From Resistance to Dissent and Back: De- Constitutionalizing Civil Disobedience

Dear Political Theory Workshop participants,
Thank you so much for inviting me to present my latest research. This article is the first, very sketchy draft of an entry on “Civil Disobedience” for The Cambridge Handbook of Constitutional Theory (eds. Richard Bellamy and Jeff King). As such, it presents the lay of the theoretical land and only includes an original argument at the end. Still, I hope you’ll find it useful and interesting (I’m not aware of any other survey on civil disobedience and constitutional theory). I look forward to your feedback!

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Dissidents around the world are arrested, beaten, tortured, and jailed, for criticizing their state. Venezuela’s President, Nicolás Maduro, banned the country’s main opposition parties from taking part in the 2018 presidential election. Russia censors, imprisons and poisons journalists.¹ Chinese dissident Liu Xiaobo was in prison while the Nobel Committee awarded him the Peace Prize in 2010. In 2013, Egypt killed at least a thousand dissidents and jailed more than 16,000. These states are not only illiberal, but also ruled by arbitrary and abusive power, rather than by constitutional governments committed to the rule of law and accountable to their constituents.

Liberal states and constitutional governments, in contrast, are supposed to recognize and protect their subjects’ right to dissent, enshrining it in a founding document as a basic right that citizens have against their government. Thus the First


In 1991, the Union of Journalists of Russia established a Remembrance Day of Journalists Killed in the Line of Duty. It is observed on December 15 every year.
Amendment of the U.S. Constitution protects the rights to free speech, peaceable assembly, and petition for a redress of grievances. Constitutional governments may not abridge those basic civil liberties, though they may restrict the time and place of speeches, and their substance in very limited circumstances (e.g., incitement to violence, defamation, or treason).

The basic right to dissent does not solely protect thought and its verbal and written expression, but it also protects symbolic speech, such as the wearing of armbands and the burning of crosses in the U.S. What the basic right to dissent does not protect, however, as one often notes, is civil disobedience, that is, acts of lawbreaking deliberately undertaken in order to protest a law, policy, or institution. Martha Nussbaum, for instance, insists that it is “irresponsible” to “confuse… civil disobedience… with protected free speech.” On her view, which, I think, represents many officials’ and laypersons’ view, the civil disobedient must be willing to bear the burden of violating the law without trying to argue her speech-act was constitutionally protected. But this begs the question: How should a liberal and constitutional state—one that respects subjects’ basic rights—treat civil disobedients? This chapter presents some of the most prominent answers legal, political, and moral theorists have given to this question.

On what I’ll call punitive approaches, which I present in the first section, civil disobedience is first and foremost a breach of law—an act of resistance that threatens the constitutional order—and thus a public wrong worthy of punishment. Theorists of civil disobedience have challenged this approach since the 1960s,

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especially by conceiving of civil disobedience as speech: a kind of dissent that liberal
democratic societies ought to and can “make room” for. Section 2 examines
“constitutionalizing” approaches, which defend judicial leniency on the basis of civil
disobedients’ appeal to constitutional principles, and section 3 surveys
“accommodating” arguments, which argue for legal recognition of civil disobedience
on the basis of basic constitutional rights. Section 4 examines the costs of these
kinds of constitutional approaches to civil disobedience—their use to police the
proper boundaries of protests—and proposes to “de-constitutionalize” civil
disobedience, re-conceptualizing it and its uncivil counterparts as resistant
practices (rather than just speech) that can be justified even in liberal democracies.

1. Punishing civil disobedience

1.1. A threat to the rule of law

The case for punishing civil disobedience seems obvious. Civil disobedience
involves a breach of law, and lawbreaking ought to be punished. Why ought the
state to punish lawbreaking in general and civil disobedience in particular? One
answer applies generally to disobedience; another identifies the unique wrong of
civil disobedience.

According to a first argument, disobedience, be it criminal or civil, is wrong
and cannot be tolerated because it impedes states’ mission to establish law and
order, undermines the rule of law, and destabilizes society, both through example,
by signaling to others that anyone can disobey if they feel the urge; and in principle,
by expressing disrespect for law’s authority. The conscientious and principled
colorature of civil disobedience does not preclude its destabilizing tendency, on this
view. On the contrary, if everyone were to violate the law each time one finds it
unjust, society would be thrown into a disorder akin to the state of nature.
Disobedience, including civil disobedience, is thus conceived as a public wrong that
must be punished—a type of conduct to be condemned and deterred—in the
interest of protecting the legal and social order.

According to a second argument, civil disobedience in particular is a proper
object of punishment because of its anti-democratic nature: it flouts democratic
decision-making processes, and seems to involve agents putting themselves above
the law and imposing on the majority their own view of the good and just. This is
unfair—a violation of reciprocity—making civil disobedients akin to free riders,
since they exploit other citizens’ compliance with the law without doing their share.
Opponents further conceive of civil disobedience as a kind of civic blackmail, insofar
as a minority, who happened to have lost in the democratic game, disregards
democratic processes and coerces the majority.

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3 Supreme Court Justice Abe Fortas viewed civil disobedience, which he only
referred to as “open lawlessness” (thereby suggesting that), as a great societal
menace and one of the gravest “dangers to the rule of law,” thereby suggesting that
civil disobedients’ openness could be worse than criminals’ covert lawbreaking in
being more disrespectful and provocative. Abe Fortas, “Dangers to the Rule of Law.”
American Bar Association Journal 54, 10 (1968): 957-959. As we’ll see in the next
section, Fortas also turned out to be a judicial ally to civil disobedients.
Such free riding and civic blackmail further speak to civil disobedients’ “arrogance” and “moral self-indulgence.” Justice John Paul Stevens expressed this sentiment in a 1971 case involving the religiously motivated burning of draft registration cards in protest against the war in Indochina:

One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decisionmaking. Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.

Civilly disobedient agents accord themselves a larger say in public matters, objectionably taking the law into their own hands and making themselves an exception to prevailing rules. Civil disobedience betrays a kind of arrogance because it appears like an assertion of moral superiority and misplaced sense of entitlement, a way to say, “I know better than everyone else what is right and wrong.” It is wrong, and deserves punishment, because it neglects both the constitutional ideal of the rule of law and the democratic ideal of lawmaking as a collective enterprise.

This argument from the anti-democratic nature of civil disobedience only works in liberal democracies, which provide citizens with meaningful opportunities to dissent and to seek legal reforms when they oppose particular democratic outcomes. So civil disobedience is both morally and legally impermissible where one can dissent lawfully, given the alternatives; and it is morally (albeit not legally)

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5 United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971).
permissible in illiberal states that fail to recognize and protect subjects’ basic right
dissent. This is critical from a constitutional perspective, as it explains why civil
disobedience is not protected free speech and doesn’t deserve any special
constitutional protections: citizens already have sufficient opportunities to express
their own political views, air their grievances, and petition their government
through lawful channels. They can vote, organize, run for office, demonstrate, appeal
in court, etc. In France, any defendant concerned about the constitutionality of what
they perceive to be an unjust law, can submit a complaint to the Conseil
Constitutionnel (the French equivalent of the Supreme Court) via the “question
prioritaire de constitutionalité.” The punitive approach is thus premised on the
availability of lawful avenues for dissent and an understanding of civil disobedience
as resistance (bypassing or throwing wrenches into the democratic system) rather
than as another way of dissenting.

In the U.S., an appellate court faced with defendants who had seized and
intended to destroy registration cards from a Selective Service office (they were
convicted of “willfully and knowingly attempting to hinder and interfere with the
administration of the Military Selective Service Act of 1967 by force, violence, and
otherwise”) declared:

We counsel only that the fabric of our democratic society is fragile, that there
are broad opportunities for peaceful and legal dissent, and that the power of

6 (Raz 1979)
7 https://www.conseil-constitutionnel.fr/decisions/la-qpc
the ballot, if used, is great. Peaceful and constant progress under the
Constitution remains, in our view, the best hope for a just society.\(^8\)

The state’s general position—as voiced by officials and judges—unsurprisingly, is
that laws can only be altered through the democratic process, however slow and
ponderous the latter may be, and that any unlawful attempt to bypass this process
endangers democracy.

1.2. Accepting punishment

A proponent of the punitive approach does not have to deny the value and
potential moral justification of civil disobedience in order to maintain a punitive
stance. One can deem civil disobedience a public wrong, while appreciating its social
benefits—its role in bending the proverbial arc of the moral universe. Justice Abe
Fortas wrote in 1968:

I am a man of law... But if I had lived in Germany in Hitler’s days, I hope I
would have refused to wear an armband, to Heil Hitler, to submit to
genocide... If I had been a Negro living in Birmingham or Little Rock or
Plaquemines Parish, Louisiana, I hope I would have disobeyed the state law
that said I might not enter the public waiting room reserved for "Whites." I
hope I would have insisted upon going into the parks and swimming pools
and schools which state or city laws reserved for "Whites." I hope I would

\(^8\) United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972).
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have had the courage to disobey, although the segregation ordinances were presumably law until they were declared unconstitutional.9

As this passage makes clear, Fortas doesn’t advocate blind obedience to law. He admires the courage of those who refuse to comply with gravely unjust law and even deems the latter a moral duty. His goal in Concerning Dissent and Civil Disobedience is to reconcile the state’s need of every subject’s “obedience to law” (for its rights-preserving function) with the “equally basic need to disobey” (not just dissent from, but resist) unjust laws. Disobeying unjust law is a moral obligation, while complying with the law is our primary legal obligation. Fortas claims that the two can be reconciled through the civil disobedient’s acceptance of punishment, which marks her respect for the rule of law, where her disobedience otherwise suggests contempt. “Non-evasion,” as I dub it, requires that agents be willing to bear the burdens of their lawbreaking, and accept arrest, prosecution, and punishment without complaint.10

But as Terrance Sandalow argues in his review of Fortas’s book, the thesis that non-evasion successfully reconciles these moral and legal obligations is on shaky ground, given the deep tension, if not outright inconsistency, between the

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10 Elsewhere I identify five different attitudes that fall under the label “non-evasion”: (i) willing submission to arrest and prosecution, (ii) guilty plea in court, (iii) no appeal to criminal defenses, and (iv) no complaint for the punishment received (assuming, in a non-question-begging way, if possible, that it is not excessive). Candice Delmas, “Civil Disobedience, Injustice, and Punishment,” in The Palgrave Handbook of Applied Ethics and the Criminal Law, Kimberley Ferzan and Larry Alexander (eds.), Palgrave Macmillan, forthcoming. The state’s treatment of civil disobeidents suggests it expects all four elements; and some theorists may be read as supporting all four, too, while other theorists only require (i) willing submission to arrest and prosecution.
justification of particular acts of civil disobedience and the legitimacy of punishing those.\textsuperscript{11} First, Sandalow notes, the conflict is not between a moral and a legal obligation but between two moral duties: the duty to obey the law is conceived as a moral requirement, not a merely legal one, and Fortas himself recognizes that disobeying unjust law can be a moral duty. In addition, in punishing the civil disobedient, the state communicates that she ought not have disobeyed. But if the balance of moral reasons weighs in favor of disobeying rather than obeying the law, then there is nothing to condemn and the state ought not to punish her. Punishing justified civil disobedience thus raises a serious moral problem.

Champions of the punitive approach respond that even if particular acts of civil disobedience can sometimes be justified, a constitutional government ought not try to distinguish between justified and unjustified civil disobedience. It should instead rule through and by law, applying the law impartially. Erwin Griswold argued that:

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it is of the essence of law that it is equally applied to all, that it binds all alike, irrespective of personal motive. For this reason, one who contemplates civil disobedience out of moral conviction should not be surprised and must not be bitter if a criminal conviction ensues... organized society cannot endure on any other basis.\textsuperscript{12}
\end{quotation}
\end{quote}

In short, all civil disobedients ought to accept (willingly, with no “bitterness”) arrest and punishment, as a matter of fidelity to law.

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The constitutional principles of respect for the rule of law and impartiality thus undergird arguments in favor of the state’s punishment of civil disobedience and agents’ duty to accept it. The punitive approach is clear: civil disobedience is constitutionally intolerable (albeit occasionally morally justified) type of resistance and it is always appropriately punished.

2. Constitutionalizing civil disobedience

On a Saturday in March 1964, Henry Brown and four other African-American members of CORE (Congress of Racial Equality) entered the whites-only Audubon Regional Library in Clinton, Louisiana. Brown requested to borrow Booker T. Washington’s *The Story of the Negro*. After the librarian informed Brown that the book was not available at this branch, the men sat down in silence and refused to leave when asked to. The five men were arrested and found guilty of breach of the peace. The Louisiana Supreme Court refused to hear the men’s legal appeals, so the case went all the way to the U.S. Supreme Court, which reversed the convictions in 1966.

Writing for the majority, Justice Fortas stressed that First Amendment rights “are not confined to verbal expression, but embrace other types of expression, including appropriate silent and reproachful presence, such as petitioners used here.”13 The state’s interference with this right to peaceable and orderly protest, he noted, was “intolerable under our Constitution.” The *Brown v. Louisiana* Court

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reaffirmed what the Civil Rights Act of 1964 had already established: that all individuals had the right to equal use of public facilities with no discrimination on the basis of race. What was groundbreaking, however, was the notion that sit-ins were a kind of speech that the government ought not to unduly interfere with.

Until then, sit-ins had been seen as a coercive tactic. They were central to labor sit-down strikes in the early 20th century. The United Auto Workers adopted the tactic in the 1930s, following the example set by the International Workers of the World, and shut down big factories in Flint, Michigan, and elsewhere.¹⁴ Activists from the labor movement brought the sit-in over to the civil rights movement after World War II, particularly via the Highlander Institute. Philosophers followed suit and re-conceptualized civil disobedience as speech, rather than coercion or resistance.¹⁵ This move, combined with the tripartite distinction between civil, criminal, and revolutionary disobedience, opened a space for civil disobedience in constitutional liberal democracy, thus paving the way for “constitutionalizing” approaches (the “accommodating” approaches I present in the next section also “constitutionalize” civil disobedience).

2.1. Civil disobedients’ appeal to constitutional principles

Philosophers highlighted the following differences between civil, criminal, and revolutionary disobedience. In contrast to criminals, who typically break the law covertly and for self-interested reasons, civil disobedients break the law

¹⁵ Complete speculation; I have no idea of the origin of this idea and direction of influence but I assume academics were picking up on things they’d read in the media (including activists’ own words and court rulings).
publicly, openly, and with the non-selfish intention of persuading the public to change certain laws or policies. Revolutionary actors, like civil disobedients, are moved by moral and political principles to break the law; and they, too, often seek to address the community. However, revolutionaries share with criminals their willingness to use violence and their evasion of punishment, whereas civil disobedients are committed to nonviolence and willing to accept punishment. John Rawls captures the importance of this civil self-restraint by stressing that civil disobedients act “within the limits of fidelity to law.” Because of this, civil disobedience, and only civil disobedience, can have a place in constitutional liberal democracy: civil disobedients are supposed to accept (while criminals and revolutionaries reject or don’t care about) the legal system’s legitimacy, and thereby to manifest respect for the rule of law, where criminals and revolutionaries show none.

Civil disobedience, then, contra the punitive arguments rehearsed above, does not necessarily destabilize society nor flout democratic ideals. To the contrary, by taking part in constitutional disputes, civil disobedients contribute to the vigor of democratic institutions and strength of the rule of law. John Rawls and Ronald Dworkin represent two prominent champions of this constitutionalizing approach.

According to Rawls, civil disobedients seek to persuade the majority that injustices such as violations of basic liberties are occurring and need to be rectified. Civil disobedience is a speech act, a plea for reconsideration. Its civility is crucial to

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17 Habermas, too, but…
its transparency as speech: the disobedient act must be nonviolent because violence would obscure its communicative nature; and it must be public, that is, done in the open and without hiding the agent’s identity, addressed to the public, and (just like politicians arguing in the public sphere) appealing to widely endorsed constitutional principles. These constitutional appeals are key to constitutionalizing civil disobedience. Martin Luther King, Jr.’s arguments from divine law, Rawls contended, should in fact be read as appeals to the “political values expressed in the Constitution”; and civil rights activists in general ought to be seen as engaged in constitutional, i.e., basic political, disputes. Civil disobedients contribute more speech, more reasons, to public debates over basic matters of justice, and thereby improve their justice and strengthen the health and stability of liberal democratic societies.

Where Rawls thinks of civil disobedients as concerned and engaged citizens, Dworkin analogizes them to Supreme Court justices. Like judges, civil disobedients engage in disputes over how best to interpret and apply certain constitutional principles, and contribute in that way to “law’s integrity.” On his view, principled disobedience, when the law’s validity is doubtful, is constitutionally acceptable.

Dworkin insisted on the breadth of this constitutional opening for civil disobedients:

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18 Dworkin’s theory of law demands judges articulate the best justification of their community’s legal practices. Law as integrity, the particular theory that fits the U.S. legal system, requires constructing an interpretation of law as structured by a coherent set of principles of justice and fairness.

19 Dworkin is interested in conscientious objection as well as civil disobedience—the two, on my account, are subsets of “principled disobedience.” See Candice Delmas, A Duty to Resist: When Disobedience Should Be Uncivil, Oxford University Press: New York, 2018, chap. 1. However, the kind of conscientious objection Dworkin discusses, such as draft evasion, is engaged in by masses of people who
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Doubtful law is by no means special or exotic in cases of civil disobedience. On the contrary. In the United States, at least, almost any law which a significant number of people would be tempted to disobey on moral grounds would be doubtful—if not clearly invalid—on constitutional grounds as well. The constitution makes our conventional political morality relevant to the question of validity; any statute that appears to compromise that morality raises constitutional questions, and if the compromise is serious, the constitutional doubts are serious also.20

Civil disobedients, then, do what judges do: they challenge the constitutional validity of law they perceive as unjust. This includes criticizing court decisions on the matter (the fact that, say, the Supreme Court has settled a constitutional issue doesn’t place dissent out of bounds—Dworkin here seems to flirt with popular constitutionalism). Such challenges are not only constitutionally permitted but they are invited, since they help make law even more faithful to the principles of justice and fairness that justify it. In short, constitutional challenges to law yield better, more just outcomes over time.

In his writings from the late 1960s and early 1970s, Dworkin illustrated his arguments with the anti-Vietnam War and anti-draft resistance.21 Vietnam War also publicly protest the object of their disobedience, thus blurring the distinction between conscientious objection (which is supposed to be private and personal) and civil disobedience (necessarily public) and warranting reference to civil disobedience simpliciter.

20 Dworkin, “On not prosecuting civil disobedience.”
dissenters argued that the declaration of war did not pass constitutional muster; that the U.S. government was committing war crimes in Vietnam; that the draft discriminated against the economically underprivileged by exempting college students; and that laws that made it a crime to counsel draft resistance abridged freedom of speech. Many civil disobedients did not see themselves as engaged in disputes about law's validity and conceived of their actions outside the constitutional framework. Dworkin nonetheless encouraged lawyers (and pundits and the public) to reconstruct their moral claims through a legal and constitutional lens. This kind of constructive interpretation (a hallmark of Dworkin’s theory of law) would be crucial not only to bettering the law, but also to defending particular disobedients in courts of law.

2.2. Constitutional governments’ treatment of civil disobedience

Dworkin constitutionalized civil disobedience in another way, which prefigures some of the accommodating approaches we’ll examine in the next section. He argued that forcing citizens to obey court decisions would mean forcing them to do something their conscience forbids them to do. And he thought this applied to Supreme Court decisions just as well. Against this view, one might think, as Nussbaum has recently argued, that while Paul O’Brien and other dissidents might have believed in good faith that their First Amendment rights protected their right to burn their Selective Service registration cards in protest, they could no longer make this case once the Supreme Court had settled the question (negatively)
in *U.S. v. O'Brien*. But Dworkin refused to make the constitutional buck stop at the Supreme Court, in part because of his belief in the value of constitutional disputes, and in part because of the constitutional imperative to respect individuals’ freedom of conscience (or “right to conscience,” anchored in dignity and political equality). Dworkin argued that citizens should continue to follow their own judgment about doubtful law, regardless of higher courts’ decisions about the matter. To the charge that such course of conduct would violate fair play and the rules of the democratic game, Dworkin responded that, well-understood (i.e., putting them under their best light), our social and legal practices permit and encourage citizens to follow their own judgment when the law is unclear. Requiring them to obey the law against their moral conscience would impose an undue burden on them. Existing conscientious objection exemptions for religious pacifists recognized this burden, although legislators and judges had failed to realize that the same burden weighed on those who conscientiously objected to the Vietnam War in particular rather than to all wars, and on non-religious moral grounds.

[Put Dworkin on the weak right here]

What did constitutionalizing approaches like Rawls’s and Dworkin’s practically imply? Rawls said very little about these implications, besides briefly gesturing toward judicial leniency:

> Courts should take into account the civilly disobedient nature of the protester’s act, and the fact that it is justifiable (or may seem so) by the political principles underlying the constitution, and on these grounds reduce

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and in some cases suspend the legal sanction. [Rawls references Dworkin’s 1968 “On Not Prosecuting Civil Disobedience” in a footnote here] Yet quite the opposite may happen when the necessary background is lacking. We have to recognize then that justifiable civil disobedience is normally a reasonable and effective form of dissent only in a society regulated to some considerable degree by a sense of justice.23

Before turning to Dworkin’s much more elaborate view on the matter, let me briefly dwell on the last two sentences of the passage. In response to the charge that Rawls’s theory of civil disobedience is excessively demanding, scholars often stress that he “designed [it] only for the special case of a nearly just society, one that is well-ordered for the most part.”24 This is supposed to open up to a more permissive account of justified dissent and resistance in less-than-near-just societies. Rawls never sketched the latter account, though he did note that “militant action and resistance, as a tactic for transforming or even overturning an unjust and corrupt system” posed no special “difficulty.”25 As the passage above indicates, however, it isn’t the case that civil disobedience does not raise any issue in less-than-near-just societies. Rawls was concerned with the turn to civil disobedience in a society that was not ordered by defective principles of political morality or in which citizens’ sense of justice was not well developed, deeming the “wisdom of civil disobedience

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24 Rawls p. 319.
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[under such circumstances] highly problematic.”26 Agents should not engage in civil disobedience unless they had reasons to think they could succeed. Prudence (or phronesis) counseled other tactics in such contexts, including perhaps less disruptive ones.

Where Rawls suggested that only justifiable civil disobedience should benefit from judicial leniency, Dworkin did not make the state’s treatment of civil disobedients depend on the normative justification of their acts. He defended individuals’ weak right to break the law, based on the right to conscience, and anchored in respect for “human personality” or dignity, that would pave the way for some of the legalizing approaches we’ll examine in the next section. This right to disobedience is a right in the sense that one “does the right thing to break the law, so that we should all respect” the agent when she follows her conscientious judgment about doubtful law, but not in the strong sense that the government would do wrong to stop her.27

The right is thus compatible with the state’s right to punish and the agent’s duty to accept punishment. Dworkin gave two main reasons against a blanket right or immunity against punishment: First, “that would paralyze the government’s ability to carry out its policies,” since the state’s law enforcement function requires the ability to prosecute and punish lawbreakers.28 Second, “if the state never prosecuted, then the courts could not act on the experience and the arguments the

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26 Rawls TJ 339. My emphasis.
27 Dworkin, TRS supplement NYRB.
28 Ibid.
dissent has generated.”\textsuperscript{29} That is, immunity for principled disobedients would jettison the constitutional benefits to law’s integrity mentioned earlier, and which require a courtroom to be realized.

Along with this right to punish, however, the state also has a \textit{responsibility of leniency} toward all principled disobedients (civil disobedients and conscientious objectors alike), according to Dworkin: “Our government has a special responsibility to try to protect him [the citizen who follows his own judgment in the face of doubtful law], and soften his predicament, whenever it can do so without great damage to other policies.”\textsuperscript{30} Leniency sometimes meant not prosecuting civil disobedience at all, depending on the balance of reasons, including individual rights, state interests, social costs, and constitutional benefits. Importantly, he deemed reasons for prosecuting in any particular case “practical,” not intrinsic or deontological ones, and always potentially defeasible. In general, prosecutors should not charge disobedients with the most serious offenses applicable and judges should give them light sentences.

Finally—and prior to its treatment of civil disobedience—a constitutional government has a duty to protect citizens’ rights to conscience and free speech. For Dworkin, a government that professes to recognize individual rights “must not define citizens’ rights so that these are cut off for supposed reasons of the general good.”\textsuperscript{31} That is, a government can never make it illegal for people to speak their mind, even for the sake of the ‘general interest’ (say, in order to protect from threats

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\item \textsuperscript{29} Ibid.
\item \textsuperscript{30} Dworkin, “on not prosecuting civil disobedience”
\item \textsuperscript{31} Dworkin 1970 TRS
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of violence that the speech may indirectly incite). Dworkin thus argued that Vietnam War dissidents had a moral right to break the laws banning draft resistance advocacy, because they retained their right to free speech, in contravention of the law. ...

To recap, liberal political philosophers sought to “constitutionalize” civil disobedience—to make sense of this type of conscientious noncompliance within, and not outside, the constitutional framework. Yet at the same time as they opened up this constitutional space for civil disobedience, they placed out of its bounds civil disobedience over matters other than constitutional principles. For instance, Rawls argued that certain issues of justice, such as economic inequalities, were not appropriate targets of civil disobedience, because they would not be seen as clear and blatant injustices (unlike, say, racial segregation). His account also rules out protests in defense of animal rights or in pursuit of global labor justice for the same reason. In turn, Dworkin ruled out nuclear activism from the realm of justifiable civil disobedience because it centered on policy, not constitutional questions, and didn’t appeal to fundamental principles of political morality, but instead turned on the expected nefarious consequences of adopting certain policies.32

Later theorists thus sought to take the work of these constitutionalizing approaches further by removing what appeared as arbitrary boundaries on justifiable protests and paving the way for legally accommodating civil disobedience.

32 (Goodin contra Dworkin, Singer contra Rawls).
3. Accommodating civil disobedience

Many take for granted that civil disobedience cannot be legalized. It seems, first of all, like a contradiction in terms: how could there be civil disobedience if civil disobedience is legal? Second, legalization would take away the visibility that civil disobedients seek to attract through their arrest and prosecution. Third, it would take away their opportunity to demonstrate their sincere commitment to the cause and respect for law through their willing acceptance of civil disobedience’s costs. Fourth, it would lead to chaos, both through proliferation of civil disobedient protests, and by inviting frivolous and excessively disruptive protests. Fifth, it would betray civil disobedience’s true nature: according to Albert Ogien, civil disobedience cannot be legislated because of its doubly “savage” nature: “it is designed to expose democracy’s limitations, spontaneously, under emotional impulse and in an uncontrolled way.”

Therefore, to legalize civil disobedience would be to eliminate the conditions for its possibility or effectiveness.

However, what some theorists have come to advocate is not legalization of civil disobedience in the sense of removing the possibility of arresting and prosecuting civil disobedients. Rather, like the constitutionalizing approaches just examined, what I’ll call the accommodating approaches (after William Smith’s use of

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“Plaider pour la légalisation de la désobéissance civile et en faire une activité organisée et reconnue, à l’image d’un lobby, revient à ignorer sa nature ou sa vocation qui est de dévoiler les limites de la démocratie et de le faire à l’improviste, sous le coup d’une émotion, de façon sauvage. Car telle est sa nature et tel est son prix. Unique.”
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the term to describe his own conception) seek to *legally recognize* civil disobedience as a special category of action, much like conscientious objection. In addition, they defend a general presumption against punishment of, and in favor of communicative engagement with, civil disobedients (the seeds of which proposal are present, but not developed, in constitutionalizing approaches). Arendt goes the furthest by conceiving of civil disobedients as lobbyists for the people, whose appeals legislators should listen to in a forum especially designed for that purpose.

The first three of the five objections I just mentioned stem from a misunderstanding of what accommodating civil disobedience would involve: legally recognizing civil disobedience as a special category and hearing out actors does not mean ignoring civil disobedients’ breach of law and not calling them to account. Let’s examine more closely the accommodating approach. [NB: I need to significantly trim down this section.]

### 3.1. **The right to civil disobedience**

Accommodating approaches like Brownlee’s, Lefkowitz’s, and Smith’s (but not Arendt’s) defend a moral right to civil disobedience, which is independent of the justification of particular exercises of this right and of the positive value of civil disobedience in general, and which entails a presumptive claim-right against censure and punishment.\(^\text{34}\) The right to civil disobedience is conceived as a liberal right of conduct. Just as the right of free speech protects illiberal and offensive speech, not just “good” speech, so the right to civil disobedience (presumptively)

\(^{34}\) (Lefkowitz 2007; Brownlee 2008; Smith 2013) To say that the right against punishment is presumptive is to recognize that there may be weighty countervailing reasons to punish or penalize civil disobedience. See infra.
protects civil disobedients who pursue illiberal, undemocratic or otherwise problematic causes from punishment, and not only those engaged in justified civil disobedience.

As we saw earlier, Raz argued that the moral right to civil disobedience, which he understands as a right to “reclaim political participation,” only arises in illiberal regimes, since liberal regimes are identified by their basic legal protection of political participation rights. William Smith and Kimberley Brownlee have raised several persuasive objections against Raz’s regime-centric view. First, Raz appears not to allow those whose political participation rights are otherwise respected to civilly disobey in solidarity with members of oppressed minorities. Second, he unduly limits the goals of civil disobedience to attempts to reclaim one’s participation rights, thereby excluding a whole range of causes, from immigration restrictions to environmental issues. Third, by defining civil disobedience as a reclaiming of political participation rights where one is deprived of it, Raz seems to make its exercise always justified, thereby obviating the point of a right to civil disobedience, which would permit its unjustified exercises too.

More recent philosophical accounts of the right to civil disobedience remedy these flaws. David Lefkowitz, like Raz, grounds the right in political participation but finds that it arises in liberal, not just illiberal, societies. This is because, well understood, the right to political participation extends beyond legal methods, given the way democratic politics works: on the one hand, there is the need for collective action, which entails that, at some point, the debate must stop and a vote must be

35 (2017, 13-14)
taken; on the other hand, democratic losers “may justifiably complain that, had there been further time for debate and deliberation, or had they enjoyed greater resources for the dissemination of their arguments, their own (reasonable) views might have won majority support.”

In recognition of this fact, Lefkowitz argues that the moral right to political participation is not limited to the right to participate in the decision-making process by voting, but that it includes “a right to continue to contest the decision reached by such a process after the fact by a variety of means, including suitably constrained civil disobedience.” The right to civil disobedience is embedded in Lefkowitz’s conception of political obligation as a disjunctive “duty to obey the law or engage in civil disobedience.”

Brownlee, for her part, extends the right to civil disobedience to everyone in liberal democratic societies (not just democratic losers) and grounds it in the “principle of humanism,” which says that “society has a duty to honor the fact that we are reasoning and feeling beings capable of forming deep moral commitments.” For the state to properly honor our rational and moral capacities, in Brownlee’s view, it must recognize “the overly burdensome pressure that society and the law place on us when they coerce us always to privilege the law before our deeply held moral convictions.” That is, society ought to allow principled persons who find themselves burdened by law’s demands to freely disobey these on the basis of their conscientious convictions.

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36 (Lefkowitz 2007, 213)
37 Ibid.
39 Brownlee p. 7.
40 Brownlee p. 144.
But precisely: liberal societies already do this to varying degrees—but not for civil disobedience. Conscientious objectors benefit from some substantial protections and are often exempt from complying with rules and orders that conflict with their moral conscience. For instance, the German Constitution, among many other countries’ constitutions, provides that “No person shall be compelled against his conscience to render military service involving the use of arms.”41 Most countries that provide reproductive healthcare services such as contraception and abortion have enacted “conscience clauses” to grant healthcare professionals the right to conscientiously refuse to provide such services.42 Forty-eight states in the US permit parents to refuse to immunize their children for “nonmedical” reasons, on the basis of religious belief; and twenty states among those permit exemptions based on nonreligious personal convictions, such as the conspiracy theoretic beliefs that animate “anti-vaxxers.” This kind of deference toward conscientious objection—and indeed this loose and permissive understanding of conscientious objection itself—is usually justified by appeal to the respect owed to individuals’ conscientiousness and the recognition of the moral and psychic burdens of complying with law that goes against one’s beliefs.

Brownlee’s central argument in Conscience and Conviction is that that civil disobedience is in fact more conscientious than conscientious objection, given the features that make conscientious acts of disobedience worthy of protection. Conscientiousness or “conviction,” in her account, is a descriptive property that

41 Article 4(3) of the German Constitution.
42 The use of conscientious objection in reproductive health care is prevalent, for instance, in Italy, Poland, Slovakia, the United States, Mexico, and South Africa.
designates sincerely held, though possibly erroneous, “communicative” moral commitment. When we have a conscientious conviction that something is wrong, on Brownlee’s view, we must (a) avoid the conduct in question to the best extent that we are able; (b) judge such conduct in others to be wrong as well; (c) be willing to bear the risks of honoring our conviction and (d) to communicate the reasons that we think justify our conviction to others. These four elements—consistency, universality, non-evasion, and dialogue—form the core of the “communicative principle of conscientiousness,” itself at the heart of civil disobedience.43

Civil disobedience, which Brownlee understands as a “deliberate breach of law taken on the basis of steadfast personal commitment in order to communicate our condemnation of a law or policy to a relevantly placed audience” is an essentially communicative practice.44 In contrast, conscientious objection is often private, and doesn’t typically involve a judgment that everyone should abstain from the conduct in question. Brownlee thus reconceptualizes conscientious objection as “personal disobedience” in order to underscore its generally private nature and eliminate the connotation of superior conscientiousness (to the extent that conscientious objection is communicative, it is appropriately conceived as civil disobedience). Insofar as efforts to engage with others about our deep commitments through open and constrained law-breaking are more worthy of protection than private and evasive acts of disobedience, Brownlee argues that civil disobedience

43 Distinction Brownlee’s non-evasion ≠ mine. Conviction also referred to as ‘conscientious conviction’ and ‘conscientiousness’.
44 Ibid. p. 18. In fact, it’s about the willingness to communicate rather than actual communicativeness: covert acts of disobedience count as civil, on Brownlee’s view, so long as their agents are willing to justify them.
deserves more protection than personal disobedience does. What kind of protections does it deserve?

3.2. Practical implications

Officials at all levels have the discretion to not sanction civil disobedients. Just as prosecutors have the discretion not to press charges against civil disobedients and judges have the discretion to dismiss charges or acquit civil disobedients on trial, so the police have no obligation to arrest protesters when they commit minor violations of the law. As the Burlington police chief noted the day after University of Vermont student protests, “blocking traffic is a violation of the law that police officers have the discretion to enforce based on their experience, judgment and the totality of the circumstances.”45 He justified his department’s decision not to make any arrests that day thusly: “When the reason people are blocking traffic is to engage in political protest on matters of great interest to the community, officers are required to be judicious in the use of their powers to remove protesters from the road.”

In this vein, Smith’s accommodating approach includes a “policing philosophy,” which orientates law enforcement strategies toward accommodation rather than prevention or management of civil disobedience. His account is all the more interesting that theorists of civil disobedience have all but neglected the question how law enforcement (and not just courts) should treat civil disobedients.

On Smith’s view, “the police should, where possible, cooperate with civilly disobedient activists in order to assist in their commission of a protest that is effective as an expression of their grievance against law or policy” (Smith 2013, p.111). Accommodation requires communication channels between police and activists and involves strategies such as pre-negotiated arrests.

A state committed to recognizing and respecting the right to civil disobedience would also have to reform part of its criminal laws. Brownlee proposes, first, to make available a “demands-of-conviction” defense to all (personal and civil) disobedients. This excusatory defense would allow defendants on trial to point to the deep and sincere reasons they had for believing they were justified in acting the way they did. Second, Brownlee proposes to extend the necessity defense to some civil disobedients who act in defense of “non-contingent basic needs” (needs that the being must have for continued survival as the kind of being it is). The necessity defense as it is codified in law grounds the non-imposition of criminal liability for defendants who can demonstrate that they violated the letter of the law in order to prevent imminent grave harm. According to Brownlee, states should accept necessity as a justificatory (exculpatory) defense for civil disobedience would also have to reform part of its criminal laws. Brownlee proposes, first, to make available a “demands-of-conviction” defense to all (personal and civil) disobedients. This excusatory defense would allow defendants on trial to point to the deep and sincere reasons they had for believing they were justified in acting the way they did. Second, Brownlee proposes to extend the necessity defense to some civil disobedients who act in defense of “non-contingent basic needs” (needs that the being must have for continued survival as the kind of being it is). The necessity defense as it is codified in law grounds the non-imposition of criminal liability for defendants who can demonstrate that they violated the letter of the law in order to prevent imminent grave harm. According to Brownlee, states should accept necessity as a justificatory (exculpatory) defense for civil disobedience.

46 (2012, p.167). chap. 5
47 thereby adopting a pluralistic approach to necessity that goes beyond imminent danger. Chap. 6
48 Four-pronged test in the U.S.: (1) they were faced with two bad options and chose the lesser; (2) they acted to prevent imminent harm; (3) they reasonably believed that their action could prevent that harm; and (4) they had no reasonable legal alternative. However, in the U.S., the Ninth Circuit created a per se rule barring the application of the necessity defense to cases of indirect civil disobedience (e.g., sit-ins). United States v. Schoon (1991)
disobedience undertaken as a reasonable and parsimonious response to violations of and threats to non-contingent basic needs.

As these defenses suggest, legally recognizing civil disobedience does not mean making civil disobedience legal. Civil disobedients would still be arrested and prosecuted, but they would get to explain and justify their actions in court. Showing proper respect for civil disobedients requires at least this minimal dialogic engagement with judges and jurors; at best something like Arendt’s forum specially designed for lawmakers to hear out activists (which doesn’t involve legalizing civil disobedience either).⁴⁹

Where Dworkin defended the state’s responsibility of leniency toward civil disobedients, Lefkowitz and Brownlee argue that the state has a presumptive duty not to punish civil disobedients, thus implying agents’ presumptive immunity from punishment. In fact, Lefkowitz and Brownlee disagree as to the scope of the right to civil disobedience—what exactly it protects from. Lefkowitz submits it entails a claim-right against punishment but not against penalty. Insofar as the state condemns as wrongful the conduct it punishes, it should not (though it has a liberty-right to) punish civil disobedience; but it may and should penalize it in the interest of deterring non-serious disobedience. Brownlee contends that the conceptual line between punishment and penalty, which is already less than bright, is further smudged by Lefkowitz’s deterrence-based defense of penalty, leading to what she dubs “communicative blurriness.” Since deterrence is commonly viewed as the main rationale of punishment, a penalty burdensome enough to deter civil disobedients

“will look and feel like punishment.” She also argues that deterrence disrespects conscientiousness because it treats civil disobedients as means to the end of (specifically or generally) deterring further disobedience. For these reasons, she argues the right to civil disobedience entails a presumptive claim-right protection against all forms of state interference, including penalization and punishment. Since this right is presumptive, countervailing reasons to punish or penalize civil disobedience may outweigh it. But Brownlee contends that even when judges are justified to punish civil disobedients, they ought to apologize to the latter for infringing upon their rights.

By reversing the burden of justification in this way, Brownlee’s argument for accommodation provides solid grounds for critiquing states’ all-too-often harsh treatment of civil disobedients; yet it is unattractive in its dismissal of democratic commitments. As Jubb notes, Brownlee fails to explain “why individual conscience should weigh so heavily against the decided will of a majority, even in cases where the majority is right.” In her view, so long as individuals are conscientious they are entitled to disregard the outcomes of democratic processes. This is arguably problematic given that the bar for conscientiousness rather low, and that conscientiousness can characterize the endorsement of morally dubious and hateful views. Brownlee’s defense of the moral right to civil disobedience thus exacerbates

50 (Brownlee 2018, 5).
51 (Brownlee 2012, 174, 211, 245-246).
rather than assuages the democratic objection to civil disobedience, undercutting its own liberal premises.\textsuperscript{53}

Lefkowitz’s and Smith’s cases against punishment of civil disobedience on the basis of political participation rights appears stronger.

Let’s take stock of how these accommodating approaches face up to the objections that opened this section. As we saw, accommodating civil disobedience doesn’t remove the conditions for its possibility: it doesn’t make civil disobedience legal or invisible nor does it invite its proliferation or remove any costs since civil disobedients may still have to go to court and (on Lefkowitz’s and Smith’s accounts at least) face penalties and fines. But it is true that accommodation would significantly reduce the costs associated with civil disobedience: after all, agents might successfully avoid arrest, prosecution, conviction, or punishment—and that’s precisely the point of a right to civil disobedience.

What are we to make of Ogien’s point that civil disobedience cannot be legislated because it consists in essence of an extra-legal, unexpected, impulsive, and “wild” usage of the law to express grievances and articulate political claims? I firmly disagree with his diagnosis that civil disobedience is undertaken “unexpectedly [à l’improviste], in the grip of an emotion, in a wild manner.” Ogien’s distinction between “civilized” and “wild” uses of the law, as far as I can tell, maps onto the more pedestrian distinction between lawful and unlawful dissent: the latter is “wild,” in his view, because it “forces judiicial intervention in a process of public

\textsuperscript{53} Note that the concern applies to Dworkin to a much lesser degree because, while he also grounds the right to principled disobedience in conscience, he restricts it to contexts of constitutionally doubtful law and denies it entails a right against punishment.
reevaluation of a legal duty that is deemed unjust, disgraceful, dangerous or illegitimate." Ogien doesn’t explain why the state couldn’t legally recognize and accommodate activists’ desire to set in motion this process. But I think he means to point to the democratic and democratizing impetuses of many civil disobedients—that is, their aspiration to reclaiming and articulating new forms of constituent power. The worry here is well taken: to constitutionalize or legally accommodate civil disobedience is to domesticate or declaw it (to pursue Ogien’s metaphor).

4. De-constitutionalizing civil disobedience

Where punitive approaches understand civil disobedience as resistance, constitutionalizing and accommodating approaches understand it as dissenting speech. As we saw, this is central to defending the constitutional protection of civil disobedients. But in what follows, I want to highlight the costs of these approaches to resistant practices that are not read as, or intentionally not stylized as, civil disobedience. I thus outline a de-constitutionalizing approach that situates civil disobedience on a spectrum of resistant practices (arching back to the understanding that undergirds the punitive approach) and shows how uncivil acts of disobedience may be justified too.

54 Ogien p. 582
4.1. Why de-constitutionalize?

There are at least four problems with constitutionalizing (including accommodating) approaches to civil disobedience.

First, the tripartite distinction between criminal, revolutionary, and civil disobedience that underlies constitutionalizing approaches misleadingly suggests that disobedience that isn’t civil is ipso facto criminal or revolutionary. This is not the case. Consider government whistleblowing, which involves the unauthorized acquisition and disclosure of classified information for the purpose of alerting the public to government wrongdoing, and animal rescue, which is often done by covertly breaking and entering into facilities. Although governments typically treat these as revolutionary or criminal disobedience, sometimes even as terrorism, they illustrate unlawful resistance that doesn’t fall neatly in any of the three categories of disobedience. Attempts to shoehorn these activities in the category of civil disobedience, with the intent of legitimizing them, are problematic and doomed to fail.⁵⁵ Or again, some disobedience generally considered criminal, like computer hacking or software piracy, is in fact (at least sometimes) principled and ought to be understood as such, say, under the label “hacktivism.”⁵⁶ My point: civil disobedience is one kind of principled disobedience among others and constitutionalizing the former problematically obscures all kinds of principled resistance besides those that

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⁵⁵ See Delmas, A Duty to Resist, chap. 1; “Uncivil Disobedience,” NOMOS (forthcoming).
abide the strictures of civil disobedience (viz. openness, nonviolence, non-evasion, and decorum).

Second, constitutionalizing approaches exclude, at the same time as they obscure, these other kinds of resistance. Activists whose disobedience doesn’t register as civil or who deliberately elect non-civil tactics are deemed beyond the constitutional pale, culpable of destabilizing society and expressing contempt for democratic ideals. This is problematic not only because, as we’ll see, uncivil disobedience can sometimes be justified, but also because the faculty to define certain activities as civil or uncivil is, as Bernard Harcourt argues, is a “political accomplishment that reflects a certain position of privilege... [It] is intimately connected to one’s place in the political realm. It is also, unquestionably, a political stratagem.”

Calls for civil dissent serve to affirm the political and legal system’s legitimacy and to preserve the status quo. Social scientists have studied the ways in which civility is more easily attributed to whites than nonwhites in Western democracies. For instance, demonstrations involving a majority of persons of color tend to be described as “riots” even while remaining largely peaceful, while actual riots by white people tend to be described as “protests” or “street parties” or some other innocuous expression. Constitutionalizing approaches may reinforce these discriminatory and exclusionary effects of civility, since only civil disobedience can be protected.

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Third, by conceiving of civil disobedience as dissenting speech first and foremost, constitutionalizing approaches miss the non-communicative goals of much principled disobedience: agents don’t necessarily break the law in order to address the public. They may engage in principled, covert disobedience in order to aid people, as Sanctuary workers engaged in the “New Underground Railroad” do in violation of immigration laws, or to rescue animals, in violation of private property laws. Rebecca Solnit praises the “hundreds of boat-owners” who eluded the authorities to get into New Orleans the day after the levees broke in order to rescue “people—single moms, toddlers, grandfathers—stranded in attics, on roofs, in flooded housing projects, hospitals, and school buildings.”59 Other kinds of principled disobedience may purport to directly resist injustice rather than just speak against it. Government whistleblowers, I think, fall in this category as they unilaterally undo state secrecy to shed light on something they believe the public ought to know. Their disobedience is not a plea for reconsideration but an action that effectively achieves what they think justice requires. Or again, consumer boycotts, divestments, and labor strikes purport to exert pressure on entities (corporations, governments, or universities) to stop them from taking a certain course of action and force them to take another. Of course they can be conceived as public addresses, but they primarily aim to levy costs on the targeted entity.

Fourth, beyond their differences, constitutionalizing approaches, like punitive ones, embrace the legal, constitutional framework. They affirm the legitimacy of the political and legal system in which civil disobedients act and expect

the latter to endorse it and show their respect for it, too. This reflects a historical misunderstanding of civil disobedience, a distortion of political reality, as well as, underneath these, a warped judgment of societies’ moral standing and appropriate civic responses to injustice. Civil disobedients indeed—from civil rights to Standing Rock activists—often contest the state’s legitimacy and reject its claim to their obedience. African Americans under Jim Crow had no reason to accept southern states’ or the federal government’s legitimate authority, though they may well have had prudential and pragmatic reasons to communicate a forward-looking commitment to fidelity to law. Indigenous people resisting the construction of access pipelines on their territory in North America (e.g., the Sioux Nation in North Dakota and the Wet’suwet’en First Nation in British Columbia) affirm their own territorial sovereignty against settler intrusions. Lawyers’ efforts to frame their resistance as civil disobedience misrepresent them. Indigenous people call themselves “Land Protectors”: they are neither disobeying the law, nor dissenting; instead they are defending their land against U.S. and Canadian illegitimate encroachments. Yet constitutionalizing approaches make the inward acceptance of the system’s legitimacy a necessary condition for, and the basis of, special protection claims.

Carving a special constitutional niche for civil disobedience, to summarize, carries significant costs: it obscures, excludes, and misrepresents political resistance. Given the narrow range of conduct likely to be recognized as civil

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61 See e.g., Glen Sean Coulthard, Red Skin, White Masks: Rejecting the Colonial Politics of Recognition, University of Minnesota Press, 2014.
disobedience, it is important to soberly assess the ways in which constitutionalizing approaches can work to the detriment of principled disobedients, and not to overestimate their benefits. Hence I propose to deconstitutionalize civil disobedience, not in order to deny civil disobedients special protections but to underline the costs of accommodating them, and only them, while marking all non-civil dissent as beyond the pale.

Alex Livingston and Robin Celikates have each critiqued the liberal, constitutional approaches to civil disobedience and critiqued the ways in which these theories police the boundaries of civil disobedience. Livingston is especially critical of the de-contextualized, a-historical understanding of civil rights activists’ civil disobedience, which is taken to be the paragon of civil disobedience. He has recently proposed to “spiritualize” (or re-spiritualize) civil disobedience, restoring its “fidelity to love,” not law.62 Livingston reminds the reader that civil disobedience “emerged as a spiritual response to the rule of fear” that characterized the U.S. racial caste system, urging a radical reimagining of interpersonal relationships through both coercive disruption and a political pedagogy of persuasion. Livingston offers a compelling analysis of the spiritual dimensions of civil disobedience and of the centrality of prefigurative politics to the King-lead part of the black freedom struggle—the idea that the means chosen are and must always be “ends-in-progress” in the effort to build the “beloved community.”

Robin Celikates, for his part, wants to “democratize” civil disobedience. Liberal constitutional approaches, in his view, have ignored or tamed its true

democratic power. Celikates re-conceptualizes civil disobedience as transformative, democratic practice directed at reconfiguring public space and existing institutions and acting as a dynamizing counterweight to the rigidifying tendencies of constituted power. In response to the exclusionary effects of constitutional approaches, Celikates broadens the concept of civil disobedience to include covert, violent (though not para-military), evasive, and offensive disobedience intended to communicate opposition to law, practice, or institution and so long as it aims (or can be interpreted as aiming) to articulate and/or exercise constituent power.

While Livingston and Celikates offer penetrating critiques of, and viable alternatives to, constitutionalizing approaches, neither of them is interested in justifying civil disobedience. In a nutshell, what we lose when we constitutionalize civil disobedience is, first, a more nuanced understanding of the tactic within a political repertoire of resistance and, second, the possibility of justifying other kinds of unlawful resistance.

4.2. Uncivil disobedience

“Resistance” designates a broad range of dissident activities, of varying scope and impact, which express opposition, and perhaps refusal to conform, to a dominant system of values, norms, rules, and practices. Principled disobedience—which includes civil and uncivil disobedience—is one subset of unlawful

63 2016; 2019, p. 74
64 So over-inclusive on the one hand: uncivil acts of disobedience count as civil so long as not paramilitary; under-inclusive on the other: only democratic disobedience counts as civil.
resistance. Resistors in general and principled disobedients in particular may seek modest reform or a complete overhaul of a system, or neither (they may simply wish, for instance, to express solidarity), and their actions may be communicative or not. Animal Liberation Front activists who rescue animals, for instance, aim to do just that in their rescue operations, independently of their public advocacy work to end animal abuse. The principles that motivate resistors may or may not be worthy of public recognition.

Civil disobedience, as one subset of principled disobedience, designates deliberate breach of law intended to protest and amend unjust laws, policies, institutions, or practices and that satisfy the basic norms of civility: publicity (the agent’s performance of the act in the open), nonviolence (which rules out the use of force and direct infliction of harm), non-evasion (submission to law enforcement and acceptance of legal sanctions), and decorum (her respectful behavior). This definition constitutes a pared down version of the standard Rawlsian account, as it keeps the marks of civility and communicative nature of the action but does not include any subjective requirements such as the agent’s endorsement of the state’s legitimacy or belief that the state generates a moral duty to obey the law.

The other subset of principled disobedience, uncivil disobedience, designates a principled breach of law in response to perceived wrongs and injustice and that fails to satisfy the basic norms of civility by being either: covert/anonymous, evasive, violent, or offensive/disrespectful. Uncivil disobedience should not be
conceived as a distinct kind or single neat category. It is rather a cluster concept, for whose application we might treat displays of any one of the four features—covertness, evasion, violence, and offensiveness—as sufficient. The category of uncivil disobedience is much broader than that of civil disobedience, since it includes acts in pursuit of any of a variety of goals (e.g., status quo, reform, system overhaul, education, aid, harm prevention, retaliation, expression of discontent etc.). Coercive and violent strikes, guerrilla theater protests, ecosabotage, open animal rescue, black block tactics, unauthorized whistleblowing, political rioting, and some vigilantism are aptly described as uncivil disobedience. As I shall now argue, uncivil disobedience can be justified too, even under constitutional governments.

First, violating the marks of civility may be necessary for certain worthwhile ends. For instance, covertness is key to members of the Sanctuary movement who have created an “underground railroad” to move immigrants from dangerous areas to safer ones and help them get to Canada. Public and open disobedience would doom the enterprise to failure and further put in jeopardy the immigration prospects of those it purports to help. Uncivil disobedience is thus necessary for the purpose of directly helping unauthorized migrants. For another, structurally similar example, doctors illegally, covertly, and evasively provided abortion access to women before Roe v. Wade (1973). Should physicians not evade law enforcement,

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66 At the edge of uncivil disobedience lie terrorism and guerrilla warfare (whose scale of violence and revolutionary goals render inadequate the more limited lens of principled disobedience) and acts of unlawful resistance that are self-interested and not primarily principled but can be interpretively construed as (thinly) principled, such as digital piracy and unauthorized immigration.
their patients’ identity would risk being made public, and their arrest and prosecution would prevent the provision of reproductive services to other women in the future.

Evasion may be prudentially justified in order to avoid excessive punishment. For instance, Edward Snowden, who stole and then publicly leaked millions of classified documents exposing the NSA’s massive surveillance programs, risks a 30-year sentence under the charges brought against him. The severity of the contemplated punishment warrants the choice of anonymity and evasion in reporting government misconduct. Indeed the journalists whom Snowden contacted to blow the whistle advised him to remain anonymous.\(^{67}\) Yet Snowden chose to come forward to the public to justify and take responsibility for his actions. By appealing to standing law in defense of what he did, according to Bill Scheuerman, Snowden was able to manifest his deep respect for the rule of law despite his evasion.\(^{68}\)

Nonviolence may also hinder the realization of certain goals. For instance, the Deacons for Defense and Justice formed under Jim Crow as an armed group to protect members of the Congress for Racial Equality (CORE) from Ku Klux Klan (KKK) violence, and soon extended their activities to civil rights work such as organizing and voter registration. Self-defensive force against immediate threats to one’s life is lawful, but the Deacons made a point of publicly displaying their force, sometimes in violation of local gun laws. Similarly, the Black Panthers (originally

\(^{67}\)(Greenwald 2014, 50-51).

\(^{68}\)(2015: 447). Scheuerman classifies Snowden’s government whistleblowing as civil disobedience. This is a mistake in my view.
Candice Delmas

called the Black Panther Party for Self-Defense) publicly carried loaded firearms, first legally then illegally after the 1967 Mulford Act, which was crafted in response to Black Panthers’ armed patrolling of Oakland, California. These groups’ uncivil threats of violence were essential to their mission—collective self-defense against white supremacist violence. They could of course have registered their grievances through lawful and civil ways (and did, also), calling for better protection of their communities and denouncing systematic police brutality. But collective self-defense primarily required the threat or use of force.

Lastly, disobedient agents may deliberately resort to breaches of decorum in order to draw attention to their action and cause. Champions of civil disobedience argue that transgressing the law through civil disobedience offers a spectacular way of dramatizing one’s protest and is likely to garner media and public attention. But the argument applies a fortiori to uncivil disobedience today, if it is true that decades of civil disobedience have desensitized us somewhat to its power. Take Femen again: one of the group’s first protests was a guerrilla theater performance protesting sexual harassment at the university in Ukraine. Soon thereafter, Femen activists discovered their distinct “weapon”: bare breasts. They “hijacked” the Euro Cup of men’s football in Kyiv to protest against sex tourism; “kidnapped” a baby Jesus from a nativity scene in Vatican; and “ambushed” Russian President Putin at the Hanover trade fair in 2013. They burst topless into these male-dominated spaces, with slogans painted on their young bodies, provoking men. They have been charged with indecent exposure, blasphemy, and sabotage. They never fail to magnetize the spotlight.
Much uncivil disobedience is impermissible and wrongful, because it violates people’s fundamental interests and/or is undertaken in pursuit of objectionable ends. So the instrumental reasons for uncivil disobedience I just identified do not coalesce into a blanket defense of uncivil disobedience. Context, ends, and means must be taken into account to draw the line between, say, the vigilantism of the Deacons for Defense and that of the KKK or between the Sanctuary movement and the anti-abortion Christian terrorist group Army of God. The point is to show that publicity, nonviolence, non-evasion, and decorum can significantly hinder the realization of some worthy goals of resistance (including mutual aid, bodily autonomy, government accountability, and self-defense) and that circumstances sometimes call for acts of uncivil disobedience.

Second, there can also be non-instrumental reasons to disobey uncivilly. To the extent that civil disobedience is taken as a signal of fidelity to law (even where agents in fact don’t endorse the system’s legitimacy), flouting it can express disrespect toward the legal system. When this disrespect is well-grounded, that is, based on facts about the system’s unjust and unfair treatment of some members, agents have reasons to express disrespect, because they are saying something true. Evasion and offensiveness are natural vehicles for such expressions.

Elizabeth Cady Stanton, a British militant suffragist, justified her refusal to submit to the legal system in these terms, in a letter to Matilda Joslyn Gage:

The insult of being tried by men—judges, jurors, lawyers, all men—for violating the laws and constitutions of men, made for the subjugation of my sex; to be forever publicly impaled by party, press, and pulpit, so far
transcends a petty verdict of butchers, cab-drivers, and plough-boys, in a
given case, that my continuous wrath against the whole dynasty of tyrants
has not left one stagnant drop of blood in my veins to rouse for any single act
of insult.\textsuperscript{69}

Stanton voices an intense and well-grounded distrust toward the state and
its rules. Why ought she (morally) submit to legal sanctions meted out by a state
that treats her and her peers as inferior human beings, unfit for self-rule? Why
should she take, or act as if she took, this system as morally authoritative and
politically legitimate? Civil, non-evasive disobedience would have expressed a kind
of respect she had no reason to exhibit. Indeed she had good reason to evade and
reject the state’s prosecution and punishment of her disobedience—and the state’s
authority in general—even if her violation of civility led some portions of the public
to deem her “unworthy” of the political franchise. Civil disobedience is likely a
superior method to achieve moral suasion of the community; but moral suasion is
not the only legitimate goal of resistance.

Uncivil disobedience may thus be undertaken as expressive action: not only
as a correct signal of injustice, whose audience may be fellow oppressed (more so
than the dominant group), but also, depending on the form it takes, as a way to
affirm dignity, one’s own or others’, in the face of laws and practices that deny it. For
instance, irregular migrants indefinitely held in ICE detention centers have
organized hunger strikes to denounce U.S. authorities’ human rights violations and

\textsuperscript{69} (Tenafly June 25, 1873)
affirm their shared humanity. Deliberately offensive acts of disobedience are naturally well suited to express disrespect and defiance. Femen activists conceive of sextremism as a “highly aggressive form of provocation,” and don’t give a fig if the majority of the public sees their actions as undignified. They are routinely called “sluts” and “whores” and describe themselves as “hooligans.” This kind of incivility stands in direct opposition to the lofty demands of the political virtue of civility in the public discourse. Uncivil disobedients do not seek consensus or compromise. They deliberately flout civility, and the liberal requirement to respect and listen to one’s opponent. Femen shout down their adversaries. Their bare chests proclaim “In Gay We Trust!” “Fuck the Church,” or “Fuck Your Morals.”

At the limit, the act may be “the fitting expressive vehicle for our charged sense of the situation,” in Chris Bennett’s analysis, even where there is no hope of righting it. In Northern Ireland’s Maze Prison in 1976, members of the Provisional Irish Republican Army (IRA) staged a “blanket protest” when the British government revoked their POW-like status: they went naked or fashioned garments from prison blankets rather than wearing the same uniform as ordinary convicts. After brutal attacks by the guards, they launched the “dirty protest,” refusing to wash and smearing the walls of their cells with excrement. These uncivil, indecent and undignified, protests dramatized the British dehumanizing treatment of Irish republicans. Political rioting may also be seen through this non-instrumental,

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70 Hunger strikes violate prisons’ and detention centers’ formal rules (unlike civilians’ fasts) and the nonviolence requirement (although the threat of violence is turned toward oneself).
expressive lens as a way to give form to individuals’ sense of the significance of the situation (say, the acquittal of police officers who shot unarmed black youth), including their anger and sense of powerlessness.

... Recap: From resistance [punitive approach] to dissent [constitutional approaches] and back [de-constitutionalizing approach re-visions principled disobedience as resistance and seeks to justify it]

Conclusion: I’m not sure what to say about how the state should treat uncivil disobedients, besides advocating leniency and dialogic engagement, much like previous approaches.....