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Disaggregating Political Authority: What's Wrong with Rawlsian Civil Disobedience?

Introduction

The definition and justifiability of civil disobedience are rightly significant questions in contemporary political debates. Controversies like that over the jailing of three anti-fracking protesters in the UK in September 2018 for climbing on top of lorries only demonstrate the importance of understanding when and under what conditions illegal protest may nonetheless be appropriate or excusable (BBC News, 2018). Political theorists and philosophers hoping to contribute to those debates often shape their discussions of what civil disobedience is and when resort to it might be reasonable around what they take to be John Rawls' canonical discussion, typically critically. According to a wide range of theorists, Rawls' theory gives too much weight to obeying the law and wrongly restricts the circumstances in which civil disobedience is acceptable (Scheuerman, 2015, p. 436ff). There are at least two perspectives which agree on this pair of related faults. Both radical democrats like Robin Celikates and liberal moralists like Kimberley Brownlee find Rawls' insistence on fidelity to law, even while breaking it, inappropriate. While Celikates theorises civil disobedience as "an expression of a democratic practice of collective self-determination" and Brownlee sees it as part of a right to express conscientious conviction, neither is satisfied with Rawls' account of how civil disobedience can stabilize a nearly just society (Celikates, 2016, p. 41; Brownlee, 2012, p. 141ff).

In this paper, I argue that this is back to front. Rawls' theory of when illegal political protest is justified is, if anything, too permissive rather than too restrictive. The critiques of Rawls ignore the quite specific problem which frame his discussions of civil disobedience and its justification. Ignoring that frame, of disobedience in a society where justice requires obedience to the law, means they fail to see how radical Rawls' stance on the authority of the law is. It is simply false to say, as Celikates does, that Rawls only allows civil disobedience when it is a coordinated last resort, targeting clear violations of the basic liberties or fair equality of opportunity or that it "exclude[s] from view... socio-economic inequality, as well as procedural and institutional shortcomings in democratic political systems" (2016, p. 39; 2017, p. 986). Rawls' restrictive conditions for politically-motivated law breaking apply only in nearly just societies, and as I show, the criteria for being nearly just are extremely demanding, at least relative to conditions in most contemporary societies. Equally, Brownlee's claim that Rawls' theory "can say nothing about the myriad of new of forms of... disobedience such as international, transnational and cyber disobedience" because of its focus on fidelity to law is inaccurate (2017, p. 969). It ignores Rawls' endorsement of whatever forms of disobedience seem to "promise some success" when faced with unjust institutions (1971, p. 353). Perhaps, as critics claim, Rawls is wrong about

how to characterize civil disobedience. Their further and more fundamental claim about his view about when civil and other forms of disobedience are appropriate is, however, based on a misunderstanding.

This under-appreciated feature of Rawls' theory of civil disobedience is important because it illuminates a general difficulty with work on political protest and resistance. Rawls' theory is permissive because he treats any political order which is not "at least as just as it is reasonable to expect under the circumstances" as "a kind of extortion, even violence" to which even consent cannot bind us (1971, p. 343). His theory of political authority is both binary and demanding. Political orders either are fully authoritative or lack all authority, and the threshold at which they become authoritative is often very high. Even if other theorists of civil disobedience and political protest do not necessarily agree with Rawls about where the boundary between authoritative and non-authoritative political orders lies, they typically, deliberately or not, share his understanding of it as a sharp division. That, I try to show here, is a mistake. Rawls' theory, along with most other discussions of civil disobedience and political protest, does not distinguish between the different forms of authority which a political order may possess or lack. That failure to distinguish different kinds of authority a political order may possess leads to a failure to distinguish different situations in which different forms of illegal protest and resistance are acceptable. A campaign of sabotage is not the same as a series of sit-ins, and a plausible theory of when it is appropriate to break the law to commit either will need to be alive to differences between them that may be relevant to their justifiability. The frame Rawls uses for his account of civil disobedience means that it cannot be sensitive in that way. That is the most deep-seated and basic problem with his account of civil disobedience, as it is with many others.

The rest of this paper proceeds as follows. First, I outline Rawls' theory of civil disobedience. I pay particular attention to the frame in which Rawls sees civil disobedience as in need of theorising, since it is widely misunderstood in contemporary discussions. This frame, of a conflict of duties which exists only in situations of near justice, shapes what Rawls says about what civil disobedience is and when it is justified, and his claims about at least the latter of those cannot be properly understood outside of that frame. I then move on to alternative accounts which criticize Rawls, focusing on Kimberley Brownlee's and Robin Celikates' discussions. Their otherwise rather different work shares an understanding of what Rawls' view is and where and when it applies. This shared misunderstanding undermines their critiques of Rawls, at least insofar as those critiques target his position about civil disobedience's acceptability. It also helps explain the inadequacy of the positive positions they espouse. The third and final section moves on to explain what is really wrong with Rawls' theory of civil disobedience. I argue that

Rawls and others are wrong to view a political order's liability to illegal protest and resistance as an all or nothing matter. Using somewhat stylized historical cases as well as various pieces of theoretical work, I suggest that a political order's liability to illegal protest and resistance needs to be disaggregated. The acceptability of citizens taking the law into their own hands to further their political goals will depend on what forms of authority their political order possesses. Exactly what those forms of authority are will depend on the available justifications for and explanations of different kinds of structuring coercion. I cannot hope to settle that here. However, I can try to show that different considerations are relevant when a political order attempts to structure its members' lives in different ways.

The Special Case of a Nearly Just Society

When John Rawls begins his discussion of civil disobedience in *A Theory of Justice*, he is quite clear about the circumstances in which he intends the justification he provides to apply.¹ His theory is "designed only for the special case of a nearly just society, one that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur" (1971, p. 363). These societies present a special case because the natural duty to support and further just institutions can generate competing imperatives. On the one hand, their members will be required to obey democratically-mandated laws because they are "required to support a just constitution". On the other, these laws will not necessarily be just in themselves because majorities are "bound to make mistakes" (1971, p. 354). As a result, conflicts between "the duty to comply with laws enacted by a legislative majority" and "the duty to oppose injustice" may arise. Rawls' theory of civil disobedience aims to solve a problem which arises "only within a more or less just democratic state" and so "does not apply to other forms of government" (1971, p. 363). Its requirements are not meant for societies which are not at least nearly just, because those societies do not have that conflict within that natural duty to support and further just institutions.

In this sense, Rawls' discussion of civil disobedience is part of his account of political authority. The discussion of civil disobedience in *A Theory of Justice* occurs in a chapter on duty and obligation. The other sections of that chapter deal with a natural duty to support and further

¹ I focus throughout my account of Rawls' theory of civil disobedience on his discussion in *A Theory of Justice*. Although Rawls does refer to the Civil Rights struggle and in particular Martin Luther King in *Political Liberalism* (2005, pp. 247n, 250, 464), his interest there is primarily in how to understand the restrictions imposed by public reason, rather than when law-breaking is permissible. There is no systematic discussion of civil disobedience. Rawls' critics have for similar reasons also tended to focus on his discussion in *A Theory of Justice*. I discuss changes in Rawls' account of political authority between *A Theory of Justice* and *Political Liberalism* when I come to discuss political authority in the last section of the paper.

just institutions, the principle of fair play, when in general unjust laws should be obeyed and the particular justification of majority rule before it moves on to civil disobedience and conscientious refusal. For Rawls, to theorize civil disobedience and conscientious refusal, “we must first discuss... political duty and obligation” (1971, p. 352). Only in that context can we understand the potentially competing duties to obey or disobey the law and when and to whom they apply. Unless we understand those duties, we will not see where a problem of civil disobedience arises. For Rawls, that is only in nearly just societies.

Rawls’ theory of political authority in *A Theory of Justice* explains the focus on nearly just societies in the theory of civil disobedience he offers there. For example, when stipulating that focus, he says there is “no difficulty” in using illegal but peaceful protest “as a tactic for transforming or even overturning an unjust and corrupt system” (1971, p. 363). Given the relevant theory of political authority, why would there be? That theory relies on the natural duty to support and further just institutions (1971, p. 333ff). The natural duty includes a “duty to oppose injustice” and doing so peacefully could hardly be problematic in itself (1971, p. 363). There is only a *prima facie* question about civil disobedience’s justifiability when there is a duty to obey the law because of its status as the law, as there “normally” is in “a state of near justice” (1971, p.354). If there is no such duty to obey the law, as *Theory of Justice* repeatedly suggests there is not in unjust societies (see for instance 1971, p. 343), then there is a strong *pro tanto* case in favour of a permission for peacefully breaking it so as to draw attention to alleged injustices.

The restriction of Rawls’ theory of civil disobedience to nearly just societies defines its scope narrowly. It is not quite straightforward to see what Rawls means by a nearly just society, but he does offer three criteria in the course of his discussion of compliance with unjust laws. He first distinguishes two ways societies may be unjust and so forfeit the entitlement to have their laws obeyed automatically. Societies may be unjust because in spite their endorsement of his principles of justice, they fail to meet their requirements. Alternatively, a society may be unjust because it endorses different, inadequate standards of justice (1971, p. 352). Rawls then says that a society “regulated by principles favoring narrow class interests” is a clear case of the latter kind of unjust society (1971, p. 353). His discussion of the inevitable imperfections of majority rule seems concerned with injustices caused by failures to live up to his principles and provides the other two criteria. Majority rule’s imperfections do not have to be complied with when the burden of injustice is not “more or less evenly distributed over different groups” in the long run. If a minority has “suffered from injustice for many years”, the law does not bind it any more. Equally, a society cannot require citizens “to acquiesce in the denial of [their] basic liberties”. Victims of this injustice are under no duty to comply, since it could not be demanded

by “the duty of justice in the original position” or “the understanding of the rights of the majority in the constitutional convention” (1971, p. 355).

On this understanding of a nearly just society, very few contemporary societies are nearly just. Most fall into the first of Rawls’ two categories of injustice by failing to endorse his principles or even anything reasonably like them. Many are in fact regulated by principles favouring narrow class interests, as the persistent growth of income and wealth inequality over the past four decades shows. Even societies which do endorse something reasonably like Rawls’ principles are often condemned by that quite general trend towards higher levels of inequality, both within and between generations. The burden of injustice has not been more or less evenly distributed over different groups, but has fallen primarily on the poor and economically marginalized. Increases in punitive police power and electronic surveillance might well also be problematic under the requirement that the basic liberties are protected. The case Rawls’ view might otherwise be most clearly taken to apply to, the struggle to enforce Black Americans’ civil rights in the United States, cannot be covered by his theory. At a bare minimum, the persistent systematic denial of basic rights to and discrimination against a racial minority shows the United States was so far from realising any ostensible commitment to Rawls’ two principles as to fail to be nearly just. On his account, it seems like Martin Luther King and others struggling to dismantle Jim Crow had “no recourse but to oppose the prevailing conception and the institutions it justify[d] in such ways as promise[d] some success” (1971, p. 353). Rawls himself may well not to have understood this,² but it is hard to see how else the requirements the theory gives for near justice could be interpreted.

The narrowness of Rawls’ theory explains many of its features. His emphasis on civil disobedience’s public, fidelity to the law and appeal to the majority’s sense of justice, like his insistence that it must be a last resort directed at substantial and clear injustices, are a result of the role he gives it. For Rawls, civil disobedience stabilizes a just or nearly just society by assuring its members that departures from justice, though inevitable, will be minimized (1971, p. 383ff). Peaceful illegal protest can only play that role if it is restricted though. Rawls fears that if it were acceptable to resort to civil disobedience whenever a group lost out in the democratic process, then it would no longer be able to play its stabilizing role. Citizens would no longer be

² It is hard to infer Rawls’ own view from the discussion in *Theory of Justice*. There are many reasons for not saying all the relevant things one believes in philosophical texts, just as there are for rejecting the idea that authors fully understand all the implications of everything they say and so are authoritative over its interpretation. Even if the discussion in *Theory* was intended for judging then-contemporary cases like the Civil Rights Movement, that does not have to have been because Rawls himself believed the United States was then nearly just, any more than he must have always acted in accordance with the theory he professed at any given time.

reasonably assured that others were doing their part and not taking advantage of them and their institutions.

That claim about civil disobedience's role and justification, like Rawls' about how civil disobedience ought to be characterized, may well be false or in some other way inappropriate or wrongheaded. It is important to see about what it is a claim though. It is a claim about the operation of civil disobedience in just or nearly just societies, where the natural duty of justice otherwise requires obedience to the law. Most contemporary societies are, by Rawls' criteria, not nearly just. That means Rawls' account of when civil disobedience is justified in nearly just societies does not explain when it or any other form of disobedience is justified in societies with which we are familiar. However, the problematic to which that account responds is clear about whether the law has any authority as such in societies which are not even nearly just. Rawls' theory treats peaceful law-breaking in contemporary societies as more or less automatically permissible, at least if it aims at putting right an injustice. The duty to oppose injustice whose conflict with a duty to obey just institutions Rawls' theory seeks to address is no longer in conflict, because there is no longer any relevant duty to obey just institutions. There may be duties to take effective means to the ends of justice or to avoid unnecessary or excessive harm when seeking to overturn injustice, but these are not duties of respect for the law. Nonviolent illegal opposition is "surely... justified" in "an unjust and corrupt system" (1971, p. 363). On Rawls' account, members of societies like the UK, the USA and liberal democracies of northern Europe do not have a duty to obey the law simply because it is the law. While they may be restricted by their moral responsibilities to others, there is no standing problem with them breaking the law as such. Criticisms of Rawls' account of civil disobedience which focus on the ways in which seemingly acceptable contemporary examples of principled and peaceful law-breaking do not meet his criteria for its justification are misplaced. Those criteria do not apply to protest in contemporary societies.

Misplaced Moralisms

Rejections of Rawls' account of civil disobedience tend to fall into one or other of two rough categories. Theorists interested in and sympathetic to radical social movements often criticize Rawls for having stripped protest of its emancipatory potential. They claim he insists that protest support the existing order by neither being too disruptive nor framing its complaint in ways that fundamentally question the principles around which society is structured. Even William Scheuerman, who is broadly sympathetic to Rawls' emphasis on the rule of law, thinks that it is "susceptible to a range of democratic criticisms" because of its conservatism (2015, p. 437). Alternatively, theorists working more straightforwardly within the liberal analytical

tradition find it problematic that Rawls allegedly requires individuals to ignore the demands of their conscience and comply with laws prescribed by democratic majorities they find wrongheaded or intolerable.

These two camps differ in a range of ways. For example, they often understand democracy quite differently. The more radical theorists tend to frame and justify protest as a democratic practice correcting the shortcomings of the entrenched and often unjust orders we live within. Daniel Markovits for example treats anti-globalization protests as illustrative of the kind of protest for which more liberal conceptions cannot account (2005, p. 1950ff). The liberal moralists instead typically see democracy not as liberating but as an impersonal coercive power, whose formal regulations can be as problematic as those of any other government. Both Ronald Dworkin and Joseph Raz treat conscientious objection as straightforwardly justified in comparison to civil disobedience. They are concerned about how anti-democratic protest may be only when it aims at changing the rules for all rather than simply carving out an exemption for some (Dworkin, 1986, p. 107ff; Raz, 1979, p. 276ff).

I focus here on two particularly stark versions of the radical democratic and liberal moralist accounts of civil disobedience and its justification, Robin Celikates and Kimberley Brownlee. They both engage with Rawls and, in their radicalism, make the direction and so the difficulties of these alternative understandings particularly clear. Both of these alternatives to Rawls' view, however, replicate, perhaps not deliberately, one central feature of his understanding of civil disobedience. Like Rawls, these critics do not disaggregate political authority. Both Brownlee and Celikates theorize civil disobedience in political orders they do not regard as authoritative. This is clear from both their critiques of Rawls, which attack him as if he were discussing a contemporary problem, and from the positive accounts they provide, which are not concerned to vindicate civil disobedience against the authority of the law.

Robin Celikates positions his account of civil disobedience as a rejection of liberal accounts, of which he treats Rawls' as exemplary, and their justification of it only as a last resort for protecting "basic principles of justice and individual rights" (2017, p. 986). As I have already noted, as a criticism of Rawls' theory, this is deeply misleading. It ignores Rawls' restriction of his account to nearly just societies and his repeated claim that societies which are not nearly just have no political authority. Celikates' interest in "the social and political reality of protest and its normative grammar" in the here and now means he frequently refers to contemporary protest movements and tactics (2016, p. 40). He uses blockades of ports meant to prevent the deportation of migrants and animal rights activists' use of "a politics of cost-levying designed to alter the incentive structure of those who will otherwise remain indifferent" as examples of practices Rawls' theory cannot properly characterize, for instance (2016, p. 38). Rawls' theory is

not meant to cover the political struggles Celikates evokes here though. Those struggles take place in a society which is not nearly just, and Rawls thinks justifying peaceful illegal protest in such societies is very easy, at least as long as it aims at making them more just. The problem Rawls' account of civil disobedience aims to resolve is not present in those societies.³

It is also clear that Celikates does not view contemporary political orders as authoritative. For Celikates, civil disobedience is justified as "as a dynamizing counterweight to the rigidifying tendencies of state institutions". This counterweight is necessary because those subject to state power often find that in representative democracies, "the official and regular institutional channels of action and communication are closed to them or are ineffective in getting their objections across" (2016, p. 41; 2014, p. 223). Contemporary societies do not meet the standards necessary to qualify as democratic. Civil disobedience is justified because it helps to democratize them. The civilly disobedient have an authority that the institutions whose rules they break lack. The cases Celikates is interested in are not only outside the scope of Rawls' account on its own terms, but are conceptualized by Celikates as a response to the exact opposite of the problem that occupied Rawls. As William Smith notes, a justification of civil disobedience on the grounds of its democratizing effects must at least be sceptical about the authority of the political orders it opposes (2013, p. 9). Celikates wants a theory of civil disobedience in political orders which have no particular authority. Rawls' theory aimed to explain how civil disobedience could be justified, even when political authority was otherwise completely binding. Even if Rawls' theory covered the cases in which Celikates is interested, treating it as an answer to the same problem would still distort it. The core of the disagreement would be over the authority in general of the political order, and not over the relatively circumscribed problem of civil disobedience's permissibility.

Celikates' scepticism about contemporary societies' political authority may explain the way he objects to Rawls' characterization of civil disobedience. Celikates does not require illegal protest to remain peaceful, faithful to the law even *in extremis*, or to appeal to the majority's sense of justice in order to count as civil disobedience. Civil disobedience must provide an opportunity for protesters to reclaim "the political capacities of citizens that the state... denies them" (2016, p. 43). That requires that they are able to challenge it as confrontationally as they feel necessary, and so need to be entitled blur and cross the boundary between violence and non-violence. Celikates' remarkably broad characterization of civil disobedience as "as an intentionally

³ Celikates does discuss Rawls' restriction of his theory of civil disobedience to nearly just societies, but focuses on the restriction's failings as a piece of non-ideal theory, which allegedly makes the theory incapable of guiding us in our even less ideal circumstances (2014, pp. 221ff, 224). This ignores what Rawls' theory quite clearly says about those even less ideal circumstances, that the law has no authority as such.

unlawful and principled collective act of protest” aiming to change “specific laws, policies or institutions” reflects his insistence on radical political change (2016, p. 39). Any form of illegal political activity apart from conscientious objection and “full-scale revolutionary revolt” or “military action aiming at the destruction of an enemy” should be understood as civil disobedience (2016, p. 39; 2017, p. 986). Since Celikates is clear that this does not rule out violence, this is unhelpfully inclusive. Intimidating government representatives or agents with physical violence is not usefully categorized as the same activity as organizing sit-ins or strikes, even if they are all permissible. Rawls’ definition of civil disobedience may be too restrictive because of the role he gives it, dictated by his view of political authority and the problem it gives his theory to solve. However, Celikates’ is too broad because he is instead interested in the exact opposite of Rawls’ problem and so gives civil disobedience a strikingly different role.

Kimberley Brownlee thinks of civil disobedience differently again. For her, it is permissible when it is an act of conscience, whether or not that conscience is related to principles of justice like Rawls’. There is a right to express conscientious conviction based “first, in a principle of humanistic respect for deep moral conviction, and second, in an acknowledgment of 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” (2012, p. 144). This right grounds a permission to disobey the law even in “a reasonably good society... founded on morally legitimate principles and values”. The value of conscience outweighs these principles and values, even though they “are standardly thought to trump whatever values support non-conformity with formal expectations” like those of the law (2012, p. 86). On Brownlee’s account, political authority does not even extend to an entitlement to punish its subjects for breaking the law if they are acting conscientiously, let alone to one to require them to obey it (2012, p. 239).

Like Celikates, Brownlee’s account of civil disobedience is structured by a background assumption about the authority of political orders exactly opposite to that which structures Rawls’ account. Her insistence that “general adherence to formal norms is deeply morally problematic” even in a reasonably good society is symptomatic of her attitude towards claims of political authority (2012, p. 96). For example, she is very quick with objections focusing on the disrespect of disobeying a democratically-mandated decision or officials. These objections are raised only so that we can be assured that civil disobedience contributes to democracy by continuing debate and empowering minorities. There is no real explanation of why individual conscience should weigh so heavily against the decided will of a majority, even in cases where the majority is right (2012, pp. 109-10, 174-178). Whereas Rawls treats democratic majorities as entitled to govern in nearly just societies, Brownlee instead thinks that individuals are not just likely to know better than them (2012, p. 95) but that when they are conscientious, this

entitles them to disregard their commands. This degree of scepticism about political authority is effectively an endorsement of philosophical anarchism.

In that sense, like Celikates, Brownlee is not interested in Rawls' problem of civil disobedience, although she does not acknowledge that. Her rejection of his account of civility in favour of her conscience-focused account neither mentions that Rawls' theory focuses on a conflict within a duty of justice nor its *laissez-faire* attitude to peaceful law-breaking in unjust societies like ours (2012, p. 21ff). Brownlee's own, alternative, understanding of the issue is implausible though. She grounds the right to disobey in a right to express conscientious convictions. Convictions are conscientious when they meet formal conditions of consistency, universality, non-evasiveness and communication, and so almost any convictions can be conscientious (2012, p. 29ff). The incredibly wide scope of such a right comes close to a rejection of politics as such. Any attempt to coordinate to provide public goods is at the mercy of anyone who feels that it violates one of their moral or religious commitments. Yet a political order just is a structure providing public goods, including the public good of a stable background against which hopefully free and fair interactions can take place. The breadth of Brownlee's putative individual right against political decisions makes it entirely unsurprising that her list of important roles society needs to fill does not include politician (2012, p. 94).

Even within a roughly liberal democratic politics, Brownlee's insistence on a right to express conscientious convictions is only not destructive because that politics typically accepts the democratic authority that she rejects. If people generally accepted Brownlee's position that conscientious convictions ground a right to disobey any formal rules conflicting with them, all regulation of issues someone thinks turns on a deep moral question would be threatened. Since any issue may turn on a deep moral question for someone, this threatens all regulation.

Brownlee's defence of her view tends to emphasize cases of disobedience in the defence of good liberal causes, like the Californian anaesthesiologists who refused to oversee lethal injections (2012, p. 85). There is no requirement though that conscientious convictions be liberal or democratic. Officials might conscientiously work to undermine liberal reforms of a patriarchal and authoritarian religious organization, or to preserve its illicit influence over democratic political procedures. Brownlee's right to express conscientious convictions would allow the systematic disruption of all political orders in the name of any ideal whose supporters are sufficiently numerous or empowered to make their defections significant. There may often be very good grounds for systematically disrupting political orders, but the mere fact of conscientious conviction cannot be enough, given how broad that category is. Politics cannot take place without deciding morally controversial questions and that must mean sometimes requiring people to act against their conscience.

Both Brownlee and Celikates assume that the problem of civil disobedience is a different one from that on which Rawls' account focuses. Their theories focus on contemporary societies and treat the civilly disobedient as under no particular duty to obey the law. In contrast, Rawls' theory does not apply to contemporary societies, which do not meet his criteria for near justice, and seeks to justify civil disobedience in the face of a general duty to obey the law. Predictably then, Brownlee and Celikates understand civil disobedience and its justifications differently from Rawls. In both cases, the way they understand the problem of civil disobedience causes trouble for their accounts. As we have just seen, Brownlee's theory is profoundly anti-political because of her commitment to the supreme importance of conscientious conviction. Celikates instead treats any illegal political activity other than full-scale revolution or destruction of an enemy as capable of justification as standard civil disobedience. It is not helpful though to treat the activities of the Angry Brigade, the Baader-Meinhof gang or the Brigade Rosse, none of which themselves aimed to overturn the state or destroy the forces of law and order, as justified in the same way as Rosa Parks' refusal to give up her seat. The problems both views face suggest that not only are they not superior solutions to Rawls' different problem, but they are not even appropriate solutions to their own puzzles. Any similarly motivated and structured view would face similar difficulties, if perhaps not at quite the same level of gravity.

However, the structure of both Brownlee's and Celikates' views in one way matches Rawls'. Rawls treats political authority as either entirely present when societies are at least nearly just or entirely absent when they are not. His view of political authority is in that sense binary. Brownlee and Celikates both deny that the civilly disobedient are under any duty to obey the law at all, and in that sense treat political authority as entirely absent. Neither give any sense that there are gradations in political authority and in that sense, although they may not intend to, like Rawls, fail to disaggregate or separate out different forms of political authority. Brownlee simply denies that there is any political authority at all. That is the implication of her claims about the breadth of a right to express conscientious conviction and that obedience in a reasonably good society founded and consistently acting on morally legitimate values is 'deeply morally problematic'. If political authority does not exist, it cannot be disaggregated or separated out. Celikates instead seems to treat political authority as binary in much the way Rawls does. On the one hand, contemporary society lacks any entitlement to command its subjects while on the other, those acting under the democratic justification his expansive definition of civil disobedience provides always seem to be within their rights. The absence of any residual normative powers for our political orders coupled with the contrastingly comparatively unrestricted entitlement for protesters attempting to remake those orders suggests political authority must be complete if it exists at all. If Rawls' view is problematic because it fails to distinguish different forms of political authority a political order may possess

or lack, then Brownlee's and Celikates' theories will also struggle for that reason, whatever other problems they may have.

A Kind of Extortion?

Rawls' insistence that societies which do not meet his criteria for near justice are a form of extortion to which not even consent would give authority is in a number of ways attractive. For one thing, it highlights the particularity of the circumstances in which civil disobedience needs to adopt the particularly respectful stance his theory requires of it. There is no need to be so respectful when political power is exploitative and dominating. Relatedly, it is a way of insisting that "justice is the first virtue of social institutions". If each person's "inviolability founded on justice" means that "laws and institutions no matter how efficient or well-arranged must be reformed or abolished if they are unjust", then political authority must be binary in the way Rawls claims. Just as we should abandon beliefs which turn out to be false no matter what other virtues they may have, so justice should be a necessary condition for offering support to political institutions (1971, p. 3). Unjust societies must lack political authority if justice is to be given the central and foundational role Rawls claims for it.

It is therefore not surprising that Rawls' view of political authority, particularly given his role in Anglophone political philosophy and theory, is reasonably widely shared amongst contemporary political philosophers and theorists working in that tradition. For example, A. John Simmons accepts this simple view of political authority even though he otherwise disagrees with Rawls and many other contemporary political philosophers about how a political order might come to be authoritative. Part of Simmons' attack on other views about the grounding of political authority is a distinction between justification and legitimacy he argues is important but widely neglected. Only the transactional criteria of legitimacy and not the more generic, typically instrumental, criteria of justification ground political authority (1999, p. 764). Still, on Simmons' account, if and where a state is legitimate, it is fully legitimate and possesses "a right, held against subjects, to be obeyed". Those who consent to the state are bound by its decisions and those who do not are not, at all (1999, p. 746).

Similarly, Thomas Christiano endorses, wittingly or otherwise, Rawls' commitment to a binary and undifferentiated account of political authority in his *Stanford Encyclopaedia* entry on 'Authority'. He argues that the content-independence of duties to obey political authority mean that "one must obey the authority because it is the authority". If you don't have to obey, regardless of what the command is, then it is not an authority (2013). The conceptual possibility of an authority that can sometimes be ignored or has different kinds of power in different

domains is ruled out. That Christiano would make this claim in a highly regarded reference work like the *Stanford Encyclopaedia*, and before he engages with theories of what might justify or ground authority, shows how much a part of the conceptual furniture something like Rawls' view is.

This agreement that political authority is binary in this sense does not depend on agreeing with Christiano, Rawls and Simmons about what the concept of political authority involves. For example, Arthur Isak Applbaum has argued that Simmons is wrong to tie legitimacy so tightly to an obligation to obey as a matter of definition, and so by extension that Christiano and Rawls also are. Applbaum instead argues for the possibility of understanding legitimacy in terms of a power to alter the normative situation (2010, p. 218ff). A court's declaration may be authoritative without its subjects having a duty to obey if, say, it changes the Hohfeldian permissions and privileges they have towards each other. Applbaum may well be right that authority involves "a moral power to... change relevant social facts in ways that change the subject's normative situation" (2010, p. 237). Nothing in his account requires though that the content of such a power differs between different authorities. In that sense, disagreement about the concept of political authority does not threaten consensus about political authority being, as Christiano, Rawls and Simmons claim, either entirely present or entirely absent.

Rawls' view of political authority of course changed over his career. *Political Liberalism* does not require states to be nearly just to be authoritative. It requires instead that they meet the requirements of the liberal principle of legitimacy, and so have and respect a "constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of principles and ideals acceptable to their common human reason" (2005, p. 137). Public reason provides the details of what free and equal citizens may reasonably be expected to endorse in this sense. It requires a liberal conception, that identifies and prioritizes a set of basic liberties, and ensures all citizens have adequate means to make use of them. Only the basic liberties are relevantly constitutionally essential, given the scope for disagreement over socio-economic measures, and so protection of them makes political power legitimate and so authoritative (Rawls, 2005, p. 223ff). Regimes which do not protect the basic liberties, however, violate the liberal principle of legitimacy and so presumably are illegitimate. In that sense, although Rawls changed the criteria by which he judged whether a regime was authoritative, the basic structure of his view remained the same. *Political Liberalism's* theory of political authority is binary in much the same way as *A Theory of Justice's* is.

This view of political authority also characterizes debates around civil disobedience. It is not just Brownlee and Celikates who do not disaggregate political authority, or theorists like David Lefkowitz and William Smith whose work follows Rawls in trying to understand civil

disobedience in otherwise authoritative states (Lefkowitz, 2007; Smith, 2013). David Lyons neatly illustrates the failure to disaggregate political authority in his critique of much work on civil disobedience and its appropriateness and permissibility. On the one hand, Lyons rightly criticizes contemporary political philosophers for treating regimes targeted by paradigmatic examples of civil disobedience as generally authoritative. On the other, he denies that contemporary societies are just enough for their members to be obligated to obey them at all. Their “significant, deeply entrenched, systematic injustice” means there is no “morally significant difference between lawful and unlawful resistance” (Lyons, 1998, p. 46). Like Rawls, from whom he derives his criterion for the absence of political authority, Lyons has a binary and demanding view of political authority. Either we assume “that obedience to law requires justification” or a “moral obligation to obey the law” as such (1998, p. 33). Similarly, Candice Delmas argues against what she sees as mistaken presumption of authority in much work on civil disobedience. For her, the same duties of justice and fairness that require that we obey just regimes also require we disobey unjust regimes (2017; 2014)

However, such a binary view of political authority is problematic when considering the permissibility of civil disobedience and political protest and resistance in general. On such a view, law-breaking is either generally permissible or generally impermissible. If a political order lacks authority, then it lacks all authority and it has no right to command its members. Any nuance in judgments about particular instances of law-breaking is derived not from political considerations, but moral prescriptions like that not to “expose innocent persons to risks they have not agreed to assume” (Lyons, 1998, p. 36; see also Delmas, 2016). That may mean that most people should obey the law most of the time because, for example, much of what the law standardly forbids is anyway morally prohibited. Nonetheless, considerations about the regime itself and particularly its relation to its subjects are excluded. It is irrelevant to the appropriateness of particular forms of protest or resistance that a regime enjoys broad public support or relies on brutal and illegal violence against its subjects to sustain itself. That view about protest and resistance is implausible, as hopefully will be clear from relatively brief reflection.

We can see that a binary view of political authority is problematic if we compare two somewhat stylized historical cases. In 1961, the ANC abandoned its commitment to peaceful protest. In the aftermath of the massacre at Sharpeville and the deployment of troops to break an illegal strike protesting against a whites-only referendum on declaring a republic, the ANC formed an armed wing, Umkhonto we Sizwe, and started a campaign of sabotage of government installations. In 1990, Margaret Thatcher’s Conservative Government in the UK abandoned plans to reform local authority funding by replacing a variable property tax with a fixed charge for each adult

resident, widely known as the Poll Tax. The abandonment was prompted by organized attempts to systematically and illegally undermine the mechanisms used to collect the tax as well as widespread protest that culminated in a riot in central London. An undifferentiated view of political authority cannot make plausible judgments about both of these cases simultaneously. Any plausible undifferentiated view of political authority must deny that the apartheid regime was authoritative. Yet this poses questions about how it judges the campaign against the Poll Tax.⁴ If Thatcher's government was illegitimate, the campaign against the Poll Tax was in principle entitled to use the same methods as the ANC. If Thatcher's government was legitimate, then the campaign to prevent the tax's collection can only have been acceptable under something like the special justification for civil disobedience's peculiarly respectful law-breaking provided by Rawls. Neither of those judgments seem plausible. It would have been wrong for the anti-Poll Tax campaign to start destroying electricity substations but it was not wrong for them to adopt tactics too disruptive and confrontational to be captured by something like Rawls' account of civil disobedience.

The differences between the methods it was appropriate for the anti-Poll Tax campaign and for the ANC to use are not reducible to straightforward individual moral considerations. They relate to the character of the two different regimes against which they were struggling. The Thatcher government was formed from the largest party following an election in which almost all adult residents could vote. In contrast, the ANC was formed to fight against the political exclusion of the majority of South Africa's residents. Thatcher had not already used massive domestic deployments of the army to defeat the anti-Poll Tax campaigners or banned those they represented from entering or owning property in most of the country. Poverty and economic exclusion and exploitation were on different scales in apartheid South Africa and the UK in the 1990. The relevance of these differences is not captured by prohibitions on risking innocents or on physical aggression. The ANC was entitled to use a wider range of methods than the anti-Poll Tax campaign because the regime it opposed was much more gravely unjust and so lacked various forms of authority that the UK Government had. When Nelson Mandela was tried for treason in 1964, he claimed the alternatives facing the ANC when it formed Umkhonto we Sizwe

⁴ This case is also problematic for theorists like Andrew Sabl whose accounts of civil disobedience rely on the way its fidelity to law signals commitment to reciprocity and cooperation. Signalling commitment to those goods is required by Sabl where making a moral appeal to the governing majority or elite has a realistic prospect of encouraging them to extend provision of those goods to the marginalized and excluded. This makes the case for civil disobedience depend "not on current obligation but on the desire not to foreclose future cooperation" (Sabl, 2001, p. 310). This makes it hard to explain the permissibility of the anti-Poll Tax campaign. Either the Thatcher government did not even meet the criteria of piecemeal justice Victorian Britain and the Jim Crow USA did, or, as William Scheuerman's more expansive account suggests, the campaign of deliberate frustration of clear and procedurally legitimate government policy by violating and evading all its requirements and any attempts to enforce them realized the virtues of fidelity to law. Neither of these seem to me plausible.

were to “submit or fight”, and that submission was morally impossible, an “abject surrender” (Mandela, 1964). Anti-Poll tax campaigners could not have reasonably made similar claims.

It is implausible then to think that political authority is binary in the way that most contemporary work in political philosophy and theory generally, and in discussions of civil disobedience in particular, assumes. That understanding of political authority seems to lead to mistakes about the acceptability of different forms of resistance and protest in different regimes. Political theorists and philosophers should adopt a more nuanced approach that can differentiate between different failures of legitimacy instead. If political theorists and philosophers do not adopt such an approach, they will be forced to appeal to moral and perhaps strategic considerations to justify judgments about the appropriateness of different forms of protest and resistance. That though looks implausible, whether the appeal is considerations to about what we owe to each other personally or the effectiveness of different forms of resistance. Different kinds of regimes are liable to different kinds of opposition, as the examples of the formation of Umkhonto we Sizwe and the anti-Poll Tax campaign suggest. They lack different kinds of authority.

Cécile Laborde’s work on disaggregating freedom of religion is suggestive here (2015). Laborde argues that prevailing conceptions of freedom of religion use a conception of religion which privileges conscience over practice, the religious over the non-religious or both. The solution is to disaggregate the way various goods which have been protected under the banner of freedom of religion. In particular, Laborde argues that freedom of religion properly protects adherents from interference in at least four ways. Religion is all at once a conception of the good life, a source of conscientious moral obligation, a key feature of identity and a mode of human association. Each of these aspects of religion has a different normative valence and so requires distinctive forms of protection. Only by disaggregating freedom of religion can the appropriate forms of religious practice and belief be protected in the right way. Political authority needs to be disaggregated in the same way, so that we can see when regimes are authoritative and when they are not.

Bernard Williams’ theorising of the first political question, of “the securing of order, protection, safety, trust and the conditions of cooperation”, can help in performing this disaggregation of political authority (2005, p. 3). As Williams repeatedly emphasizes, answering his first political question involves offering an explanation to particular people. A regime’s answer needs to make sense to those for whom it claims it is authoritative. In that sense, answers to the first political question are historically variable. For example, for Williams, liberalism’s answer to it is a historically-situated response to various specific historical developments, and one which is troubled by its failure to see itself as in that way historical (2005, p. 7ff). Williams’ theorising is

helpful here though because it prompts thinking about the various different goods a political order might provide and the different ways in which those different goods might be understood to ground its authority over its members. In that way, his emphasis on the variable and contextual explanations and justifications of political authority offers resources we might use to perform an operation on political authority analogous to that Laborde has performed on religious liberty. Instead of thinking of authority as one thing, we may think of it as potentially being made up of many different things.

For example, for Williams, liberalism is successful around here and now in part because it responds to the demystification of various hierarchies which were once able to legitimate themselves as in some way natural. That does not show though that a regime reproducing and reliant on demystified hierarchies is therefore wholly illegitimate for liberals. Such an order still provides basic Hobbesian goods, and insofar as that provision can be disentangled from its maintenance of unacceptable inequalities, it may still be authoritative. As Williams himself puts it, it is “illuminating... to ask *how far*, and in *what respects*, a given society... is an example of the human capacity for intelligible order, or of the human tendency for unmediated coercion” (2005, p. 10. Emphases added). It would be strange, for example, to understand the political order in Great Britain under Queen Victoria as wholly illegitimate, despite its widely protested denial of formal political participation rights to the substantial majority of the adult population.⁵ Despite that surface similarity, it was not a regime like that of apartheid South Africa. It did not structure its entire economic, social and political order around such a steep, comprehensive and brutally enforced hierarchy in which position was fixed at birth. Even for us now, Victorian governments of Great Britain do not seem as illegitimate as the apartheid regime was. Obviously their subjects did not generally experience them as illegitimate in the way subjects of the apartheid regime did.

Attempting to disentangle the failures and successes of various political orders is obviously difficult. Identifying the relevant standards and to what exactly they apply, and how both of those relate to each other, will not be straightforward. Consider for instance criticisms of contemporary political philosophy as excessively abstract which stress the importance of the context-dependence of judgments about how we ought to act (Hall, forthcoming; Jubb, 2016; Sangiovanni, 2008; Williams, 2001). On this kind of account, the generalizability of judgments about both concepts like liberty and practices like camping are restricted by the way they assume, at least in most contemporary political philosophy, the particular context of “(Western)

⁵ To be clear, this is a claim about Victorian Great Britain and not Victorian Ireland or the Empire beyond the British Isles. The Victorian regimes in Ireland and the settler colonies and imperial possessions outside Europe involved steep, comprehensive and brutally enforced hierarchies and were widely rejected and resisted. As such, they lacked the legitimacy the regime in Great Britain possessed.

modernity” (Jubb, 2016, p. 73). If that is correct, then understanding judgments and their relation to other judgments means understanding how they are shaped by their context, including by how they fit into that context and all the constraints that apply to it. Judgments about political authority, whether general or particular, presumably then have to be related both to each other and a broader context. Disaggregating political authority will then require working both from the inside out and the outside in, and at the same time. That suggests it is not a project I can realistically complete in the remainder of this paper.

However, I can offer some reflections on one of the two instances of political protest I have already mentioned that may help illustrate the kinds of questions such a project might raise. One way of understanding the acceptability of the anti-Poll Tax campaign would be to draw a distinction between a responsive and a fully democratic regime. On this account, a responsive regime is sensitive to the political preferences of its subjects, even if it does not qualify as fully democratic by giving them all equal rights to participate in determining its policy. The subjects of a responsive regime are not obedient simply because they are coerced, but accept, perhaps only grudgingly but equally perhaps quite happily, that their government is entitled to maintain their social and political order. A fully democratic regime, as well as being broadly accepted, will be able to demonstrate that it is governing according a public or general will in a way that a responsive regime will not. However, that difference does not seem to be enough to strip a responsive regime of all its authority. A fully democratic regime may be more authoritative, since it can point to a public or general will that mandates its decisions or at least its decision-making power. It might not be liable to organized illegal frustration of its policy. In contrast, a responsive regime could lack that protection, since its authority comes from acquiescence rather than decided will. That authority still might protect it from systematic illegal resistance to its rule in general or removal through extraconstitutional means though. The boundaries of acquiescence can legitimately be tested, but they cannot be forced.

That understanding would fit well with the methods used by the anti-Poll Tax campaign. The Thatcher government did not have a full democratic mandate. It had an unassailable legislative majority despite nearly 60% of votes being for other parties and well over half for national parties which explicitly rejected its political programme wholesale. In that sense, this sketch of a distinction would allow for the campaign’s attempt to make the tax unenforceable. That presumably speaks in favour of it. That it is also able to explain why it would have been wrong to attempt to widen and deepen the campaign seems to me a point in its favour, though others may disagree. Responsive regimes ought not to be generally systematically opposed or extraconstitutionally removed. The discussion is not supposed to convince though, even if it would be disappointing if its claims had no appeal. Instead, its point is to illustrate the kinds of

considerations which are likely to be relevant when disaggregating political authority. Anna Stilz argues that there are three criteria a political order must meet in order to be authoritative (2009, p. 89ff). This is a mistake, especially given how demanding her criteria are. Democratic but socially inegalitarian states have some authority for their refusal to consistently treat all their members as equals. There is a sense in which their members accept that refusal, and that acceptance is owed a certain kind of respect. Sketching the distinction between fully democratic and responsive regimes in the context of the anti-Poll Tax campaign is meant to illustrate how we might understand what that respect involves.

Conclusion

This paper has three aims. First, it tries to show that two prominent strands of critique of Rawls' view about civil disobedience are seriously damaged by their misunderstanding of the problem his theory tries to answer. Second, it argues that like much of contemporary political theory and philosophy, these two critiques share the view of the structure of political authority which shapes Rawls' theory. Their position on the other side of a stark division requires agreement with Rawls that there is such a stark division. Third, this paper tries to show that dividing political orders into those with authority and those without it is implausible, particularly when it comes to understanding protest and resistance. Instead political philosophers and theorists need to develop a disaggregated model of political authority, perhaps along the lines of Cécile Laborde's disaggregated model of freedom of religion.

Bibliography

- Appelbaum, A. I. (2010). Legitimacy without the Duty to Obey. *Philosophy and Public Affairs*, 38(3), 215-239.
- BBC News. (2018, October 17). *Three Jailed Fracking Protesters Freed on Appeal*. Retrieved November 7, 2018, from BBC News: <https://www.bbc.co.uk/news/uk-england-lancashire-45888172>
- Brownlee, K. (2012). *Conscience and Conviction: The Case for Civil Disobedience*. Oxford: Oxford University Press.
- Brownlee, K. (2017). The Civil Disobedience of Edward Snowden: A Response to William Scheuerman. *Philosophy and Social Criticism*, 42(10), 965-970.
- Celikates, R. (2014). Civil Disobedience as a Practice of Civic Freedom. In J. Tully, *On Global Citizenship: James Tully in Dialogue* (pp. 207-228). London: Bloomsbury.
- Celikates, R. (2016). Rethinking Civil Disobedience as a Practice of Contestation - Beyond the Liberal Paradigm. *Constellations*, 23(1), 37-45.
- Celikates, R. (2017). Democratizing Civil Disobedience. *Philosophy and Social Criticism*, 42(10), 982-994.
- Christiano, T. (2013). *Authority*. (E. N. Zalta, Editor) Retrieved from Stanford Encyclopaedia of Philosophy, Spring 2013 Edition: <https://plato.stanford.edu/archives/spring2013/entries/authority>
- Delmas, C. (2014). Political Resistance: A Matter of Fairness. *Law and Philosophy*, 33(4), 465-488.
- Delmas, C. (2016). Political Resistance for Hedgehogs. In W. Waluchow, & S. Sciaraffa (Eds.), *The Legacy of Ronald Dworkin* (pp. 25-48). Oxford: Oxford University Press.
- Delmas, C. (2017). Disobedience, Civil and Otherwise. *Criminal Law and Philosophy*, 11(1), 195-211.
- Dworkin, R. (1986). *A Matter of Principle*. Cambridge: Harvard University Press.
- Hall, E. (forthcoming). How to Do Realistic Political Theory (and Why you Might Want to). *European Journal of Political Theory*. doi:10.1177/1474885115577820
- Jubb, R. (2016). "Recover it from the Facts as We Know Them": Practice-Dependence's Predecessors. *Journal of Moral Philosophy*, 13(1), 77-99.
- Laborde, C. (2015). Religion in the Law: The Disaggregation Approach. *Law and Philosophy*, 34(6), 581-600.

- Lefkowitz, D. (2007). On a Moral Right to Civil Disobedience. *Ethics*, 117(2), 202-233.
- Lyons, D. (1998). Moral Judgment, Historical Reality and Civil Disobedience. *Philosophy and Public Affairs*, 27(1), 31-49.
- Mandela, N. (1964). *Statement from the Dock at the Opening of the Defence Case at the Rivonia Trial ("I am Prepared to Die")*. Retrieved 6 3, 2016, from <http://www.anc.org.za.show.php?id=3430>
- Markovits, D. (2005). Democratic Disobedience. *Yale Law Journal*, 114(8), 1897-1952.
- Pineda, E. (forthcoming). *The Awful Roar: Civil Disobedience in the Wake of the Civil Rights Movement*. Oxford: Oxford University Press.
- Rawls, J. (1971). *A Theory of Justice*. Cambridge: Harvard University press.
- Rawls, J. (2005). *Political Liberalism*. New York: Columbia University Press.
- Raz, J. (1979). *The Authority of Law*. Oxford: Clarendon Press.
- Sabl, A. (2001). Looking Forward to Justice: Rawlsian Civil Disobedience and its Non-Rawlsian Lessons. *Journal of Political Philosophy*, 9(3), 307-330.
- Sangiovanni, A. (2008). Justice and the Priority of Politics to Morality. *Journal of Political Philosophy*, 16(2), 137-164.
- Scheuerman, W. (2015). Recent Theories of Civil Disobedience: An Anti-Legal Turn? *Journal of Political Philosophy*, 23(4), 427-449.
- Shelby, T. (2007). Justice, Deviance and the Dark Ghetto. *Philosophy and Public Affairs*, 35(2), 126-160.
- Simmons, A. J. (1999). Justification and Legitimacy. *Ethics*, 109(4), 739-771.
- Smith, W. (2013). *Civil Disobedience and Deliberative Democracy*. London: Routledge.
- Stilz, A. (2009). *Liberal Loyalty: Freedom, Obligation and the State*. Princeton: Princeton University Press.
- Williams, B. (2001). From Freedom to Liberty: The Construction of a Political Value. *Philosophy and Public Affairs*, 30(1), 3-26.
- Williams, B. (2005). Realism and Moralism in Political Theory. In B. Williams, & G. Hawthorn (Ed.), *In the Beginning Was the Deed* (pp. 1-17). Oxford: Princeton University Press.