities on the surface but was also code for the imposition of white rights over non-white wrongs. While drawing on Rawls’ theory of justice as fairness, the Parks’ episode does not imply that those who take part in civil disobedience incontrovertibly accept the moral, social, political and legal consequences of their actions as seen in Rosa Parks’ refusal to move to the back of the bus in 1955 that demonstrated the moral indignation suffered by a people who refused to be pushed around any longer. This also means that the imposition of white morality was the critical subtext of the new Nation’s means of dealing with the political discomfiture of slavery, Blacks, and sharing of the politico-economic pie that many white folk believed to be theirs and theirs alone. The good intentions were therefore never good in the first place. Hence there it should always be assumed that any law no matter how tried and tested could and should be amended or outlawed. The question for legal theorists is when does one have sufficient moral grounds to amend, repeal or remove an offending law? The answer is that when the law is unjust for at least one citizen and deprives him or her of their right. Who should assume the moral right to judge whether or not a

law ought to be expunged is not a difficult question to answer but one that remains contextually dependent [37]. If you ask a legal scholar, she or he would attest to the use of a bank of legal experts. If you ask a politician, you may or may not get a useful answer but you can be assured of a certain response. Therefore it becomes irrelevant to determine whether or not a citizen (or an illegal alien for that matter) has transgressed a law through civil disobedience or whether her or his actions are morally justifiable or not. It becomes morally defensible for a citizen or an illegal alien to break the law, violently or otherwise, when the individual perceives that her or his own individual liberties are in question. Rawls own justice as fairness argument has been severely and severally criticized especially by those who are more politically conservative than he. Rawls' political conservatism led him to believe that civil disobedience had to be done in a public but nonviolent manner in spite of his claim that justice is the first virtue of a "politically organized society" [38]. Public reason alone, however, is necessary but not sufficient a condition for determining the outcomes of civil disobedience. In other words, neither the public nor the legal system can proscribe any individual or group from questioning, challenging, refuting or disobeying the law by means that are peaceful or violent. When does it become morally defensible to disobey a law? Bedau believed that "civil disobedience would vastly improve the quality of individual participation in public affairs" [23] but he was of course referring to the need for non-violent civil disobedience. In other words, peaceful protest that sometimes leads to greater policy inaction and political reticence: this merely results in fueling the public ventilation mechanism for venting social frustration. The system cools down the politics, and the process of conservatism continues. The Christian right shares common moral ground with Jews and Muslims. Therefore the moral dimension of a society is perhaps the most important determinant of political outcomes and all this arises because of the problem of the tyranny of the majority. There are moral and rational bases of civil disobedience. Civil disobedience should not result in damage to property, loss of income, or loss of life. One therefore must conclude that the categorical imperative of civil disobedience is necessarily a moral one. In all cases before the law, the question that has to be asked is whether the act of disobedience was morally compelling?

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