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Civil Disobedience and Deliberative Democracy

William Smith



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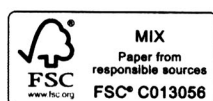
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Civil Disobedience and Deliberative Democracy

Civil disobedience is a public, non-violent, conscientious yet political act, contrary to law, carried out to communicate opposition to law and policy of government. This book presents a theory of civil disobedience that draws on ideas associated with deliberative democracy.

This book explores the ethics of civil disobedience in democratic societies. It revisits the theoretical literature on civil disobedience with a view to taking a fresh look at long-standing questions: When is civil disobedience a justified method of political protest? What role, if any, does it play in democratic politics? Is there a moral right to civil disobedience in a democratic society? And how should a democratic state respond to citizens who commit civil disobedience? The answers given to these questions add up to a coherent and distinctive theory of civil disobedience, which draws on ideas associated with deliberative democracy to forge an account that improves upon prominent approaches to this subject.

Civil Disobedience and Deliberative Democracy will be of interest to students and scholars of contemporary political theory, political science, democratization studies, social movement studies, criminology, legal theory and moral philosophy.

William Smith is assistant professor in the Department of Government and Public Administration at the Chinese University of Hong Kong.

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- 'Reclaiming the Revolutionary Spirit: Arendt on Civil Disobedience', *European Journal of Political Theory*, 9:2 (2010), pp. 149–66 (Sage).
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- 'Democracy, Deliberation and Disobedience', *Res Publica*, 10:4 (2004), pp. 353–77 (Springer).

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Introduction

A deliberative theory of civil disobedience

Civil disobedience is an enduring but contentious feature of the political landscape. It is undertaken by groups across the political spectrum: green movements protesting the impacts of human activity on the natural environment, student organizations battling against sweatshop labour, and religious groups campaigning against legal toleration of abortion. Those who commit civil disobedience are described by Jürgen Habermas as ‘ambivalent dissidents’ (Habermas 2004: 9). He uses this term to capture the complex quality of a mode of political protest that he claims can either betray or uphold the underlying principles of a constitutional democracy. Those who express their opposition to law and policy through transgressive acts of lawbreaking ‘could in the final analysis transpire to be the enemies of the constitution’. On the other hand, these citizens may ‘contrary to their image ... prove themselves to be the true patriotic champions of a constitution that is dynamically understood as an ongoing project—the project to exhaust and implement basic rights in changing historical contexts’ (Habermas 2004: 9).

The ambivalent quality of civil disobedience can be illustrated by considering its use during high-profile public protests against the 1999 World Trade Organization (WTO) Ministerial Conference, in Seattle. On the opening day of the conference, large numbers of activists defied police orders by chaining themselves to each other and sitting cross-legged at important downtown interchanges (Noakes and Gillham 2006: 105–6). These tactics ‘brought rush-hour traffic to a standstill and, with additional protesters clogging the sidewalks, most WTO delegates were unable to reach the meeting site’ (Noakes and Gillham 2006: 106). These highly effective acts of mass civil disobedience contributed to the decision of the WTO to cancel its opening day schedule, setting in train a pattern of confrontation between police and protesters that would be repeated at future summits of global governance institutions (della Porta *et al.* 2006).

These civilly disobedient acts have been defended as part of a legitimate protest against what many see as an undemocratic system of global governance implicated in gross injustice and inefficiency (Held and McGrew 2007; Pogge 2008; Stiglitz 2002). It is undeniable, though, that activist tactics in Seattle entailed significant collateral damage, in the form of costs to third parties and disruption to institutionalized deliberation. As one summary of the protest puts it, ‘by the end of [the conference] 500 protesters had been arrested, retailers had

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lost millions of dollars in sales and property damage, and the WTO meetings collapsed without any significant trade agreements being reached' (Noakes and Gillham 2006: 106). The major disruption and impact that mass civil disobedience actions can entail—particularly their capacity to prevent or obstruct institutionalized deliberation between policy-makers—prompt some writers to suggest that there is, or at least can be, tension between this form of activism and the ideals and practices of constitutional democracy (Humphrey 2006; Talisse 2005; Young 2001).

Civil disobedience thus sits somewhat uneasily between toleration and transgression in democratic societies. There is, on the one hand, an acknowledgement that it is an important weapon in the armoury of conscientious democratic citizens. This intuition supports the cultivation of tolerant and perhaps even supportive attitudes to civil disobedience in the public political culture (Dworkin 1978: 217–22; Habermas 1985: 99; Rawls 1999a: 339). There is, on the other hand, residual awareness that it can be a mode of political engagement that disappoints the expectations of democratic citizenship, at least in so far as those expectations include a commitment to resolving disagreements through dialogue and abiding by the outcomes of such dialogue. This intuition acts as a brake on the impulse to treat civil disobedience as a routine and regular mode of political engagement (Raz 1979: 275).

The aim of this book is to negotiate these competing intuitions about the status of civil disobedience in democratic societies. It does this by elaborating a normative account of this type of protest that is informed by the much-discussed 'deliberative turn' in democratic theorizing (Bohman 1998; Dryzek 2000; Goodin 2008). The book thus revisits the philosophical literature on civil disobedience with a view to taking a fresh look at long-standing questions: When is civil disobedience a justified method of democratic engagement? What role, if any, does it play in democratic politics? Is there a moral right to civil disobedience in a democratic society? And how should the state respond to citizens who commit civil disobedience? The answers given to these questions add up to a distinctive theory of civil disobedience, which draws on ideas associated with deliberative democracy to forge an account that synthesizes and improves on prominent liberal and democratic approaches to this topic. The arguments developed in this book provide a significant degree of support for the intuition that civil disobedience should be treated as a legitimate, even routine, feature of healthy democratic politics. At the same time, the book acknowledges the inevitable limits of well-meaning attempts to institutionalize an inherently transgressive mode of political protest.

Civil disobedience

This introductory chapter sets out some important preliminaries for the arguments that follow. The first task is to fix ideas about the subject by providing a working definition of civil disobedience. It is not my aim to engage with or contribute to the ongoing, seemingly intractable, philosophical disagreements about

the concept of civil disobedience.¹ Instead, throughout this book I relate a particular understanding of this protest to a broader normative account of democracy. The definition of civil disobedience that is deployed does, though, attempt to satisfy two important desiderata that should be met by any definition. First, it identifies a distinct form of protest that can be contrasted with other forms of disobedience (Rawls 1999a). Second, it achieves at least a partial fit with the historical and contemporary reality of civil disobedience (Lyons 1998).

Civil disobedience is defined throughout as a *public, non-violent, conscientious yet political act, contrary to law, carried out to communicate opposition to law and policies of government*.² It is 'public' in the sense that it is carried out openly without attempts to escape arrest; it is 'non-violent' in that it avoids bringing about or threatening physical harm to persons and damage to their property; it is 'conscientious' in that it is motivated by sincere opposition to law or policy on grounds of moral, ethical or pragmatic considerations; and it is 'political' in the sense that it aims to communicate this opposition in the hope of bringing about change in the laws or policies of local, national or international governmental organizations.³ This definition, in keeping with others, incorporates direct civil disobedience, involving deliberate violation of the law that is the object of protest, and indirect civil disobedience, involving deliberate violation of an undisputed law as a means of communicating opposition to another law or policy (Rawls 1999a: 320). An example of the former might be a direct violation of a court injunction preventing a protest or demonstration. An example of the latter might be an infringement of laws against trespass as a means of communicating opposition to an aspect of foreign or defence policy.⁴ The definition also endorses the familiar thought that citizens involved in civil disobedience are not merely raising a test case for legal adjudication (Rawls 1999a: 320–1).

This conception of civil disobedience can be refined by contrasting it with two different forms of political dissent. The first is *conscientious refusal*, which is a deliberate act of non-compliance with a legal injunction or administrative order. The aim of this form of dissent is to disassociate an agent from a practice that they regard as incompatible with their deepest commitments. Conscientious refusal differs from civil disobedience in that it is not necessarily a political act. This means that there is no intent to communicate opposition with the aim of bringing about a change in law or policy. In other respects, however, conscientious refusal is similar to civil disobedience. In particular, both forms of protest can be employed to communicate a wide range of conscientious convictions or beliefs. This is important, as it is sometimes said that civil disobedience differs from conscientious refusal because the former, unlike the latter, limits its appeal to public political principles that establish fair terms of social cooperation in a democratic society (Rawls 1999a: 324). This requirement is rejected here on the grounds that a public, non-violent, unlawful campaign for political reform, of the sort often associated with civil disobedience, might in theory and practice appeal to other types of normative value, such as ethical ideals not touched upon by prevailing public political principles or pragmatic considerations about the wisdom of law and policy (Singer 1973: 87–90). The good of minimizing

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unnecessary complexity in our typology of protests suggests that these campaigns should be categorized as instances of civil disobedience. The difference between this mode of protest and conscientious refusal, then, is that civil disobedience is necessarily carried out in support of political reform.

The second type of protest that can be contrasted with civil disobedience is *militant resistance*, which is defined here as a campaign against public authorities that incorporates covert and/or violent tactics. Those who practice militant resistance differ from civil disobedients in that they are prepared to resist or escape arrest. The militant also does not disavow the use or threat of violence against persons or property. Their tactic of resistance is, though, similar to civil disobedience in certain respects. An act of militant resistance can, like civil disobedience, be framed as a conscientious effort to communicate support for political or legal change. In addition, both forms of dissent can employ coercive tactics and express opposition to the legitimacy of the prevailing legal order (Rawls 1999a: 322–3). This latter point is significant, as it is sometimes said that civil disobedience differs from militant resistance in its disavowal of coercion and acceptance of the prevailing legal order (Rawls 1999a). These stipulations are rejected on the grounds that our definition should, as far as possible, achieve a fit with the historical and current practice of civil disobedience. A cursory appraisal of this practice shows us that public, non-violent, unlawful campaigns for political change often employ coercive tactics, such as raising the cost of a law or policy as a means of publicizing opposition to it or exerting pressure on authorities to reverse it (Dworkin 1985: 109). Such an appraisal also reveals that public, non-violent and unlawful tactics have been carried out in contexts where practitioners did not accept the legitimacy of the prevailing legal system. This appears to be true of the celebrated campaigns of civil disobedience associated with Thoreau, Gandhi and Martin Luther King (Lyons 1998). It would be an unfortunate departure from this prevailing, non-theoretical, wisdom to define civil disobedience in a way that disregards these aspects of its historical and current practice (Smart 1991).

This line of thought also supports the view that civil disobedience should be defined as non-violent and public (Bedau 1961: 656). Although these definitional features are often waived by political theorists writing on this topic (e.g. Raz 1979), it is striking how resilient is the association between civil disobedience and these properties in its historical and current practice. As Jarret Lovell observes, ‘the history of civil disobedience is a history that is largely rooted in a tradition of nonviolence and in the teachings of such pacifists as Jesus, Mohandas Gandhi, Dorothy Day, and Martin Luther King’ (Lovell 2009: 6). Civil disobedience is understood by many contemporary activists as a non-violent form of protest, sometimes as a matter of principle but also as a strategic means of enhancing its moral acceptability to observers (Herngren 1993: 17–20). The association of civil disobedience with publicity is a less entrenched, but noticeable, feature of its historical and current practice (Lovell 2009: 74–5). The association of civil disobedience with publicity appears to derive from a similar mixture of principle and strategy. It is, for instance, identified as an important

means of distinguishing civil disobedience from common criminality. The civil disobedient, unlike the criminal, does not seek to escape personal consequences for his or her actions by evading detection or capture (Arendt 1972: 75). The good of achieving at least a partial fit with historical and current practice, then, lends further support to the view that civil disobedience differs from militant resistance through its commitment to non-violent *and* public tactics.

The definition of civil disobedience that is deployed here barely touches on the many controversies that beset any attempt to categorize this form of protest. There are, though, two points worth bearing in mind in light of these debates. First, incorporating concepts such as non-violence or publicity into a definition of civil disobedience does not entail moral condemnation of disobedience that fails to observe these self-limitations. It does not, for example, imply that violent or covert activism against a democracy cannot be morally justified, or that violent acts are necessarily more harmful than non-violent acts. It is simply a means of distinguishing a particular class of actions within the general category of principled disobedience to law, in order to simplify and fix ideas about the justification and role of that class of actions within a democratic society. Second, it may sometimes be difficult to draw a sharp distinction between civil disobedience and conscientious refusal or militant resistance in practice. It is sometimes said, for instance, that Thoreau should be categorized as a conscientious objector rather than a civil disobedient, as his non-payment of tax aimed to disassociate himself from an unjust government (Arendt 1972). At the same time, in publicizing his act in the way he did, Thoreau contributed to a public campaign geared towards generating support for legal and political change (Kateb 1984: 110–12). The same act, then, may exhibit elements of different types of principled disobedience, such that its appropriate categorization will be a matter of judgement dictated by context and common sense. The modest goal of this discussion is to draw out the constitutive features of civil disobedience in order to pave the way for a consideration of the justification and role of this particular type of protest in a democratic society (Rawls 1999a: 326).

The problem of civil disobedience

This book assumes that citizens who engage in civil disobedience in a democratic society owe their fellow citizens a moral justification for their choice of tactic. This is because there are important countervailing considerations that weigh against its use in such a society, which weigh less heavily, or not at all, against the use of other forms of political participation. The specification of these countervailing considerations helps to establish the problem of civil disobedience. The aim of a theory of civil disobedience is, in part, to address this problem by identifying reasons that might defeat, or outweigh, these countervailing considerations and contribute towards making civil disobedience, all things considered, a morally justified course of action.

There are three considerations that weigh against the use of civil disobedience in a democratic society. The first, which is by far the most commonly cited objection, is that civil disobedience, as an unlawful mode of protest, goes against

the moral requirement that citizens comply with the decisions of a democratic authority. This objection presupposes the controversial philosophical claim that there is a duty to comply with democratic institutions (Wolff 1970; Simmons 1979; Green 1989; Raz 1999). In recent years, several theorists have developed a plausible defence of the moral duty to comply with democratic institutions (Waldron 1999a; Lefkowitz 2007; Christiano 2008: 231–59). The basic idea is that compliance with democratic institutions is one way in which citizens convey their respect for the entitlement of each citizen to participate as an equal in a suitably structured law-making process. Civil disobedience, as a form of principled non-compliance, might, on this account, be open to criticism on the grounds that it fails to show the requisite kind of respect for fellow citizens in a democracy (Kateb 1984: 140–6). This suggests, at the very least, that its practitioners are under a moral requirement to justify their choice of tactic to their fellow citizens. The argument of this essay accepts the case in favour of a duty to comply with democratic institutions, for reasons that are elaborated in the following chapter. It also affirms the necessity for civilly disobedient citizens to justify their actions to their fellow citizens in light of this duty.

The second consideration that counts against the use of civil disobedience is that it is a form of political participation that imposes certain costs on a democratic society that are generally not levied, at least not to the same degree, by lawful forms of political participation. This can be appreciated through reflecting on the aims and objectives of those who employ this tactic. An important reason for engaging in civil disobedience, to be discussed several times throughout the chapters that follow, is to secure publicity for political opposition through attention-grabbing tactics (Lovell 2009: 182–6). The publicity-generating function of civil disobedience is, in part, purchased through its illegality. Its practitioners hope that greater attention for their views might be secured through a form of unlawful activism that entails a certain degree of disruption to others, which may culminate in prolonged stand-offs between police and protesters, arrests, and the imposition of further sanctions. The upshot is that civil disobedience compels government to divert its resources away from the implementation of policies that are adopted by democratic bodies and towards responding to the actions of civilly disobedient citizens (Lefkowitz 2007: 219–20). These costs may well be justified, but they may also trigger attitudes of irritation or resentment on the part of fellow citizens. The problem is that civil disobedience is, by its nature, a costly and confrontational mode of address, which can provoke angry reactions throughout the democratic community as a whole (Brownlee 2007a: 183). The good of reducing this likelihood provides further support for the expectation that civilly disobedient citizens offer their fellow citizens a justification for their unlawful activism.

The third reason is that civil disobedience by one group may encourage others to employ this tactic, with the consequence that its use may proliferate. Joseph Raz articulates this worry when he notes that ‘such acts are normally designed to catch the public eye and inevitably set people thinking of resorting to disobedience to achieve whatever changes in law and policy they find justified’ (Raz 1979: 262). There is, for example, a risk that civil disobedience carried out in the

name of just or important causes may encourage others to civilly disobey in support of unjust or frivolous objectives. Given that civil disobedience imposes certain costs in terms of disruption and resource allocation, the risk of proliferation relates primarily to the stability of a democratic society. There is, though, another negative consequence of proliferation, which relates to the potency of civil disobedience as a mode of address. Civil disobedience, in order to be an effective method of communication, must retain its capacity to command the attention of the public. Its impact may be dulled through repetition and over-familiarity, perhaps with the result that activists are drawn towards more militant tactics. It is important to note that, in this respect as well as others, civil disobedience differs from lawful forms of political participation. The ballot box, for instance, does not, or at least should not, become a less potent means of pursuing political objectives the more one uses it. The capacity of civil disobedience to have the desired impact on the public forum does, by contrast, appear to presuppose that it is used with a certain degree of restraint and imagination (Rawls 1999a: 328). The risk of proliferation, with its deleterious consequences for the stability of society and the effectiveness of civil disobedience as a mode of address, offers further support for the expectation that civil disobedients offer a justification for their actions.

The common thread that links these three reasons is that civil disobedience is a form of political participation that places a certain amount of strain on what Rawls describes as the bonds of 'civic friendship' in a democratic society (Rawls 1999a: 5). These bonds are revealed by the willingness of citizens to cooperate with each other under shared democratic institutions. Civil disobedience, as an unlawful, disruptive and burdensome form of non-compliance, tests the strength of these bonds in circumstances marked by a considerable amount of institutional imperfection and finite reserves of mutual trust. It is because of its tendency to place significant strain on the ties of civic friendship that countervailing arguments against its use are particularly weighty. The willingness to offer a justification for its commission is a means for civilly disobedient citizens to acknowledge that their choice of tactic has certain costs that might not be levied, at least not to the same degree, by forms of advocacy that remain in the bounds of legality. Their justification aims to convince fellow citizens that the good of communicating their opposition to law and policy through civil disobedience outweighs the relevant countervailing considerations. The articulation of a justification for civil disobedience thus contributes to preserving and strengthening the bonds of civic friendship. Although the theory developed in this book cannot claim to exhaust all the relevant considerations that might contribute to a defence of civil disobedience, it draws on ideas associated with deliberative democracy to furnish a vocabulary that protesters should use to formulate justifications for their actions.

Towards a deliberative approach

The preceding account of the definition and problem of civil disobedience, although contentious in certain respects, does not depart to a significant degree