Protest and Punishment: The Dialogue between Civil Disobedients and the Law

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Introduction

A parallel may be drawn between the communicative aspects of lawful punishment and the communicative aspects of civil disobedience.¹ In punishing an offender, the state aims to engage the offender in a moral dialogue, communicating to her both its condemnation of her action and its desire for repentance and reformation of her conduct.² Both the state’s backward-looking aim of communicating condemnation and its forward-looking aim of achieving a reformation in conduct are mirrored in a civil disobedient’s efforts to engage in a moral dialogue with authorities and society. In civilly disobeying the law, a person typically aims to communicate to policymakers, authorities, and society her condemnation and disavowal of a particular law, policy, or institutional practice (be it governmental or non-governmental) as well as her desire for a lasting change in policy.³ I have argued elsewhere that the confrontation between civil disobedience and lawful punishment not only allows for a direct comparison of their respective justification, but also presses the claim that authorities and disobedients each endeavour to engage the other in a moral dialogue.⁴ In this paper, I consider more fully the nature of the moral dialogue

¹ I shall refrain from defining ‘civil disobedience’ and adopt instead a paradigm case approach, which highlights certain key features exemplified in typical or paradigm cases of civil disobedience. These key features include a conscientious conviction and the communication of condemnation against a given policy through breach of law.


³ Civil disobedience undertaken in opposition to the decisions of non-governmental agencies such as banks, trade unions, and private universities often reflects a larger challenge to the legal system that permits those decisions to be taken. It would be a mistake to hold that the policies and practices of non-governmental institutions are somehow not matters of law and thereby not the proper objects of civilly disobedient protest. In condemning such policies, civil disobedients challenge, amongst other things, the legal framework that accepts these policies and practices as lawful.

which purportedly occurs between disobedients and the law as well as the kinds of responses that a genuine dialogue would permit from each party. The justified response by each to the other cannot be determined, I argue, solely on the basis of deserved censure. To be justified in communicating censure through punishment or through civil disobedience, authorities and dissents respectively must not simply have good grounds for condemnation and a legitimate motivation, but also accommodate concerns of charity or good will, restoration, and the prevention of further wrongdoing. I conclude by examining briefly some ways in which the analogy between lawful punishment and civil disobedience might break down.

I. A Communicative Theory

A. Civil Disobedience

My characterization of civil disobedience and lawful punishment as communicative practices requires some explication.⁵ Concerning civil disobedience, in paradigm cases, a disobedient seeks to communicate not only her disavowal and condemnation of a certain law or policy as well as her desire for recognition by authorities and the relevant majority that a lasting change in policy is required, but also her personal dissociation from both the policy in question and the authority that enacted it.⁶ When the policy in question is a non-governmental policy by a private company or institution, a disobedient’s condemnation includes a challenge to the legal framework that accepts this policy as lawful; and as such she dissociates herself not only from the institution that generated the policy, but also from the government that permits it. The dissociative aspect of civil disobedience requires teasing out, as it does not figure prominently in many accounts of civil disobedience. And, while the communication of protest does figure in most accounts of this practice, it too requires explication since thinkers disagree over the form this communication takes. According to John Rawls, for example, the communicative character of civil disobedience, by definition, involves publicity and fair warning to authorities of the intended action. The fidelity to law which distinguishes civil disobedience from other types of illegal protest necessitates, says Rawls, that disobedients commit their offenses openly and with fair notice.⁷ In a similar spirit, Hugo Bedau suggests that often it is essential to a dissenter’s purpose that both the government and the public know what she intends to do.⁸ One may question, however, not only the claim that civil disobedients show fidelity to the law (Gandhi is the obvious counterexample), but also the claim

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⁵ My discussion is intended to apply to the context of an imperfectly liberal democracy.
that such fidelity is and must be reflected in publicity and fair notice. Although forewarning authorities sometimes may be prudent or may be essential to a dissenter’s strategy, this is not always the case since, as Brian Smart observes, publicizing the intention to breach the law provides both political opponents and legal authorities with the opportunity to abort disobedients’ efforts to communicate.⁹ Consequently, sometimes unannounced or (initially) covert disobedience better serves disobedients’ communicative aims than does disobedience undertaken publicly and with fair notice. To succeed, for example, in releasing animals from research laboratories or vandalizing military property, disobedients must avoid publicity of the kind that Rawls defends. Such acts of civil disobedience nonetheless may be regarded as ‘open’ when followed soon after by an acknowledgment of the act and the reasons for acting.¹⁰ In making that acknowledgment, disobedients (whose actions meet other constraints I shall discuss) may claim plausibly to be willing to deal fairly with authorities.¹¹

A different conception of the communicative aspect of civil disobedience characterizes it in terms of ‘expression’ rather than publicity and fair notice. Joseph Raz defines civil disobedience as a ‘politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one’s protest against, and dissociation from, a law or a public policy.’¹² As a concept, however, expression not only lacks the other-directedness of communication, but also lacks its emphasis on understanding and rational engagement by the ‘speaker’ with her ‘hearer’. In engaging in civil disobedience, a person aims not simply to express her objection (which she could do alone and in private), but to lead her audience to understand and hopefully to accept her reasons for both condemning a given policy and dissociating herself from its authors.

Concerning dissociation, often civil disobedients are represented as asserting their right to participate in the decision-making process rather than as honouring a moral conviction which prompts them to make a communicative act of dissociation from a policy and its creators. Paradigmatically, however, civil disobedience reflects principled opposition based upon deeply and conscientiously held commitments, and it is this principled objection which leads dissenters communicatively to dissociate themselves where possible from particular policies.¹³ Their actions demonstrate their moral consistency. As Antony Duff notes in his discussion on punishment, when one judges a certain decision or policy to be wrong one must not only avoid that type of decision oneself and judge the conduct of others who pursue such decisions as being wrong, but also, in some contexts,
make known one’s judgment of that decision: to remain silent and to let an action pass without challenge can cast doubt on the sincerity of one’s conviction that this action is wrong.¹⁴

Avenues for conscientiously motivated disobedients to communicate their judgment will vary depending upon the object of their judgment. When breaching the law or disrespecting the policy they oppose is either impossible or indefensible then they may have to resort to indirect disobedience, a strategy which lacks the explicit act of dissociation exemplified in direct civil disobedience. The person who uses indirect civil disobedience breaches a law which ceteris paribus she does not oppose in order to challenge the law or policy that she does oppose. Her dissociation from the object of her condemnation is moral rather than legal in character.¹⁵ Through her communication, she affirms that these policy-makers do not speak for her when enacting this law or implementing this policy, and that were it possible or defensible for her directly to distance herself from this policy (or to intrude upon its parameters) she would do so.¹⁶

The centrality of dissociation to both direct and indirect civil disobedience highlights a difference, beyond legal status, between these practices and legal protest. Although legal protest, like civil disobedience, typically aims to convey to others certain commitments and values, nevertheless legal protest lacks the conscientious and communicative dissociation which distinguishes civil disobedience from ordinary offences. Either the legal protestor does not believe that her cause is sufficiently weighty to warrant a breach of law in its defence or she does believe this but for various reasons does not act upon that belief. While her reasons not to offend may be compelling (eg concern for personal security or others’ well-being or a commitment to legal obligation), the point remains that she does not dissociate herself from the policy she opposes. And, in some cases, that can cast doubt on the sincerity of her judgment that the policy is wrong.

A further reason to favour civil disobedience over legal protest as a vehicle for communicating opposition is its effectiveness. As Bertrand Russell observes, typically it is difficult to make the most salient facts in a dispute known through conventional channels of participation.¹⁷ The people who control mainstream media tend to give defenders of unpopular views limited space to advance their causes. Given, however, the sensational news value of illegal protest, engaging in civil disobedience may be less clear-cut than one might think. For example, would refusing to pay taxes that support the military be an act of indirect or direct civil disobedience against foreign policy? Although this act presumably would be classified as indirect civil disobedience, nevertheless a part of one’s taxes, in this case, would have gone directly to support the policy one opposes.

¹⁵ The distinction often drawn between direct civil disobedience and indirect civil disobedience may be less clear-cut than one might think. For example, would refusing to pay taxes that support the military be an act of indirect or direct civil disobedience against foreign policy? Although this act presumably would be classified as indirect civil disobedience, nevertheless a part of one’s taxes, in this case, would have gone directly to support the policy one opposes.
¹⁶ The language of dissociation suggests a refusal to follow a direct order or an abstention from a social practice. But, often dissociating oneself means interfering with or intruding upon the policy one opposes. For example, James Meredith dissociated himself from the admissions policy of the University of Mississippi in the early 1960s when he demanded to be admitted as a student. James Meredith became in 1962 the first African American to attend the University of Mississippi.
disobedience often leads to wide dissemination of a position where legal protest might not do.¹⁸ But the effectiveness of a communicative strategy must be weighed against its credentials as a contribution to a moral dialogue. Although the civil disobedient often may be better placed than the legal protester is to ensure that her view is heard, her communication only counts as a genuine contribution to a moral dialogue when it respects the constraints upon such contributions. Forcibly conveying one’s view is incompatible with the parameters of genuine dialogue when it combines with a failure to take into account the contribution of other parties to the dialogue. The civil disobedient’s desire to communicate effectively, therefore, must be tempered by her awareness that she must eschew modes of communication at odds with her persuasive aims. I shall pursue this issue further in the next section. For now, let us consider the communicative conception of punishment.

B. Punishment

Whereas there is general agreement amongst philosophers that civil disobedience is a communicative practice (though philosophers disagree over how that feature is to be understood), there is less agreement that punishment is an essentially communicative practice. Traditional theories of punishment highlight either its preventative aims or its retributive aims as central both to its definition and to its justification while disregarding the appropriateness of characterizing punishment in terms of moral communication. I shall reserve my comments on justification for the next two sections, highlighting here some reasons to regard lawful punishment as an essentially communicative practice.

As noted above, communication is an other-directed activity that emphasizes, first, engagement at a rational level by the ‘speaker’ with the ‘hearer’, and second, understanding by the hearer of what has been conveyed to her. Communication does not necessarily involve a reciprocal rational engagement, as Duff suggests it does, because the hearer need not be an active participant in the communication.¹⁹ There is no reciprocal engagement, for example, between a newscaster and her viewing audience or between a billboard and its observers, but there is communication when the ‘heavers’ understand the information or position conveyed. That said, successful communication usually requires awareness by the speaker of her hearer and the kinds of communicative measures he is likely to understand. Communication means, at a minimum, that the hearer comprehends the content conveyed, and typically (but not necessarily) that he makes some response in return. But ‘communication’ is not synonymous with ‘dialogue’ since only the latter requires that both

¹⁸ John Stuart Mill makes a similar point with regard to dissent in general. Sometimes, says Mill, the only way to make a view heard is to allow, or even to invite, society to ridicule and sensationalize it as intemperate and irrational; J Mill, On Liberty (London, 1869). Admittedly, the success of this strategy of self-sensationalization depends partly upon the character of the society in which it is employed; but we should not rule it out as a mode of communication.
¹⁹ Duff, Punishment n 12 above, 79.
parties be speakers as well as hearers. Arguing that lawful punishment is communi-
cative is easier than arguing that punishment is an attempt to engage the offender
in a moral dialogue, because the latter requires the state to be responsive, at least in
principle, to the response made by the offender. I will say more about the nature of
dialogue, particularly moral dialogue, in the next section.

Punishment can be plausibly presented in terms of a rational (if not obviously
reciprocal) engagement with the offender in the first instance and with other hear-
ers in the second. In imposing a burden on an offender for an offence, the state
seeks to bring her to understand certain things such as the reasons she has to fol-
low the law, the censure rightly elicited by her offending action, and the expect-
ation that she will reform her conduct. Like civil disobedience, lawful punishment
involves a performative act of condemnation, dissociation and disavowal of certain
conduct. The state demonstrates through isolating, ostracizing, and burdening a
person for her action that she did not act in its name or in keeping with its values
when she carried out this offence. In a liberal polity, constraints of publicity and
openness apply to lawful punishment, greater perhaps than those upon civil dis-
obedience, to make sense of the claim that the state wishes to deal fairly with its
citizens. Given the burdensome nature of punishment, openness and fair-warning
are important to treating those liable to the pain of punishment as rational agents
with equal moral status. While fair-warning is not always possible, striving to pro-
vide it is essential for a state that purports to respect citizens’ rights and autonomy.

In my comments on civil disobedience, I suggested two reasons that favour
civil disobedience over legal protest as a vehicle for communicating with policy-
makers and society. The first related to the moral consistency and sincerity of the
disobedient’s action as communication of condemnation, the second to the rela-
tive effectiveness of disseminating a view (though that might not translate into
a greater effectiveness in persuading people of the view). By no means do these
reasons amount to a justification for civil disobedience; rather, they highlight
advantages of civil disobedience over lawful protest as a communicative prac-
tice. The question is whether similar reasons favour lawful punishment over alter-
native vehicles that the state might use to communicate censure for breach of
law. Concerning effectiveness, the state does not have the same difficulties that
disobedients have in airing its views at least to its primary hearer. Therefore, only
when the state’s efforts to communicate to persons other than the offender would
be unsuccessful through non-punitive measures would there be a reason relating
to communicative effectiveness or dissemination to punish (persuasiveness is a
separate issue). Concerning moral consistency, the issue is whether punishment is
the appropriate way for a state to dissociate itself from the conduct of its citizens.
Would a refusal to punish reflect negatively on the sincerity of the state’s judg-
ment that an action was wrong? Whether it did would depend upon the nature
of both the offence and the proposed punishment. Less serious offences invite
less condemnation and may make other forms of communication more appro-
priate than the burdens of punishment: in charging a person with an offence, for
example, the state makes known its dissociation from her conduct. Some thinkers maintain, however, that penal hard treatment is to be understood as an essential aspect of the enterprise of moral communication itself. Duff, for one, argues that it would be a mistake not to recognize the contribution that punishment can make to reparation and restoration:

A crime involves not merely (nor always) material damage to a victim’s interests, for which material compensation might be appropriate, but a wrong done by the offender to the victim. An appropriate ‘restoration’ or ‘reconciliation’ between them must then involve a proper recognition of that wrong and of its implications…A suitable programme of ‘restoration’ must thus involve the offender in recognising, repenting, and apologising for the wrong he has done.²⁰

Duff maintains that this process of restoration involves the same central elements as punishment understood as the government’s effort to engage in a moral dialogue with the offender. Punishment, on this picture, not only communicates both disapprobation of the offender’s action and a desire for repentance and reformation on her part, but also gives the offender an opportunity to communicate her repentance by accepting the punishment, apologizing, and making reparation where possible. But the fact that punishment can make a contribution to reparation and restoration, does not mean that it always must be part of that process or that it would play that role better than other kinds of responses. The question for our discussion is whether a programme of punishment is appropriate when the state engages with civil disobedients.

With this understanding of the communicative character of lawful punishment and civil disobedience, we may now consider what criteria must be met for the parties to these practices to engage in a genuine moral dialogue. After outlining in section II the conditions for moral dialogue, I consider in section III the conditions for a justified communication of censure by authorities and dissenters through their respective vehicles of punishment and civil disobedience.

II. Moral Dialogue

A. Requirements for Moral Dialogue

Before analysing the features of a moral dialogue, we should consider the key features of a dialogue. First, as noted above, a dialogue is a specific form of communication in which both (or several) parties to the exchange play the dual roles of speaker and hearer. Second, the term ‘dialogue’ implies a more extensive exchange amongst these parties than a simple call-and-response scenario in which one party communicates, another responds and the exchange ends. A dialogue involves a

sustained reciprocal exchange in which the parties attend to each other’s contributions and modify their responses in light of those contributions: a dialogue is neither a monologue nor a quarrel. Third, there are connotations of fairness and equality in the notion of a dialogue. The parties are represented as equals in some important sense; moreover they are represented as willing (if not enthusiastic) participants to the exchange. The notion of a dialogue suggests that the parties respect each other as rational beings capable of understanding and responding to the reasons and arguments offered by others. Fourth, while a dialogue need not lead to any resolution or agreement amongst the parties, engaging in a dialogue implies a certain progress or development in mutual understanding.

With this conception of dialogue, we may now ask what makes a given dialogue a moral dialogue. First, such a dialogue either has a moral issue as its topic or has as its topic an issue which has some moral implication. Second, in many cases, such a dialogue will involve some moral disagreement, be it about the nature or status of morality, the nature or status of a given moral principle, the application of a certain moral principle, the moral evaluation of a given act or type of conduct in light of a particular moral principle or value, and so on. In the case of the purported dialogue between disobedients and authorities, the parameters of discussion may include disagreement on several of the above fronts. It cannot be assumed that authorities and disobedients engage each other on a single point of disagreement or indeed the same points of disagreement.

A potential implication of this complexity in their exchange is that the discussion often may be, pardoning the expression, ‘a dialogue of the deaf’, that is, an exchange in which none of the parties makes allowances for the others’ positions or even recognizes a common focus of debate. However, as we shall see, this possibility is rendered unlikely by the constraints placed upon those who may legitimately claim to be engaged in either civil disobedience or lawful punishment understood as attempts to conduct a moral dialogue.

B. Constraints upon Civil Disobedients and Law Enforcers

The forward-looking aspect of civil disobedience has two parts. The first is to lead the authors of the policy in question to reform that policy. The second is to lead these policy-makers and society generally to internalize the reasons behind the disobedient’s condemnation and disavowal of that policy so that no similar policy will be implemented in future. As I have argued elsewhere, when a civil disobedient has these kinds of aims, this places certain restrictions upon the modes of disobedient communication that she reasonably may use to realize those aims.²¹ I wish to note here, which I have not before, that the key constraint is non-consequential in nature. Since, in paradigm cases, a civil disobedient aims to persuade her hearers of the merits of her cause, this constrains how she may act.

²¹ Brownlee n 3 above.
in defence of that cause. To aim to coerce authorities and society rather than to persuade them of her view would be to treat her hearers as less than fully autonomous beings with whom she could engage rationally. If she is to claim legitimately that she endeavours to engage in moral dialogue, her modes of communication must aim to respect the autonomy of her hearers as rational beings capable of responding to the reasons she believes she has to challenge current policy.

The constraints imposed by her persuasive aims also have a consequential aspect. Since, as a strategy, coercion and intimidation are likely to turn policy-makers and society against a position, a disobedient who sincerely aims to have a long-term impact upon people’s views has reason not to try to force policy-makers to adopt her position, but rather rationally to persuade them of the merits of her view and the flaws in the law or policy she opposes. In short, to be serious in her aim to bring about a lasting change in policy, she must recognize the importance of engaging policy-makers and community members in a moral dialogue.²² Too radical a protest could obscure the moral force of her objection. Both the non-consequential reason of respect and the consequential reason of succeeding in her persuasive project are reasons to prefer civil disobedience as a communicative strategy to more radical disobedience.²³

The constraints upon civil disobedients arising from their conscientious, forward-looking aims have certain limits since disobedients sometimes may find it necessary or unavoidable to employ limited coercion in order to get their issue onto the table. Only when they have an ear may they undertake meaningfully to persuade authorities and society of their view. Their actions also may have a coercive aspect irrespective of their intentions since many kinds of civil disobedience—illegal boycotts, illegal strikes, refusals to pay taxes, draft dodging, roadblocks, sit-ins—make it difficult for a system to function and thus can have a potent effect upon leaders’ decisions. However, modest, incidental coercion does not muffle disobedients’ moral plea in the way that radical protest can do, and so its use can be consistent with both the persuasive aims of civilly disobedient communication and a respect for their hearers.

The backward-looking aim of civil disobedience to communicate condemnation and dissociation from a certain policy also places a non-consequential constraint of respect for her hearers upon the disobedient’s mode of communication since only censure that is in some way proportionate to the wrongness of the policy is potentially justified as part of a moral dialogue. In the next section, I argue that the censure by disobedients that is justified is sometimes less than that which a policy or practice warrants. The same holds true for the censure communicated by the state through punishment: sometimes the justified censure is less than the censure the offender deserves.

²² Brownlee n 5 above, 337–51.
²³ By ‘radical disobedience’, I mean extreme forms of dissent—militant action, coercive violence, terrorization—which lack the conscientious communication and persuasive aims exemplified in paradigmatic civil disobedience.
Concerning the forward-looking aims of punishment, the constraints on mode of communication that apply to paradigmatic civil disobedients also apply to authorities who sincerely aim to have a lasting effect upon an offender’s conduct and views. The non-consequential and consequential reasons that disobedients have to avoid overly radical responses to laws or policies are mirrored in the reasons that authorities have to avoid overly harsh punishments. When authorities aim to communicate censure in a way that will lead the offender to appreciate the moral reasons behind this condemnation, they must recognize that they have reason to be modest in the imposition of punishment. In other words, when the state is properly sensitive to the moral values it wishes to inculcate in the offender, this places certain constraints on how it may treat that person in its efforts to bring her to change her attitudes and conduct. First of all, excessive or inappropriate punishments would fail to respect the offender as a rational agent with whom authorities may endeavour to engage in moral dialogue. Second, as Andrew von Hirsh observes, to perform the function of normative communication, moderation in punishment is required because too harsh threats (and penalties) from the law would drown out the moral appeal.²⁴

In previous writing, I highlighted von Hirsch’s ‘drowning out’ metaphor for communication through punishment and applied it to civil disobedience as well, saying that since disobedients aim to persuade, they have reason not to be overly radical in their communication. The moral appeal of the communication of censure is lost if it is drowned out by preventative measures. I wish to stress, though, that it is not just that the appeal would be drowned out if the measures are too extreme. The appeal rests on treating the other as an interlocutor with whom one may engage in a rational and moral discussion. Respecting the other as a moral being with rights and dignity constrains the kinds of actions one may employ to communicate one’s condemnation to her.

With this conception of both moral dialogue and the constraints upon authorities and disobedients who may claim to engage in such a dialogue, we may dismiss the worry that their exchange will be a ‘dialogue of the deaf’. To claim legitimately that they aim to persuade the other by appealing to reasons which justify their attempt to persuade, they must engage with that other in a respectful manner at a rational level in keeping with people’s status as autonomous beings. We may now consider what particular responses by these parties would be permitted within these parameters.

III. Justified Censure

The constraints discussed above are formal constraints of consistency that derive from conceiving of punishment and civil disobedience as communicative

practices whose practitioners seek to engage their hearers in a moral dialogue. The substantive question we must now address is: Which particular acts of punishment or civil disobedience are admissible within this moral dialogue? In this section, I consider four factors that bear upon the justification of a given act of punishment or act of civil disobedience. These factors are deserved censure, prevention of wrongdoing, charity or good will, and restoration.

As I noted above, for both disobedients and authorities, deserved censure is central to the justification of their response. For the civil disobedient to be justified, for example, she must have objective reasons for her challenge deriving from a respect for the value of considerations that are objectively valuable. Various considerations could generate objective reasons to condemn a policy such as justice, transparency, trust, security, social welfare, rights, integrity, democracy, stability, autonomy, equality, privacy, and so on. When a law or policy offends these considerations in a significant way, this opens up a space in which a person could be justified not to respect it or another law in order to demonstrate her objection. Similarly, to be justified in punishing, the state’s objection to a person’s conduct must be well-founded. There must be objective reasons for regarding this action as wrongdoing.

Having a well-founded objection does not license just any kind of burdensome response that fits the description of ‘civil disobedience or ‘punishment’. As noted above, the severity of the censure must be in some way proportional in both cardinal and ordinal terms to the seriousness of the wrongdoing at issue. For punishment, for example, the severity of the response must not only be proportional to that meted out for other offences of comparable seriousness and reflect the relative reprehensibility of the offence (ordinal proportionality),²⁵ but also be proportional to the absolute seriousness of the offence (cardinal proportionality).²⁶ The seriousness of an offence is determined by both the harm it does or risks and the offender’s degree of culpability; the greater the harm or culpability, the greater the justification for punishment. For the civil disobedient to be justified too, her communication of censure cannot be excessive relative to the wrongness of the policy at issue. The wrongness of a policy could turn on a variety of factors, including its perniciousness, impact, the intentions of the authors, and the relative harm. If, however, the disobedient’s censure goes unheard (in the way that punishment sometimes goes unheeded), she may be justified in resorting to more extreme or prolonged action to gain a hearing for her view.

²⁶ For example, as Tasioulas notes, focusing only on ordinal proportionality would allow one to punish an act of less relative seriousness overly harshly in absolute terms provided that the punishment was less severe relative to the punishment for the more serious offence. Borrowing an example from Tasioulas, since murder is a far graver crime than littering, one cannot impose the same sanction for both. But ordinal proportionality would allow a year’s imprisonment for littering provided that the penalty for murder is something like life imprisonment or death. cf J Tasioulas, ‘Punishment and Repentance’ (2006) 81 Philosophy, 292.
Determining which acts of civil disobedience would be proportionate responses to a given objectionable policy is not a simple matter: attention must be given not only to the seriousness of the objectionable policy, but also to the current political climate (e.g., national emergency), the ability of the government to be responsive if it chose, and so on. Determining the proportionate response by the state to civil disobedience is also not a simple matter. It requires establishing both how serious (in absolute terms) a given act of civil disobedience is and which offenses that act of disobedience most resembles. Should a given act of civil disobedience be compared against other politically motivated offenses or against other offenses classified as, say, mischief or property damage (which may not have been politically motivated)? Assessing the seriousness of the offense requires analyzing both the nature of the harm caused or risked by civil disobedience, which typically has no specific victim, and the disobedients’ culpability, which differs from that of ordinary offenders. Since disobedients engage with the state at the level of deeply held conviction, there is reason to treat them more like conscientious objectors than ordinary offenders.

While desert and proportionality are central to justified censure, they are not everything. In previous writing on this topic, I over-emphasized desert as the factor that judges should focus upon when they decide whether punishment is appropriate for civil disobedience. I wish to stress here that attention must also be given to prevention of wrongdoing, charity or good will, and restoration. Concerning prevention, Andrew von Hirsch argues in his discussion on punishment that censure itself cannot justify the use of hard treatment; added to the communication of censure must be the aim of deterrence. Only the aim of prevention, says von Hirsch, can justify hard treatment as opposed to mere formal or symbolic punishment. If our parallel between punishment and civil disobedience holds here, then, on this view, the communication of censure against a bad policy would be insufficient by itself to justify the use of civil disobedience; added to the censure would have to be the aim of preventing the development of similar policies. This constraint seems too stringent for civil disobedience since typically people are regarded as most justified in protesting through unconventional channels when the state is least responsive and when success seems unlikely; these dissenters need not aim to bring about a meaningful change in policy to be justified in communicating their opposition. And, according to John Tasioulas, the introduction of deterrence into von Hirsch’s account of justified punishment threatens to render his account incoherent because what is added to censure (namely the prevention of crime) threatens to undermine the communicative character of punishment.²⁷ Thus, deterrence cannot operate as an independent justifying aim for either practice because, first, the case for censuring would be defeated when prevention of further wrongdoing would not result, and second, deterrence would permit or even require modes of censure at odds with treating hearers as rational agents. Our discussion of the constraints imposed by a genuine moral dialogue showed

²⁷ Tasioulas n 24 above, 279–322.
that, for both civil disobedience and lawful punishment, there are restrictions upon the means that may be used in pursuit of preventing further wrongdoing. Excessive measures fail to respect hearers as rational agents.

This does not mean that all consequential reasoning is ruled out for each practice. Prevention of further wrongdoing can and does figure prominently in the decision by dissenters and the government to engage in these practices. Prevention is part of the aim of communicating censure and of seeking through moral dialogue to effect a change in attitudes and values. A disobedient, for example, must consider the appropriateness of her particular strategy (for instance vandalism, sit-ins, trespassing, illegal boycotts, illegal strikes) since the specific action that she performs and the manner in which she performs it will determine its effectiveness as the vehicle through which to communicate censure. A person may have reasons for engaging in one form of disobedience, but choose to engage in another form that is not supported by these reasons. For example, she may have an undefeated reason to participate in a road block because this action is well suited to her political concerns and is one that her government and society understand and respond well to or because this action has a public impact that does not greatly harm the interests of others; but she has no undefeated reason, say, to trespass on government property or to engage in strategic violence. In taking the latter actions, she is guilty of a certain error of judgment about which actions are supported by reasons that admittedly apply. Given her error, the best she could claim is that her conduct is morally excused, as she had reason to believe that she had reason to undertake that particular act of civil disobedience. When, by contrast, her civilly disobedient action is supported by undefeated reasons that apply to her situation then, provided she acts for those reasons, her choice of action may be justified.

Similarly, not all consequential reasoning is ruled out of the justification of punishment. When deciding on the appropriate punishment, the state must consider how the punishment will be received, that is to say, what form of punishment will most effectively communicate the particular condemnation that the state seeks to convey.²⁸ And when choosing between two punishments that are equally defensible on a desert basis, the state must consider their respective benefits, including their deterrence benefits, to determine which is preferable. Adducing such consequential considerations as part of the justification for punishment reaffirms the parallel between this practice and civil disobedience since instrumental reasons to use the most appropriate and effective modes of communication also bear on the justification of an act of civil disobedience.

In addition to consequential evaluation, which plays a role, though not an independent role, in the determination of justified censure, there are two other factors that both judges and disobedients must accommodate to be fully justified in the censure they communicate, namely, charity (mercy) or good will and restoration. Using Tasioulas’s definition, mercy by the state to an offender

²⁸ I thank Antony Duff for highlighting this point.
is a charitable concern for the well-being of that offender as a potential recipient of deserved punishment. When the law has reason to be merciful toward an offender, this can reduce the justified punishment in relation to the deserved punishment. Repentance is one factor, says Tasioulas, which may give the law reason to be merciful. Since a key aim of punishment, on the communicative theory, is to lead the offender to repent her action and to reform her conduct, when the offender demonstrates prior to punishment that she does repent and has reformed, this gives the law reason to show mercy and to impose a lesser punishment on her than that which she deserves according to justice.²⁹ On this nuanced communicative theory, the notion of moral dialogue is filled out in a meaningful way that takes account of the offender’s contribution to that dialogue. As such, this account offers the most plausible conception of punishment as an attempt to engage in genuine moral dialogue.

There may be grounds other than repentance for the state to show mercy toward a given offender, some of which are particularly relevant for civil disobedients. Given the sincerity of conviction and moral consistency that distinguish the paradigmatic civil disobedient from both ordinary offenders and radical protesters, the state has reason to appreciate the onerousness for her of not interfering with nor effectively challenging (through non-radical means) a policy she finds objectionable. Concern for her well-being as a conscientiously motivated offender may give the state reason to be merciful toward her whether her cause is well-founded or not.

One might argue that when civil disobedience is well-founded, there are no grounds for mercy, as there is nothing for these offenders to repent. Judges must appreciate (particularly when they sympathize and even share dissenters’ opinions) that civil disobedience paradigmatically is disobedience grounded upon deeply and conscientiously held values and commitments which, quite rightly, make it very hard for their holders either to follow laws which contravene those values or to refrain from communicating in effective ways their objections to laws and policies that they cannot breach directly. Given this, sometimes it would be inappropriate to demand repentance from offenders. Demanding repentance from such disobedients would attack values which the state and society themselves should advocate.

However, not all instances of civil disobedience are well-founded. And sometimes, even when disobedients’ cause is well-founded, their choice of civilly disobedient action may invite censure. In other words, although disobedients’ defence of genuine values itself does not warrant punishment, the mode of civilly disobedient communication they employ may deserve censure if, for example, it has significant negative effects for individuals or society (some of which might

²⁹ J Tasioulas, ‘Mercy’ (2003) 103 Proceedings of the Aristotelian Society, 101. This position discounts the suggestion that full punishment must be imposed for the offender to demonstrate the sincerity of her repentance. For a discussion of mercy and repentance see Tasioulas, 2003; Tasioulas, 2006.
not be foreseeable). Censure of such offenders may be justified to the extent that they intentionally, knowingly or recklessly brought about harmful consequences through their chosen civilly disobedient action. How much weight these considerations should be given will depend upon the facts of the particular case.

The language of mercy and charity is less relevant for civil disobedients than for law-enforcers given the disparity in their coercive power. However, the related language of good will is relevant to civil disobedience. Disobedients have reason to deal fairly with authorities, as this demonstrates their respect for authorities and policy-makers as rational persons capable of responding to the arguments disobedients make against current policies or practices. Good will, however, should not be confused with fidelity to law. Since civil disobedience may be part of a revolutionary project (as in the cases of African protests against the Apartheid South African government or Gandhian resistance in India under British rule), it need not exemplify a fidelity for the political system in which it is undertaken. That said, the constraints of moral dialogue require civil disobedients to treat their interlocutors as rational persons and thus to engage with them on terms of equality and fairness.

Although good will and respect constrain disobedients’ actions, these demands do not require that disobedients soften their efforts when they begin to succeed. There are various other ways that disobedients can deal openly and fairly with authorities than by lessening their dissent when the state seems responsive. Co-ordinating with law-enforcers where possible, giving fair warning of their intended actions when doing so will not undermine their efforts to communicate, explaining their reasons for action, behaving well when arrested, attending to the contribution of authorities to this dialogue, and so on, are all ways to show good will. In the same way that the state must recognize that it deals with rational human beings when it punishes them as offenders, so too citizens must recognize that they deal with rational human beings when they challenge the practices or policies of their government and society. When fully deserved censure would be at odds with good will then the justified acts of civil disobedience may be less forceful than those which the policy warrants.

Turning to restoration and reconciliation, I suggested above that, although punishment may contribute to the process of restoration and reconciliation, it might not always be the appropriate response particularly to civil disobedience. Although punishment can serve the various communicative aims of a society, it is not the only response that can do so. That said, sometimes the only forms of permissible communication for the state are those involving punishment. However, these forms of communication have the potential to be less severe or impersonal than traditional forms of punishment are. The inappropriateness of imposing customary sanctions on much civil disobedience does not leave the state speechless because there are other responses that the state can make to paradigmatic civil disobedience, even when its particular form is morally problematic.³⁰

³⁰ During the 2005 British Columbia Teachers Federation’s (BCTF) illegal strike, BC Supreme Court (trial court) Justice Brenda Brown chose not to adopt the customary strategy of imposing
As John Gardner observes, there are many types of normative consequences for breach of law apart from liability to punishment, such as a duty to show regret, to apologize, to make restitution, and to provide reparation. These actions may be required of disobedients even when whatever wrong they do is also justified. All legal systems, continues Gardner, presuppose that even fully justified wrongdoing has at least one normative consequence: it makes it the offender’s job to offer up what justification she can as a responsible agent who answers for her own wrongs. In the case of justified civil disobedience, this answering comes almost automatically. Through their effort to engage in a moral dialogue with authority, such disobedients offer justification for their actions in the form of an account of their values and their reasons for disobeying the law. When authorities attend to these reasons and when disobedients attend to the reasons the state gives not to resort to certain methods, then their exchange may truly be called a moral dialogue.

IV. The Contrast between Protest and Punishment

Let me conclude by noting some ways in which the parallel that I have drawn between civil disobedience and lawful punishment might break down. First, these practices differ in their directness. Whereas there is space within an account of justified civil disobedience for indirect disobedience, there is no such space within the communicative theory of punishment for what one might call ‘indirect punishment’. Indirect punishment could involve either punishing a person other than the offender in order to punish the offender or punishing the offender for some action other than the offence for which she should be punished. In either case, the punishment would be disproportionate and at odds with a predominantly desert theoretic approach which requires that only the guilty be punished and only to the extent that they deserve (and sometimes less than they deserve when considerations of mercy, restoration, or likely benefits reduce the justified punishment). Indirect civil disobedience, by contrast, is not necessarily disproportionate on the communicative theory since sometimes it is a more appropriate and less harmful vehicle

heavy fines on the union, but chose rather to freeze the union’s strike fund, preventing the union from paying its members their daily strike pay. In this precedent-setting decision, Justice Brown argued that the BCTF acts through its members to commit the contempt of the court order that required them to return to work and that the BCTF is using its assets to facilitate the continuing breach of that order in part by paying teachers. Her response to the union was to impose a punishment of sorts in denying members their strike pay, but not the traditional punishment of a fine that the union had expected (and that it received a week later after it continued to act in contempt of the court order). In making this judgment, Brown stepped around the union and addressed teachers directly. Many teachers took the judgment as a challenge to them to show the strength of their convictions, that is, to show whether they would continue the strike without their strike pay. See 

B C P ublic S chool E mployers A ssociation v B C T eachers F ederation [2005] BCSC 1446.
for communicating censure than direct disobedience is. Also, sometimes it better communicates the disobedient’s objection than direct disobedience would do.

Second, there is a difference in how the practitioners of punishment and civil disobedience conceive of their own activities. Whereas the state (in a democratic society) may with some legitimacy represent itself as the voice of the people, disobedients may not do this unless the minority for which they speak is in fact the majority. However, they may claim to speak for the interests of the community when their communicative condemnation and dissociation serves the genuine ideals and values of that society.

Third, a related difference pertains to the attitude that each adopts toward their activity. It is often argued that the state should adopt an attitude of regret when it is required to punish its citizens. No comparable attitude of regret may be expected from civil disobedients for the mere act of dissociating themselves from a law or policy they oppose. They have reason to regret any harm they cause through their action or duties they breach by their action, but not to regret the mere act of breaching the law.³¹

Fourth, disobedients and authorities also differ in their expectations of how the target audience will respond to the communication. The disobedient, presumably, does not expect repentance as such from government officials or policymakers in the way that the state expects repentance from an offender. However, when her challenge is well-founded and her dissent persuasive, she may reasonably expect an acknowledgement of wrongdoing by the government or the institution. Moreover, she may reasonably expect reformation in policy if not in officials’ outlooks.

Certainly, there are other points of contrast between the communicative features of punishment and those of civil disobedience not noted here. While interesting, these warps in the parallel I have identified do not diminish the usefulness of this parallel both for explicating the key features of these two practices and for analysing their respective justifiability as contributions to a genuine moral dialogue.³¹

³¹ I have argued elsewhere that there is no good reason to hold that there is a general moral obligation to follow the law.