How Should Liberal Democratic Governments Treat Conscientious Disobedience as a Response to State Injustice?: A Proposal

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Abstract
This paper suggests that liberal democratic governments adopt a *reconciliatory* approach to conscientious disobedience. Central to this approach is the view – independent of whether conscientious disobedience is always morally justified – that conscientious disobedience is normatively *distinct* from other criminal acts with similar effects, and such distinction is *worthy* of acknowledgment by public apparatus and actors. The prerogative applies to both civil and uncivil instances of disobedience, as defined and explored in the paper. Governments and courts ought to take the normative distinction seriously and treat the conscientious disobedients in a more *lenient* way than they treat ordinary criminals. A comprehensive legislative scheme for governments to deal with prosecution, sentencing, and imprisonment of the conscientious disobedients will be proposed, with the normative and practical benefits of such an approach discussed in detail.

1. Introduction

Recent years have seen many large-scale political protests in different parts of the world. They have taken place not just under authoritarian regimes such as Belarus and Myanmar, but also in states conventionally deemed to be liberal democracies. From the Black Lives Matter protests remonstrating police brutality in the United States throughout 2020, to the Extinction Rebellion protests that took Britain by storm in 2019, to the Gilets Jaunes protests in France that began in 2018, it is clear that liberal democracies have seen their fair share of protests, directed towards problems ranging from public apathy towards climate change and police brutality. None of the above protests strived for revolutionary regime change as such. They had a limited goal of changing a supposedly unjust decision, policy or practice, reforming a flawed institution, and/or transforming

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public attitudes. Although many of these protests were largely peaceful and civil, they occasionally turned violent – but even so, the participants involved in violence were not, in a majority of instances, armed with tools of destructive force.

Political protests not only trigger huge political tensions and controversies in societies; they also generate many moral questions for both protestors and governments alike. Much of the contemporary literature on political disobedience in recent decades has focused mainly on the ethics of disobedience, exploring the questions of what the individual protestor may or may not do in protests. A few exceptions in recent years aside[1], relatively little attention has been paid to the question of government action: How should governments treat who those who transgressed the law in political protests? In particular, what should governments do with regard to prosecution, sentencing, imprisonment in cases of legal transgression?

Our paper confines legal transgression to what we call *conscientious disobedience*, which can manifest in both civil and uncivil forms. Disobedience is understood to be a violation of law, often resulting in disruption to law and order. Disobedience is *conscientious* if it is motivated by what the disobedients perceive as state injustice, which includes the state's *direct* violation of basic rights or freedoms, such as racial injustice, policy brutality, or political disenfranchisement, as well as *indirect* injustice such as the state's failure to rectify long-term social injustice.

Our paper recommends that liberal democratic governments adopt a *reconciliatory* approach to conscientious disobedience. Central to this approach is the view that there is a *normative distinction* between the conscientious disobedients and those who commit ordinary crimes.

For the purpose of this paper, we take 'normative distinction' to denote a morally significant difference – one that affects the way we should appraise the moral quality of the actions and/or characters of the agents involved. More generally, normative statements involve value judgments or rules of behaviour – they make claims about how people or institutions should act, and whether their actions are appropriate or justified.

The disobedients have experienced substantial injustice under the coercive state apparatus or systematic structural injustice. If the disobedients turn to unarmed violence, more likely than not they do so as a last resort to resist the police's actions to disperse them away

[1] For examples of such works, see Smith (2013); Lefkowitz (2007); Shock (2015); Scheuerman (2020) and Smith and Brownlee (2017).

from the streets they occupy for the purposes of protest. The disobedients often wield force not disproportionate to the injustice they have suffered. Of course, there must be violent acts that must not be given sympathetic treating. Our paper does not need to presuppose that conscientious disobedience is always morally justified, still less to argue that citizens have a *right* to it. We are sympathetic to, but will not defend, the view that conscientious disobedience is sometimes justified. Instead, we argue only for a weaker claim: justified or not, conscientious disobedience is normatively *distinct* from other criminal acts with similar effects, and such distinction is *worthy* of acknowledgment by public apparatus and actors.

Governments and courts ought to take the normative distinction seriously and treat the conscientious disobedients in a more *lenient* way than they treat ordinary criminals. We propose a legislative scheme for governments to deal with prosecution, sentencing, and imprisonment of the conscientious disobedients. In our proposal, the scheme is to be adopted by the government based on a legislation debated in society and passed in the legislature, so that the scheme has a political mandate so to speak. One strong advantage of this scheme is that it will take the heat away from the court room as it were, in the sense that judges can avoid as much as possible making judicial decisions on the basis of their own controversial political or moral beliefs. The prosecutors are the officials to decide whether or not to initiate prosecution using the scheme. The adoption and implementation of the scheme is thus not a purely legalistic process but also a political and moral one.

We shall explain the scheme and its philosophical rationale in the main sections. In the second section, we explain why conscientious disobedience is normatively distinct from ordinary crimes. In the third section, we explain why governments and courts should take seriously the normative distinctness of conscientious disobedience. In the fourth section, we outline a legislative scheme for governments to treat the conscientious disobedience in legal proceedings. In the fifth section, we consider two objections to our approach. The sixth section concludes.

Before we move on, we want to note here that the considerations that might motivate governments to adopt the reconciliatory approach apply *primarily* to liberal democracies, as opposed to authoritarian regimes. Liberal democratic governments under the pressure of public opinions do occasionally admit that they have made serious mistakes. They understand that their legitimacy is partially based on the people's willing endorsement, and that a mass political protest of a prolonged period of time might signal a

kind of government's failure that eventually erodes their legitimacy. In addition, in liberal democratic states, the rule of law must be based on respect for human rights and civil liberties, and so governments would have incentives to prefer reform to repression as a response to political protests. More often than not, a stringent legalistic approach to punishment would harden political divisions and tensions, making reforms difficult to carry out within parliamentary or civil society settings. All these considerations seem to motivate liberal democratic governments to consider a reconciliatory approach to handling the conscientious disobedients. These prudential considerations, however, cannot easily apply to authoritarian states, which typically refuse to admit state injustice or tolerate citizens' serious political challenges through open and unfettered competition at the electoral and sub-electoral levels.

2. Why conscientious disobedience is normatively distinct

We follow Smith and Brownlee in defining *conscientious disobedience* as 'nonconformity with a law, injunction, or formal directive for principled motives to communicate convictions to particular addressees' (Smith and Brownlee, 2017). This term serves as an umbrella term that encompasses *civil disobedience and uncivil disobedience*, and conscientious objection.

2.1 Civil Disobedience

To see the normative distinctness of conscientious disobedience, we shall first look at its more common and widely discussed form, namely, civil disobedience. Let us begin with Rawls' relatively comprehensive, archetypal definition of civil disobedience. An act of civil disobedience is a (1) *public*, (2) *non-violent*, (3) *principled*, (4) *political* act (5) *contrary to the law*, (6) *with the aim of bringing about a change in the law or policies of the government* (Rawls, 1971, p. 364).

(1) denotes the *publicity* condition – an act of civil disobedience must be fundamentally capable of communicating a clear and unambiguous message to *the public*, with apparent visibility and publicisation of the act in question.

(2) constitutes the *non-violence* condition: civil disobedience must refrain from force, violence, and physical forms of disruption and undermining to the wellbeing of third parties. Per Rawls'

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original interpretation, civil disobedients ought to be cognizant of the 'civilly disobedient quality of [their] acts, [which would be undermined by…] any interference with the civil liberties of others' (Rawls, 1971, p. 321).

(3) comprises the *principledness* condition. Individuals who partake in civil disobedience must do so with the intention of challenging unjust laws, structures, and tenets on the basis of sincere commitments (Delmas and Brownlee, 2021). Principled disobedients are driven by collective, societal interests, as opposed to individual, ego-centric gains. Recent discussion has raised the view that civil disobedience need not be selfless – *per* Delmas (in Ferzan and Alexander, 2019, pp. 167-88), oppressed groups could derive much from their continued resistance against injustice, though we are of the view self-centric gains should by no means be the *dominant reason* for which individuals carry out their acts.

(4) consists of the *political* condition in civil disobedience. Disobedience must be political in kind – *grounded in the political values in the society*, individuals employ civil disobedience as a means of securing political and institutional reform, with an apparent focus on the distribution of resources, rights, and power under existing sociopolitical structures. In contrast, conscientious objection – as a refusal to conform with a legal prerogative or stipulation – tends to be more *private in kind*: *grounded in the individual's personal values or faith*, individuals conscientiously object in order to avoid the requirements or associations with particular roles.

(5) constitutes the *transgressive* condition. Trivially, civil disobedience requires *some* law to be broken, in order for it to be differentiated from mere acts of public protest or criticisms. Legal violations – of unjust protocol, rules, and regulations – are part and parcel of civil disobedience Some theorists include additional stipulations – that only laws whose transgression is *absolutely necessary* for *effective* and *proportionate civil disobedience* should be broken. Under this view, individuals are obliged to accept both a) the consequences and penalties associated with their legal violations (Rawls, 1971, p. 322) and b) the importance of (accepting and abiding by) laws that are not targeted by their critique, to the extent that such laws exist. Call this the *thin* variant of 5).

On the other hand, others are skeptical of both the moral imperative of agents to respect the legal system in which they carry out

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their disobedience (Lyons, 1996, pp. 33-34), as well as the extent to which accepting the legal system at large is mandated on grounds of political legitimacy (as opposed to prudential reasons) (Sharp, 2012). In other words, agents are permitted to evade their legal responsibilities under this view. Call this the *thick* variant of 5). We will return to whether the *thin or thick* variants are to be preferred, in subsequent sections.

Under the *transformative* condition (6) – civil disobedience should seek to introduce transformations to governmental structures and official policies, with the operative description being one of *reform*. As Singer describes it, civil disobedience is a 'plea for reconsideration' (Singer, 1973, pp. 84-92). Habermas terms it a 'symbolic [...] appeal to the capacity for reason and sense of justice of the majority' (Habermas, 1985, p. 99).

There exist plentiful defenses of civil disobedience that we shall not relitigate in detail here. Some accounts invoke the principle that disobedients are offering an active critique of the law, which paves the way for the law to improve upon its fidelity to principles of procedural and substantive justice underpinning it (Dworkin, 1978). Others argue that the selfless and publicly oriented motivation of civil disobedience ought to render it morally permissible, especially if conducted under systems engaged in systemic, sustained violations of human rights and civil liberties (Delmas in Ferzan and Alexander, 2019, pp. 167-69). We are sympathetic to the view that civil disobedience as understood above is normally justifiable from a moral point of view. Yet our present aim is to support the weaker position that civil disobedience is normatively distinct from ordinary crimes committed with non-civil disobedience-related motivations. It is easy to see that ordinary crimes do not meet criteria of (1) publicity, (3) principledness, (4) politically grounded, and (6) aiming at political transformation. All these features convey significant values commonly shared in liberal democracies.[2]

2.2 From civil to uncivil disobedience

The question is thus as follows – what are we to make of disobedience that is *uncivil*?

[2] We do not, however, grant that individuals have a right to civil disobedience Individuals may possess strong reasons to wish to engage in civil disobedience – though they must also be open to a range of potential consequences and sanctions that subsequently bind them.

Given we accept that civil disobedience is indeed normatively distinct from criminal behaviours performed with ulterior motives, could we extend this *normative distinction* to apply between criminal acts and acts of *uncivil* disobedience? To offer a broad preview of the argument we shall make, we do not seek to *justify uncivil disobedience*, nor is such *justification* necessary for our account to hold. We are of the view that not only *civil disobedience*, but also *some forms of uncivil disobedience* are worthy of distinction from ordinary, criminal acts. More specifically, acts that satisfy criteria (1), (3), (4), and (6), whilst failing to meet the *non-violence* criterion and engaging in legal transgressions that extend beyond those deemed justified under the thin variant of 5), should and can still be deemed as *normatively distinct* from other acts of violent legal transgressions: they amount to instances of uncivil disobedience.[3]

Prior to delving into the exposition of why uncivil disobedience is distinct from ordinary criminality, let us establish the characteristics of the cases we are discussing here. Recall that these cases satisfy the *publicity*, *principledness*, *politically grounded*, and *transgressive* conditions outlined above, though they *may* fail to be a) *non-violent* and b) *transformative* in nature.

On the former, uncivil disobedience may feature *violence* – here, taken to denote the use of physical force causing or likely to cause injury to the *physical persons* and *property* of individual agents. Instances of violence in disobedience could range from mild physical confrontations and altercations to arson and destruction of public property. Such violence may arise as a part of more general episodes and movements undergirded by and conforming largely with tenets of civil disobedience. Alternatively, however, disobedience-centric violence may also be enacted on a standalone basis – e.g. limited violence is employed by disobedients as the sole and predominant means of securing their end goals.

As for the latter, we posit that uncivil disobedience can also be *non-transformative*. To be clear, there exists a range of actions that can be undertaken with transformation in mind – even if transformation is not realistically achievable within the short- to medium-term – that is, uncivil disobedients may adopt acts that seem to be practically futile in generating results, yet nevertheless be *aimed* at transformation. With that said, we would suggest that uncivil disobedience *can* also be aimed purely at registering discontent towards unjust laws – transformation need not be an objective that undergirds such actions. Delmas notes that, 'But even where there is no hope

[3] Lim terms this the 'Differentiation Demand' in Lim (2021).

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of socio-political reform or moral suasion, uncivil disobedience may still have intrinsic value insofar as it constitutes a meaningful expression of political solidarity and assertion of agency in the face of injustice' (Delmas, 2018, p. 63).

The argument that disobedience must be directed towards the securing of reforms from within the system, presupposes that the legal and political institutions are indeed open to the processes of protest and appeal invoked by disobedients. Yet where such institutions remain unmovable and intransigent in face of persuasion, disobedience may be warranted as a form of passive resistance against injustice. Democratic regimes, too, could be obstinate in face of movements seeking empowerment and rectificatory justice – consider, for instance, the violence championed by Malcolm X and adopted by forces such as the Black Panther Party against white-supremacist groups and the political disenfranchisement confronting African-Americans in 20th century America (Shelby, 2005); or alternatively, the violence embraced by vigilante groups such as the Gulabi Gang (Richards, 2016, pp. 558-76) against sexual predators in India. These entities' actions should not be reduced into mere protests and articulation of disavowal of the state – instead, they straddle the amorphous terrain beyond civil disobedience, yet is short of a full-fledged revolution or rebellion.

In advancing the view that uncivil disobedience is *distinct* from criminality, we are answering to the negative against those who insist that uncivil disobedients are nothing more than merely 'thugs', or are comparable to violent criminals who employ force as a means of securing selfish gains. However, we are *not* concurrently defending the view that there exists *no morally salient difference* between civil and uncivil disobedience; it would be entirely plausible, indeed most likely the case, that differences *also exist* between civil and uncivil disobedience. Nor are we defending the proposition that uncivil disobedience is *justifiable* or *always permissible*.

We advance three possible lines of defence as for why uncivil disobedience should not be equated, all else being equal, with general criminal violence. The overarching strategy here is to identify unique explanatory factors that exist – and only exist – in instances of uncivil disobedience, as juxtaposed against violent crimes at large.

Firstly, there is the view that uncivil disobedients are wielding force that is *roughly proportionate* as a response to the egregious structural violence that they endure. Some unpacking is warranted here. The presupposition is that the disobedients themselves, or the group on which they are resisting and fighting, have been experiencing substantial transgressions under the probably coercive state

apparatus. Injustices ranging from systemically engrained police brutality, structurally hard-wired racism and alienation of particular groups, and socioeconomic deprivation at the hands of inept, unresponsive bureaucrats and politicians, may fall into the category of such transgressions.[4]

Indeed, such injustices could amount to what Galtung (1993, p. 106) terms *structural violence* – 'avoidable impairment of fundamental human needs'. We would add that the scope of relevantly egregious deprivation could extend beyond the scope of violation of core human rights, and apply equally to civil and political liberties deemed and agreed upon as morally urgent in the spaces where the violence is perpetrated. Lest we be accused of excessive stretching of the concept, we do not posit that structural violence is wholly equivalent to physical violence; this is why the physical force deployed by disobedients can only be *roughly* proportionate. We would nevertheless also note that certain forms of structural violence inflicted by the state could well harm individuals in manners more intense, long-lasting, and substantial as compared with physical infringements – consider, for instance, the harms inflicted by electoral disenfranchisement and denial of access to freedoms of assembly as compared with the mild pain posed by piercing someone's fingers. Physical violence is not innately more severe than structural violence[5]; this is also why uncivil disobedience may be *appropriate*, even if non-justified all-things-considered, as a response to egregious violations by the state that would amount to a systemic inducing of avoidable impairment of human needs. The circumstances to which disobedients are responding to, as well as the moral urgency attached to remediating their occurrence, render the uncivil disobedience sufficiently distinct from incidental violence.

Secondly, there a salient distinction between the use of violence as a last resort for self-protection under circumstances of significant duress (as in the case of uncivil disobedience) and resort to frivolous violence for flippant reasons in other criminal cases. In the case of

[4] It would be incredibly difficult, albeit certainly a direction for possible future research, to determine what would constitute transgressions of such kind and to such degree. We suggest that injustices such as persistent gerrymandering, rigging of welfare services to exclude or penalise particular groups, and the systemically engrained suppression of reasonable dissent would comprise 'clear examples' of such transgressions, though the definitions and boundaries of the subset are, as with most questions in politics, debatable.

[5] Where severity is measured by the extent to which the individual is personally affected in permanent, intense, irreversible, and significant ways.

uncivil disobedience, the disobedients often have few options to turn to other than violence, as a means of transforming and/or engaging (non-transformatively) with political structures writ large. In other words, the violence adopted constitutes a *last resort* – in at least one (if not both) of two ways: a) *objective constraints* – there actually exists no closely accessible alternative method through which disobedients can accomplish their political objectives; b) *reasonable belief* – under the circumstances, the disobedients can reasonably believe, on the evidence the disobedients can reasonably obtain, that there exists no alternative method through which they can accomplish their political objectives. The upshot here is that under conditions of great duress, the extent to which the motivation stems from a place of despair and exhaustion of alternatives does and should matter in shaping our judgment concerning the character of the act and agents involved.

Thirdly, there is often a temptation to engage in excessively ideal-theoretical evaluation of the dynamics and mechanics of social movements, to the point where *realistic considerations* and *sensitivity* to the complex empirical circumstances in which individuals find themselves are eschewed in favour of monistic moralisation (Srinivasan, 2018, pp. 123-44). This ignores the fact that activists, protesters, disobedients may be caught up in conditions in which they subjectively opine that there exists no option but to turn to the deployment of force as a recourse. Indeed, the very nature of sites of protests being active locations for struggles and contestations for power manifesting through physical altercations that are at times violent, renders the act of instantaneous, impromptu violence one that is, more likely than not, driven by impulse and impetuous whims, as opposed to well-thought-out reasons. Now, does this justify uncivil disobedience? Plausibly not. Yet would the dearth of measurement and restraint – induced by the mass frenzy of social movements – render the manifest behaviours of individuals normatively distinct from those who engage in criminal conduct in a private and non-social movement-related manner? We would suggest the answer lies to the affirmative.

In his recent discussion on differentiating uncivil disobedients from ordinary criminals, Lim (2021, p. 129) makes the meta-observation that theories of disobedience should be willing to '[accommodate] imperfect beings like ourselves.'; that the failure to meet one or more of the strictly stipulated conditions concerning what conscientious disobedience (outlined above) looks like, should not be taken as automatic disqualifiers in terms of judging whether individuals are in possession of 'conscientious convictions'. Delmas

(2018, p. 68) makes the observation that '[…] those who shoulder the burdens of oppression cannot reasonably be expected to satisfy the demands of civility, since these demands aim to preserve civic bonds that do not extend to them and even serve to maintain their oppression'. Without weighing too much into the more contentious debate of whether such incivility is, all things considered, justified or permissible, it is evident that uncivil disobedients should be differentiated from those who partake in flippant or egregious violence for motives and under conditions that are disanalogous from those characterising conscientious disobedience – civil or uncivil.

3. Why courts should take seriously the normative distinctness of uncivil disobedience

The subsequent question, then, is this: why should courts take seriously the difference between uncivil disobedience and violent criminality at large? Whilst most debates on conscientious disobedience have revolved predominantly around questions of *justification* and *justifiability* (public or private), an emerging strand in the existing literature features a reflection upon the appropriate responses specifically the court should, and should not, undertake – that is, the judges, jury, and other co-participants of the judicial process (Smith, 2011, pp. 145-50).

Consider the dualist view that whilst a) conscientious disobedience can be justified (or individuals may have pro tanto rights to commit such actions), b) conscientious disobedience should also remain punishable by the courts. As Farrell (1977, pp. 165-68) notes, the affirmation of these two propositions reflects the view that the law serves as a rule-based system that should not forego punishing disobedience. A primary explanation cited here is that in foregoing punishment, the law would encourage undesirable downstream consequences, by setting the wrong precedents. Let us term this the *consequentialist* objection.

This objection opines that any principle officials employ to differentiate between illegal acts committed as a matter of civil/uncivil disobedience, and those committed for non-disobedience-related reasons, could well open the floodgates to further criminal behaviours from private citizens. Individuals may infer from some judgments – rightly or wrongly – that their criminality would go unpunished, thereby undermining the instrumentalist role of the law in deterring transgressions in the future (Greenawalt, 1987, p. 273). There are two subsets of individuals that are particularly worth highlighting

here – first, those who see themselves as engaging in (justified) conscientious disobedience, even where they are not; second, those who would interpret the lenience of the law as a feature to take advantage of in enabling them to commit non-disobedience-related crimes of their own. Both groups' transgressing the law would be deeply undesirable from the perspective of *ordre public*.

Further variants of this claim include the charge that disobedience would 'challenge the state's supreme right, through law, to take decisions on behalf of a whole community' (Horder, 2004, p. 224), or that an attempt at differentiation would weaken the authority and credibility of the courts in the eyes of those who feel aggrieved by the court's failure to punish accordingly.

Our response is three-fold. Firstly, the normative link between *differentiating* between uncivil disobedients and violent offenders at large, and the *tacit endorsement or encouragement* of uncivil disobedience (and hence violence), is not as potent as it may seem. Courts can rule that there exists a difference between criminal violence and uncivil disobedience, *without* expressing or adopting the view that the latter is thus *justified*. This is also amongst the reasons for which we have emphasised repeatedly that the justificatory question must be separated from the differentiation question.

Secondly, as effective remedial measures, the court could also offer elucidating comments in its sentencing and ruling, in noting that whilst there exists a normatively salient distinction between criminal violence and uncivil disobedience, this does not thereby render the latter something that others ought to emulate – especially if conducted with flippant or improper motives. This could be done through precise, targeted communicative strategies whose contents are beyond this paper's scope.

Thirdly, a partial concession could be adopted – we could acknowledge that there are instances where the instrumentalist case against recognition of such differences is so potent, that the court ought to refrain from granting any consideration to the normative distinction raised above. Indeed, as Ceva proposes (albeit in the distinct context of political and legislative processes), 'the concession of conscientious exemptions is […] an issue whose case-by-case evaluation must be open to consequence-sensitive considerations concerning the impact that any given exemption could have on the rights of others' (Ceva, 2015, pp. 26-50). A case-by-case, context-sensitive judiciary approach both precludes the undesirable slide down the slippery slope, as well as ensures more accurate appraisal of the situation in the judiciary process. The upshot of the above, however, is that the

consequentialist argument holds little water in precluding courts from adopting the proposed distinction.

Is there a *positive argument*, then, for the courts to take seriously the distinction raised? We believe so. Our suggested argument is one centred around *quality of intentions*. Intentions matter. A core tenet undergirding criminal law is 'the act is not culpable unless the mind is guilty'; *actus reus non facit reum nisi mens sit rea*. In engaging with the specific question of the mental state of the agent, we must take into consideration the values and beliefs the agent espouses. Indeed, dispositions, motivations, beliefs, and values, in turn, can determine not only the charge they are presented with in the first place, but also the extent to which the agent should be deemed worthy of condemnation and/or partial clemency (considerations that feed directly into the sentencing process). Consider, for one, an individual who tosses a Molotov cocktail at a shop out of *sheer ennui* could be charged with *assault* and *arson*; on the other hand, if the said individual does so as a part of a destructive, semi-organised political gang of a number of people, this would transform the act of tossing the cocktail into one of *rioting*, too. Alternatively, if the agent partakes in the act out of genuine and reasonably grounded fears that the shop harbours individuals who may threaten their wellbeing (e.g. terrorists), the charge in question may be dropped entirely, on grounds that the act *could* comprise reasonable self-defence.[6] None of this is to say that the violence is at all justified, but that the specific reasons for which the agent acts could determine the nature of their crimes – especially given that courts bear the responsibility of arbitrating not only whether the act in question is committed, but also the mental and psychological circumstances surrounding the said act. The court bears what we term the *context-sensitivity prerogative*, to be sufficiently discriminate and judicious in detecting and processing the mental states of the defendant *at the time of the act in question*.

Mental states are often opaque; at other times, they are difficult to arbitrate without a comprehensive understanding of the past and broader behavioural patterns of the agent (Lim, 2021, pp. 133-35). As such, judgments concerning culpability may – on grounds of incomplete or inconclusive evidence – require background evidence (e.g. testimony from character witnesses) on the character and integrity of the defendant, which could act as tipping-point factors in determining the precise charges laid against the individual. Furthermore, even if a defendant is deemed to be guilty, a comprehensive assessment of their character would be necessary in ensuring

[6] For more literature on this, see Cohan (2007); Cameron (2020).

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that the penalties (e.g. sentencing, orders, and whether their criminal record would be spent) are commensurate with whom they are as *individuals* in relation to both the law and the public at large. An agent who – out of vigilante impulse – inflicts grievous bodily harm at another person they deem to be guilty and who has wrongly escaped the law, should be differentiated from an agent who maims others, purely out of their sadistic motives. Noting the potential impediments to an accurate assessment of an individual's character purely on the basis of their *past* behaviours (Rhode, 2019, pp. 378-385), it is all the more important that – as far as is possible – the court takes seriously testimony and circumstantial evidence concerning the individual's mental state *at the time* of their committing the disobedient act, in order to calibrate and come to the most fitting judgment that is cognizant of both their past and present moral profiles. We term this the *character-sensitivity prerogative*, to be as accurate as possible in gauging the overall character of the defendant both prior to and at the time when the act is committed.

4. A legislative scheme for treating conscientious disobedients

If governments and courts should take seriously the normative distinctness of conscientious disobedience, including its uncivil form, how should they do it in practice? We recommend a *reconciliatory* approach, in the sense that a measure of *leniency* is to be applied throughout the legal process of handling the civil disobedients. We flesh out this approach in terms of a legislative scheme with the following features:

1. The scheme is to be adopted by the government, via a piece of legislation debated in society and passed in the legislature, such that the scheme has a political mandate and popular legitimacy.
2. The scheme covers all stages of a legal process, from arrest, prosecution, and sentencing to imprisonment and post-imprisonment.
3. One strong advantage of this scheme is that it will take the heat away from the court room as it were, in the sense that judges can avoid as much as possible making judicial decisions on the basis of their own personal political or moral beliefs.
4. The discretion is to be given rather to the prosecutors: they decide whether or not to put a case of prosecution under the scheme.
5. The adoption and implementation of the scheme is thus not a purely legalistic process but also a political one.

The scheme consists of guidelines regarding (a) the eligibility conditions; the roles of (b) the police, (c) prosecutors, and (d) judges; (e) the treatment of the convicted during imprisonment; and (f) post-release treatment.

a. Eligibility conditions: Offenders eligible to be treated under the scheme are those who participated in a protest, expressing serious discontents over perceived state injustice, and calling for policy or institutional changes. There has to be a rational connection between the aims of the protests and the actions undertaken. Looting, for example, would generally be regarded as failing to satisfy this requirement. Furthermore, the protesters' response must be *roughly proportionate* to the injustice of the threat posed to them during the protest. This proportionality requirement may appear rather indeterminate. Yet generally, we could divide cases into three kinds: (1) *ineligible cases* in which responses are quite clearly disproportionate, such as killing, serious violent attack on a policy officer or another person; (2) *eligible cases* in which responses are quite clearly proportionate, such as unlawful assembly or demonstration, obstruction of road traffic and minor violence such as burning of things on the streets to prevent police's dispersal of protesters, physical confrontation of a minor kind with police officers; and (3) *intermediary cases that lie in between*, whose eligibility can only be determined by prosecutors on a case-by-case manner.
b. The police: For unlawful assembly or demonstration of a peaceful kind, the scheme recommends that the police tolerate it as circumstances allow. If dispersion of protesters is necessary to restoring law and order, it should be done peacefully and without arrest. For other kinds of protests that go beyond peaceful demonstration, leading to significant disruptions of public order and safety, the police might judge that arrests be necessary. After arresting a protester, the police could then consider *the option of diversion* for minor offenses, which means the case in question will not be brought forward for prosecution, but put it in an alternative scheme, such as *warning*, or *bind-over*[7], which *in this stage* is not a conviction

[7] Binding-over is an exercise by criminal courts in certain common law jurisdictions to deal with issues that are usually low-level public order offenses; individuals are required to enter into an agreement to keep the peace and be of good behaviour, in exchange for a waiver of sentence after conviction, or a withdrawal of prosecution. See Feldman (1988).

or punishment, but an agreement of the offender to engage in good behavior within a specified period of time. The government may even consider offering not just legal aid but counselling service to the offender during police investigation.

c. The prosecutors: If a case is brought forward for prosecution, the government prosecutors will decide in light of the spirit of reconciliation whether or not to place the case under the scheme.

d. The court and judges: The court (by judges or juries) will decide whether the defendant is guilty or not. If found guilty, judges will make judgments about sentencing according to the leniency spirit of the scheme. Bind-over and compulsory social service are preferable to imprisonment, and if the latter is necessary, a lighter sentencing than similar crimes falling outside of the scheme is to be encouraged.

e. Custody: There exists a trend amongst liberal democracies, where social movements and protests are increasingly helmed by young people still in school or college. During imprisonment, their education would inevitably be affected – if not come to a grounding halt. The scheme will provide enhanced educational opportunities and services for this special category of the convicted. Another category of convicted protesters is those who are educated, white-collar, or professional. Standard work opportunities for inmates in various countries tend to be low-skilled or manual labor. The scheme will offer diverse and tenable work opportunities for educated in-mates. Such opportunities should also serve a rehabilitative role, in facilitating in-mates' re-integration and rekindling of normal ties and connections with their community at large.

f. Post-release treatment: In many countries, a criminal record itself would pose significant constraints on discharged prisoners in relation to job opportunities, travel and immigration, and eligibility of board membership and political representation. To reduce these constraints for the discharged prisoners falling under the scheme, it is recommended that for imprisonments under three years, no criminal record will be given for the discharged. For imprisonments from three to five years, deletion of criminal record after three years of absence of offense after release should be implemented. If a criminal record is to be given in any case, it should note that the discharged prisoner was treated under the special scheme for conscientious disobedients. Unlike ordinary criminals,

> discharged prisoners of this category will not be prevented by law from standing for elections or appointment in boards, councils, and political bodies; they can also be invited to sit on consultative bodies concerning prison governance.

We believe that this scheme is *not utopian* and can be implemented without excessive difficulties in resources and administration. After all, many similar provisions such as alternatives to imprisonment and educational opportunities for inmates are already in place for other occasions in many jurisdictions. The *adoption* of this scheme is rather a matter of political judgment and will. A crucial factor is whether liberal-democratic governments will see not only the *normative rationale* of a reconciliatory approach to conscientious disobedience, but also its *prudential value*.

There are a few reasons for thinking that a liberal democratic government may see the scheme's prudential values and thus have *incentives* to adopt it. First, adopting the scheme means that the government acknowledges dissents and discontents are not uncommon in a liberal democratic society, and part of the value of liberal democracy is precisely its willingness to recognize and accommodate them as best as it can. Secondly, adoption of the scheme expresses the government's goodwill to reconcile with protesters and win back the support from them and their sympathisers, paving the way for cross-partisan consensus and convergence. Thirdly, the scheme helps minimize the likelihood of further radicalization of protests. Prosecution and imprisonment of protesters will likely result in further serious loss of trust in democratic politics and erosion of government legitimacy in the eyes of the protesters, leading to radicalization of the aims and means of political action on the part of the disaffected. Fourthly, and from a narrowly defined self-interest-centric perspective, because of the above benefits, the scheme would enable the incumbent administration to cultivate political goodwill and get re-elected. It would correlatively help the new administration to make peace with protestors who were disaffected with the previous administration.

5. Possible Objections

Objection #1: A right to conscientious disobedience?

A primary objection to our account is that we don't go far enough in recognising the purported right of conscientious disobedients to

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engage in their transgressive acts; in other words, our account is defective because it *presumes* the court's right to *punish* disobedients.

Grounding his account on citizens' right to engage in disobedience – even when in doing so they fail to act in accordance with bringing about the *right* state of affairs – Lefkowitz argues that the moral right to political participation entails a *right* to civil disobedience (Lefkowitz, 2007, pp. 205-208). Noting that the right to political participation entails both individuals' rights to a) participate in decision-making processes, and b) continue to contest the decision reached through the decisive procedure, Lefkowitz submits that individuals may reasonably disagree with the law and courts' interpretation over the morally best *means* and the particular *ends* served by public policymaking. In cases of such disagreements, then, individuals should be *permitted* to express their discontents and disagreements through concrete actions, as opposed to merely abstract speech.

In explaining why this right to disagree should extend to and justify the employment of illegal means (e.g. civil disobedience), Lefkowitz invokes four tentative reasons: firstly, it would take *too long* for individuals to articulate their demands, should they *not* break the law – violating the law is hence an *effective means to* an end, pace Lefkowitz; secondly, disobedience *works* – it raises salience and highlights the problematic dimensions of a particular policy; thirdly, that disobedients are willing to risk the imposition of various costs upon them attests to the *strength of their convictions*, which in turn suggests that their disobedience is at least founded upon relatively praiseworthy intentions, and should not be unreservedly condemned; fourthly – and perhaps most substantially – Lefkowitz (2007, p. 215) is of the view that, 'The best understanding of the moral right to political participation is one that reduces as much as possible the degree to which it is a matter of luck whether one attracts majority support for one's reasonable views regarding what justice requires.'

What is the upshot of this? Here, Lefkowitz draws a distinction between *penalty* and *punishment* – whilst the former refers to the imposition of costs, fines, and other negative disincentives associated with the transgression in question, the latter features *not only such costs*, but also the *expressive component* that the individual in question is worthy of resentment, indignation, disapproval, and reprobation. The former is warranted, as a prudential means of ensuring resolution of collective action problems; the latter, on the other hand, is unwarranted – on grounds that individuals do possess the right to engage in civil disobedience. Term this the *punishment-penalty cut*.

In our view, Lefkowitz's view, as intriguing as it is, does not work. Firstly, the explanatory move from the right to political participation/disagree, to the *right to break the law* in order to express *disagreement*, is unwarranted. The first three explanations Lefkowitz provides – concerning efficacy and lack of expedient remedies – suffice in explaining why civil disobedience *differs* from non-disobedience transgressions of the law, i.e. what we have surmised above. Yet they do not, without further qualification, justify the existence of a *permission* to break the law, which entails the imposition of costs (both symbolic and actual) upon others in the community.

The implicitly *moral luck*-grounded fourth argument is more promising (e.g. individuals should not be faulted for whether one attracts a majority of society's support for one's reasonable views), but even then, it appears unclear why the particular *means* of violating the law is permissible – we can accept that individuals should be compensated and offered adequate opportunities to express their discontents about the law, but this neither suggests that they have the right to *act out accordingly* (in ways that affect others in their community), nor that the specific *method* of legal violations is thereby justified. In any case, Lefkowitz's argument from *expression* and *participation* to *transgression* – seems too quick a move for the substantiation of a *right to civil disobedience*.

Secondly, Brownlee (2018, pp. 291-96; 2008, pp. 711-16) offers a further critique – that to the extent that Lefkowitz attaches a significant value to the non-instrumental right of individuals to autonomously participate in the political system, such value should render it thereby impermissible for the state to seek to impose any penalty at all against practitioners of such disobedience. To prescribe any forms of penalties, costs, or orders restricting the agents' future actions, would also undermine their respective autonomy – as such, the alternatives to sentencing that Lefkowitz advances are equally compromising when measured against the overarching objective of preserving individuals' ability to register and express their disapproval of collective decisions. Brownlee (2008, p. 716) suggests that Lefkowitz's *punishment-penalty cut* is untenable, for '[the] status of public disobedience as a legitimate form of political engagement considerably weakens the symbolic grounds for penalisation'.

We share Brownlee's concerns, and offer a further reason as to why the punishment-penalty cut does not hold. To the extent that Lefkowitz believes penalties are *necessary* in enabling the state to facilitate, as is necessary, effective decision-making processes and deter undue violations of the law, it is unclear why he would not *also* support the imposition of *punishment* upon the disobedients.

Recognise that the communicative value of punishment – in expressing the moral wrongness in the actions conducted by the disobedients, in appraising them as blameworthy – would in fact play a pivotal role in deterring disobedients from committing such offences in the future. This is because the sheer costliness of penalties alone will not suffice in dissuading individuals – fully convinced of the *rightness* of their *behaviours* and potential sacrifices – from committing the disobedient acts in question. The communication that there is something *wrong* with what they are doing, is thus necessary in precluding them from partaking in such behaviours in the future. This also explains why a fine may suffice in deterring illegal parking, but not in preventing future disobedience. Hence, following on from Lefkowitz's logic, if courts are truly concerned about preventing the disorder and instability sowed by individuals viewing disobedience as a *carte blanche*, they should not stop at purely penalty – but must also impose communicatively embedded punishment upon the perpetrators.

If Lefkowitz is serious about his instrumentalist and prudential reasons in favour of punishment, he must also resist waiving the penalty imposed upon offenders. To push back against this, Lefkowitz must explain why the *correct compromise/balance* is struck at the precise point of *penalty without punishment*. This strikes us as rather implausible. A more reasonable view, we suggest, is a *continuum-based* approach: where disobedients, both civil and uncivil, *can* be punished for their actions, but the extent of penalty-cum-punishment exacted should be determined in accordance with a basket of variables, including but not limited to:

a) the individual's precise quality of will at time of the act in question;
b) their broader background and upbringing;
c) the socio-political circumstances that precipitated their transgressive act;
d) the punishment (or lack of)'s impact on others' likelihood of offence;
e) the punishment (or lack of)'s impact on the individual's likelihood of re-offence.

These parameters reflect, more broadly and fundamentally, the range of considerations that ought to be pertinent in shaping the state's precise response to conscientious disobedience. The legislative scheme outlined in IV aptly encapsulates this continuum-based view – whilst for an extreme minority of individuals, it would be appropriate to forego any and all negative sanctions against uncivil disobedience altogether,

in most cases, the prudential justification for sanctioning uncivil disobedients would require the government to adopt *some* negative treatments against such transgressors. Where this is indeed the case, Lefkowitz's punishment-penalty cut would be irrelevant – indeed, the state should punish *and* penalise these individuals, albeit not without applying discounts commensurate with the aforementioned considerations a) – e). Note, such sanctions should go hand-in-hand with the specific treatments proposed in IV – e.g. deletion of records, implementation of bind-overs and diversion, and/or the provision of assistance with re-integration upon the completion of the sentence.

A further pushback to our rejoinder here, is that perhaps there exists no positive case for the punishment of conscientious disobedience in the first place. This pushback operates as follows: given that we grant that disobedience *can* be justified, it seemingly follows that *where* such disobedience is justified, the state – e.g. the courts, police, and related apparatus – ought not sanction those engaged in such actions. This is because the punitive exacting of costs upon these individuals requires there to be something worthy of *condemnation* on the part of such agents – they must have acted *wrongly* in order to merit punishment (Tadros, 2011). To the extent conscientious disobedients have not acted wrongly, they should not be punished.

In response, note that whilst there may be *some* instances where conscientious disobedience can be justified, there are also many where conscientious disobedience is *not* justified – civil or uncivil. This may be because such acts of transgression are *unacceptably disproportionate* (e.g. inducing mass disruption to civilian life over relatively minor infringements by the law), clearly *not committed as a last resort* (e.g. there are other alternatives available to the participants with regard to advancing institutional changes), or driven by a significant (though not predominantly so) preoccupation with *self-interest*; whilst these acts may technically qualify as disobedience per the definitions stipulated in section 3, they are not *justifiable* disobedience, all things considered. Alternatively, it may be because the robust normative reasons for punishing disobedience – again, well-litigated in existing literature[8] – outweigh contextually the reasons against such. Given our primary aims, we have not allocated as much space to arguments in favour of punishing disobedience – this is by no means to say that we disagree with the

[8] To see two established examples of such arguments, consider Moore (1997) and Feinberg (1994); the latter offers a specific account centered around the community's disapproval of law-breaking disobedience.

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reasoning adopted by these accounts. Conscientious disobedience – civil or uncivil – can be unjustified.

A further thought – worthy of further, separate exploration – is this: even where acts of disobedience are indeed justified, this does not imply that the individuals involved are not deserving of at least *some* condemnation. Indeed, one specific way in which this may play out is this: disobedients – even if justified in their acts of transgression – can be deemed worthy of condemnation for the downstream consequences induced by their actions. For instance, if justified acts of disobedience result in heightened perceived permissibility of lawbreaking, or undercuts the credibility of the state's threat in upholding law and order in instances where such legal requirements are both justified and binding, we may have powerful prudential grounds to sanction disobedients for having *foreseeably brought about* such consequences, even if they are justified in doing so. It is beyond this paper's scope to flesh out a complete theory of *justifiable yet punishment-worthy* disobedience.

Objection #2: 'Bad Apples' – Proving too Much?

A second objection is as follows. Suppose one grants the validity of our account – and that the distinction between uncivil disobedience and ordinary criminal violence must be taken seriously. It appears that there are instances where the implementation of our model would be unreasonable, if not downright absurd. Consider, for example, the mob of extremist protesters who stormed the Capitol Hill on January 6, 2021, in dispute of the results of the 2020 U.S. presidential election results (*Capitol Hill*) (Heine, 2021), or, indeed, individuals who took to violent protests in Martinique and Guadeloupe over the French government's decision to implement a COVID-19 vaccination mandate (*Anti-Vaxx)* (France 24, 2021). In both *Capitol Hill* and *Anti-Vaxx*, we may have tentative grounds to believe that what unfolded were episodes of uncivil disobedience: protesters were opposing what they construed to be unjust laws or policies (e.g. the ruling that Donald Trump lost the 2020 elections; the vaccination mandate to be issued by France) through means that were violent, albeit perhaps not to the degree of terrorism and/or civil war.[9]

If our argument on uncivil disobedience does indeed hold, must this behove courts to treat with *leniency* those engaged in

[9] Some may dispute this assessment for the Capitol Hill riots.

disobedience across both instances? Granting this conclusion seems problematic – and it is on such an 'unpleasant' implication that our account may be challenged by sceptics. The *bad apples* seem to pose a problem for our model.

We offer several responses. The first is to suggest that some of those involved in *Capitol Hill* and *Anti-Vaxx* do not meet the necessary criteria to qualify as participating in uncivil conscientious disobedience. It would not be unreasonable to speculate that some of the many protesters across both cases were not driven *predominantly* by a desire to serve public or communal interests – anti-vaccination protesters saw the vaccine mandate as jeopardising their own wellbeing, and/or the riots as a convenient opportunity for them to express frustrations towards the government at large; many Capitol Hill rioters opposed the outcome of the vote not out of a sense of grievance or public justice, but because they held personal grudges against the Democratic Party and the political establishment.

Yet such a speculative rejoinder is only partially successful, for we possess neither the empirical evidence nor the contextually grounded perspectives to judge. This is why our model places a heavy premium upon procedures of arbitration, determination, and investigation, where it falls upon the judiciary and disciplinary forces to pursue the truth and establish the facts of the matter, as much as is possible. For some of the protesters involved – more than others – the state may have strong evidentiary grounds to believe that they acted out of genuine concern for others, as well as fulfilling the criteria (1), (3), (4), and (5) necessary for the acts in question to qualify as *conscientious disobedience*. In these cases, we would gladly bite the bullet, and argue that our reconciliatory approach should indeed be adopted. Countervailing intuitions – in absence of potent moral justifications – should not be accepted as necessarily normatively binding. We could well be prey of partisan biases that skew us erroneously in favour of particular moral judgments.

Finally, we do not rule out the existence of independent reasons – stemming from the downstream detriments and structural harms posed by (some of) the anti-vaccination and Capitol Hill protesters – that render their actions worthy of punishment. Indeed, these reasons' entailment that they be punished, and punished stringently, are perfectly compatible with what we advance here: a plurality of factors must be considered in determining the nature of treatment most befitting and suitable for those who engage in uncivil disobedience. This has always been our stance.

6. Conclusion

Liberal democracies are supposed to be able to effectively pursue several tasks at the same time: to encourage free political expression and popular participation; to co-opt diverse political views and interests into workable governing platforms and policies, thereby containing disagreements and dissents within a political and legal framework acceptable to all, and to uphold a minimum level of political order. However, with the ever widening economic inequality, the rise of populism, and the increasingly frequent occurrences of protests and riots in liberal democracies in recent decades, many individuals have begun to seriously question liberal democracy's ability to deliver upon its promises.

So long as liberal democracies have yet to emerge with proper diagnoses and creative solutions to such malaise, these large-scale, mass protests will not disappear, and governments and citizens in liberal democracies must ponder over the question of how to cope with them. Repression is inconsistent with the fundamental values of liberal democracy. A *draconian* approach may achieve short-term results, but will not ensure long-term stability and peace. A *permissive* approach that takes no legal action against legal transgression of protesters, on the other hand, would only encourage undue transgressions and undermine the rule of law.

Our paper steers a middle way between these two extremes by proposing a *reconciliatory* approach to handling the conscientious disobedients. According to this approach, while the government and police may take legal action against protesters in order to prevent further disruption and deterioration of the law and order, a measure of *leniency* is to be applied throughout the legal process of handling the civil disobedients. We have tried to justify this approach by arguing that there is a normative distinctness of *conscientious* disobedience that separates it from other crimes committed in a non-conscientious disobedience situation. We have further argued that such distinctness applies to both the civil and uncivil form of conscientious disobedience.

This is not to say that conscientious disobedience is always morally justified. Yet even if it is not justified – in reality, there must be many such instances – we have argued that the normative distinctness of conscientious disobedience ought to be given serious consideration in legal proceedings against the conscientious disobedients. This consideration, we have argued, is best fleshed out in a legislative scheme that implements a measure of *lenience* in treating the conscientious

disobedients throughout the legal process, from arrest, prosecution, and sentencing, to imprisonment and post-release treatment.

We believe that this legislative scheme has appropriate flexibility to handle the complexity of judging about conscientious disobedience. It is not an easy task to determine whether a law-breaking act is as an instance of conscientious disobedience. Still more difficult is to decide whether an instance is morally justified all things considered. Judgments must be highly context-sensitive and case-by-case. The scheme thus places a heavy onus upon the judiciary and disciplinary officials to pursue the truth and establish the facts of the matter. In particular, the prosecutors – given the discretion to decide whether to place a particular case under the scheme for further legal action – and the courts should jointly determine the extent of penalty-cum-punishment in accordance with a basket of variables.

Irrespective of whether an act of conscientious disobedience is morally justified, we believe that this scheme, with its reconciliatory spirit and an emphasis of context sensitivity, is realistically the best path forward for liberal democratic governments.

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