

## **Must I Accept Prosecution for Civil Disobedience?**

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Abstract: Piero Moraro argues that people who engage in civil disobedience do not have a *pro tanto* reason to accept punishment for breaking the law, although they do have a duty to undergo prosecution. This is because they have a duty to answer for their actions, and the state serves as an agent of the people by calling the lawbreaker to answer via prosecution. I argue that Moraro does not go far enough. Someone who engages in civil disobedience does not even have to show up for the trial, provided that they answer for their actions adequately via some other means. This is because sometimes states are not agents of the people who can call lawbreakers to account, and even those states which are agents cannot demand that lawbreakers answer for their crimes in the form of a trial.

**Keywords:** civil disobedience, political obligation, punishment, answerability

Piero Moraro argues that people who engage in civil disobedience do not have a *pro tanto* reason to accept punishment for breaking the law. He says that ‘by *merely* engaging in an act of civil disobedience, a citizen commits no wrong. Hence, he maintains a claim-right against being punished (i.e. has no *pro tanto* reason to submit to the punishment)’ (Moraro 2018: 504). He also argues that ‘a civil disobedient has a *pro tanto* duty to answer to his fellows for the deliberate choice to disobey the law’ (Moraro 2018: 504). This second duty entails a duty to

undergo criminal trial. This is because ‘the state, acting on behalf of the community, has the right to call a lawbreaker to answer, at the criminal trial, for his conduct, because a breach of the law is the business of all citizens’ (Moraro 2018: 511). One of the innovations of Moraro’s view is that by distinguishing between ‘the moment of *prosecution*’ and ‘the moment of *sentence*’ we clear the space for arguing that the civil disobedient is morally liable for the former but not the latter (Moraro 2018: 504–5). But Moraro does not go far enough. According to the logic of his argument, a civil disobedient does not even have a moral duty to show up for the trial, provided that they answer for their actions adequately via some other means. If Moraro’s argument succeeds, then there is no *pro tanto* moral duty to undergo prosecution, just as there is no *pro tanto* moral duty to serve whatever sentence might result from prosecution.<sup>1</sup>

### I. Moraro’s Argument and the Duty to Answer

Moraro understands responsibility as answerability, which crucially does not also entail liability (Moraro 2018: 509–11). Thus someone who is responsible for something is answerable for it but not necessarily liable to punishment for it. Moraro then argues that the obligation to obey the law is based on the duty of each citizen to respect the autonomous agency of each other citizen. Not all obedience of the law respects the autonomy of one’s fellow citizens, so the obligation to obey the law only obtains when doing so would respect one’s fellow citizens (Moraro 2018: 511–4). By engaging in civil disobedience (which entails disobeying the law) one can fulfil one’s role as a member of the political community so long as the disobedience is done

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<sup>1</sup> Henceforth I talk just of duties (and obligations, and responsibilities, and so on) but I am discussing *moral* duties, not legal duties. Moraro himself is concerned with moral duties, and derives his account from ‘what, if anything, grounds a citizen’s moral obligation to the law’, rather than from a positivist account of purely legal obligation (Moraro 2018: 511). Legally speaking we may have all sorts of duties, but Moraro’s point is that we may have no *pro tanto* moral duty to carry out our legal duties when the law mandates punishment for our civil disobedience. My claim is that the same can be said about our legal duty to undergo trial.

to protest a law that violates autonomy. In doing so, one does nothing wrong, and thus one has no *pro tanto* duty to accept punishment. However, although one escapes liability, one does not escape answerability, because one is still responsible for one's actions, and thus one has a duty to answer for one's crime by submitting to prosecution in court.

The reason submitting to prosecution in court counts as answering for one's crimes is that, as noted above, Moraro suggests that 'the state, acting on behalf of the community, has the right to call a lawbreaker to answer, at the criminal trial, for his conduct, because a breach of the law is the business of all citizens' (Moraro 2018: 511). Moraro does not elaborate on what it means to say that the state is acting on behalf of the community, but we can glean some details from his argument.

First, it seems that providing an answer to the state in the context of the prosecution stage of the trial must be one way to discharge one's duty to answer for one's crime. So, one way in which the state is acting on behalf of the community might be by serving as a listener to whom the answers are provided. Or perhaps the thought is that trials must be public, and therefore the prosecution offers a platform for providing answers to the broader community.

Second, and most relevantly for our purposes, the state is not just a passive listener or a neutral provider of a public platform: it is an active agent of the community because it has the *right* to call the lawbreaker to answer. The state, on behalf of the citizens, can compel the lawbreaker to appear in court for prosecution. The state is thus specially positioned in the way the community at large is specially positioned, in that it is not uninvolved like a stranger. Rather, it is tied up with the lawbreaker such that it, like the community at large, is in a position to call the lawbreaker to answer.

## II. When the State Does Not Act on Behalf of the Community

Accordingly, if the state is not so positioned as an agent of the community, then the state does not have the right to call the lawbreaker to answer. In this circumstance lawbreakers will have no more duty to defend themselves in trial than they would have to defend themselves against criticisms in a trial held by a foreign government with no involvement in the affair. The question, then, is whether and when the state is in fact an agent of the community in this way.

Clearly there are many circumstances under which the state would not be such an agent, like deeply unjust dictatorships or even otherwise legitimate democracies with occasional unfair trials.<sup>2</sup> If we limit ourselves just to cases of legitimate democracies with fair trials, there are still instances in which it would be inappropriate for the state to act as the agent calling the lawbreakers to answer for their crimes. Consider a state that, while otherwise legitimate, unjustly prosecutes members of a minority group for various criminal infractions more often than it prosecutes others, and which doles out harsher sentences to members of this group. If a member of this group engages in civil disobedience, it is awkward for the state to serve as an agent of the people in order to receive the justification from the lawbreaker, because the state stands accused of unfairly treating exactly the sort of person that it is supposed to be listening to.<sup>3</sup>

For example, I am confident that Black members of Black Lives Matter who illegally block a highway owe an answer to the community at large (and I am confident they have a suitable answer to give!) but it is less clear to me that they owe an answer to the state in the context of a criminal trial. In light of the claims of the protestors, we should think that the state

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<sup>2</sup> Moraro may be limiting his argument just to legitimate states. This limitation is attached to the ‘standard view’ of civil disobedience which he rejects (Moraro 2018: 506–9). If so, he could accept that illegitimate states cannot be agents of the community. I thank an anonymous reviewer for suggesting this.

<sup>3</sup> Do lawbreakers of all kinds (not just civil disobedients) who belong to the minority population owe an answer to the population at large if that population itself is mostly racist or otherwise biased? This is an interesting question about answerability that I cannot address here. Antony Duff briefly addresses a similar question but does not reach any concrete conclusion (Duff 2007: 191–3).

has rendered itself an unfit interlocutor in matters relating to its misconduct in this matter. The state stands accused of (among other things) mishandling legal prosecution of Blacks, and so if anyone has the right to demand that the protestors answer for the crimes, it probably isn't the state, at least insofar as the state wants to demand this via criminal prosecution.

In fact, we might think this issue generalizes to any case of civil disobedience in which the protestors are protesting the actions of the state. It is hardly fair for the state, and especially the criminal prosecution arm of the state, to serve as the judge when it stands accused. What is needed instead is a neutral third party. Many states are arranged such that the judiciary is at least partially independent from the rest of the state, and from the prosecuting body more specifically, and these arrangements partially alleviate this sort of worry. But in cases where the judiciary is not particularly independent (even if the judges are fair), it is a little odd to say that the state's criminal prosecutors are a proper representative of the community as a whole when it comes to calling civil disobedients to answer for their crimes. The prosecutors, since they are the ones trying to punish the civil disobedients, are too tied up with this business to act as an agent of the community. The agent we pick should at least not also be busy prosecuting the lawbreakers.

Sometimes, for practical purposes, we tolerate an overlap between the one meting out the punishment and the one asking us to account for our actions. It is not a breach of justice for a parent to simultaneously punish a child and ask the child to account for their wrongdoing. (Even here, though, it might be better if one parent handles the punishment and another asks the child to account for their wrongdoing.) One might think that civil disobedience is a case like this, because nobody but the state can prosecute lawbreakers, and also nobody but the state can serve as an agent of the community. But, if there is the possibility of another body standing in as an agent of the community, then it seems sensible to separate the task of punishment and the task of

calling the civil disobedients to answer for their crimes. If, for instance, a community has picked representatives who speak for the community with respect to responding to civil disobedience, it would be unwise to pick the state to serve as the agent of the community instead. In fact, it is not clear why the community needs an agent at all. If the lawbreaker is willing to answer to the community at large, why require a stand-in?

Thus, at least in some cases, the state will not be a suitable agent of the community with the standing to call the civil disobedients to answer for having broken the law. We may reach this conclusion with respect to any state, or just with respect to states that are unjust in certain ways, or just with respect to states that are so unjust as to be illegitimate. However far-reaching the conclusion is, it at least vitiates Moraro's argument in the relevant cases.

### III. Even if the State *Does* Act on the Community's Behalf...

Even assuming that the state can call the civil disobedient to account for having broken the law, there is a deeper issue. There is no good reason to link the duty to answer for one's crimes with submitting to prosecution by the state. Being answerable for one's actions does not entail being answerable in the very specific form of allowing oneself to be prosecuted in a criminal trial. The citizens, and by extension the state, have a right to demand of the lawbreaker that the lawbreaker answer for breaking the law, but the citizens and the state do not have a right to require that this answer take the form of standing trial.

Analogously, if I ask you to cover my class while I am out of town, and you spend the class session filling the heads of my students with a bunch of malarkey, you are answerable to me for your misdeeds. This does not mean I can compel you to undergo a trial, complete with

judge, jury, and sentencing. Obviously your being answerable to me does not entail anything like your having a duty to undergo a trial.

Why, then, would the case be any different for civil disobedience? Why could the citizens demand that someone who engages in civil disobedience show up in a courthouse to be prosecuted for the crime in order to discharge their duty to answer for their actions? Certainly there are numerous reasons why it might be a good idea to prosecute lawbreakers, and good reasons for lawbreakers to submit to this prosecution.<sup>4</sup> Most notable among the latter is the duty to respect the law (if such a duty exists), where such respect includes showing up to one's trial. Note though that this reason does not stem from the duty to answer for one's actions. Indeed, Moraro's argument relies on the notion that the duty to respect the law is separable from the duty to undergo punishment (since he thinks the former does not entail the latter), and if we can separate these two ideas, we can also separate the duty to respect the law from the duty to show up to one's trial. It is no use to point out that the law requires showing up, because if we can point to that, we can also point to its requirement that one undergoes punishment, thus vitiating Moraro's argument. So, assuming that the duty to respect the law allows one to legitimately disobey it in one way (namely: by avoiding punishment, even though the law requires it) then there must also be space for the duty to respect the law to admit of another exception (namely: by avoiding trial, even though the law requires it, so long as one answers for one's disobedience some other way).

To discharge the duty to answer for one's actions, it is sufficient to answer for one's actions. Obviously not just any answer will do. You cannot discharge your duty to answer to me by, for instance, sending me a signed photograph of Val Kilmer, even if the signature is

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<sup>4</sup> For a discussion of these reasons and their plausibility, see David Lefkowitz (2007) and Kimberley Brownlee (2008). I am not committing here to any view on the matter.

personalized for me. What you need to do is provide some sort of convincing explanation. Similarly, the lawbreaker cannot discharge their duty however they see fit. Perhaps they need to disseminate a well-argued manifesto in language that is accessible to the public, or they need to give a speech in the public square and make available a recording of the speech, or something like this. But certainly the duty to answer doesn't require that they show up and listen to two teams of lawyers argue over the status of evidence that pertains to whether they did or did not break the law.

Indeed, depending on the procedures in the particular trial, the actual defendant might not get a chance to say much of anything (doubly so if they don't want to hurt their case). Silence hardly counts as answering to the public for one's actions. Since civil disobedience is paradigmatically a clear public violation of a law, there probably won't even be much of a trial. The verdict is going to be a foregone conclusion, and thus we might expect the defendant to cop a plea (if this is an option) rather than go to trial in the first place. Perhaps Moraro would argue that the duty to answer for one's crimes entails that one must refuse a plea bargain and demand a trial, but this seems like too big of a bullet to bite, and in any case this only brings us back to the main issue, which is that the public and the state have no right to demand answerability in the form of a trial in the first place. So, Moraro cannot explain why a duty to answer to the community for one's disobedience *must* take the form of a criminal trial unless he adverts to the fact that the law demands a trial. But, the law also demands that one undergo punishment, and thus if Moraro posits a duty to submit to the law in the prosecution stage, he must also accept a duty to submit to the law in the sentencing stage, on pain of inconsistency.

#### IV. Once You Show Up, You're Toast



A further issue with Moraro's suggestion is that although conceptually it distinguishes between prosecution and sentencing, in practice it is hard to see how one could avail oneself of a liberty to avoid punishment if one has a duty to be prosecuted. It is not customary for the accused to excuse themselves from the proceedings after the prosecution phase on the grounds that they have no duty to obey the results of the sentencing phase.<sup>5</sup>

Perhaps what Moraro has in mind is a legal system according to which defendants who provide suitable explanations of their conduct are therefore not assigned any legal punishment in the first place. This would solve the problem because there would be no sentence to run away from after having stood trial.<sup>6</sup> I have serious doubts about the workability of a system that lets people off the hook for a crime on the basis of the moral defensibility of civil disobedience in general, and on the basis of the applicability of this moral defensibility to each particular court case.<sup>7</sup> Setting aside these worries, though, suffice it to say that Moraro's suggestion is practicable only for a legal system very different from many (if not all) present legal systems. Absent a more enlightened set of laws, escaping the *pro tanto* duty to accept punishment is no help unless one can also escape the duty to be prosecuted.

Perhaps Moraro thinks that the liberty to avoid punishment is typically going to be moot, because the liberty merely gets one out of the *pro tanto* duty to accept punishment rather than the all-things-considered duty to accept punishment. If, however, there are any cases where there is in fact no all-things-considered duty at all to accept the punishment, then it will behave the

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<sup>5</sup> An anonymous reviewer notes that one could also challenge Moraro's conceptual distinction by claiming that the legal notion of sentencing is incoherent without the notion of effective punishment, and thus to accept the former is to accept the latter. I am sympathetic to this argument, but here I am only making the weaker claim, which is that for practical purposes, it's not much help to have the right to avoid punishment if one does not also have the right to avoid the sentencing.

<sup>6</sup> Providing a defense that blocks the transition from responsibility to liability to punishment is the general process Duff envisions, although the defenses he has in mind are things like insanity rather than a strong moral conscience and consequent desire to engage in civil disobedience (Duff 2007: 179).

<sup>7</sup> If the above mentioned conceptual argument in footnote 5 works, then this sort of legal system would be not just practically unworkable but also conceptually confused.

lawbreaker who wishes to avoid punishment to get out of ‘get out of Dodge,’ so to speak, which is going to be difficult (if not impossible) if the lawbreaker first has to wait around to get prosecuted.<sup>8</sup>

## V. How to Answer for One’s Civil Disobedience

Thus to answer for one’s crimes one need not show up in court, at least in principle. But if we discard not just the acceptance of punishment but also the acceptance of prosecution, what is left of the idea that civil disobedience entails fidelity to the law? Note first that even on Moraro’s view, there are many fidelity-based reasons to show up for the trial, just like there are many fidelity-based reasons to accept punishment, like if avoiding the trial or the punishment would ‘encourage civil unrest’ or ‘hinder the communicative process’ (Moraro 2018: 516). These may entail an all-things-considered duty to show up for prosecution, even if there is no *pro tanto* duty. Second, if Moraro is right to say that illegal behaviour can express fidelity to the law in some cases, then avoidance of prosecution in favour of answering for one’s crimes in some other way should also count, like for instance if one answers in a much more public, issue-centric forum than a court of law (Moraro 2018: 515). It may be much more faithful to the law broadly speaking if one very publicly and thoroughly explains one’s violation of an unjust law, rather than having one’s explanation confined to the few moments one is able to speak during a criminal trial.

Moraro’s example of Edward Snowden, whose ‘communicative aims were not weakened by his choice to go into hiding and avoid facing a US court’, demonstrates that the important aspects of civil disobedience can be accomplished without ever showing up for prosecution, let

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<sup>8</sup> Kimberley Brownlee similarly argues that it does not make sense to endorse a right to engage in civil disobedience without also endorsing a right against all sorts of coercive interference, which I think includes prosecution in addition to sentencing (Brownlee 2012: chap. 8). See also Lefkowitz’s response (2018).

alone sentencing (Moraro 2018: 508). Snowden, after all, didn't stick around for his trial before fleeing. Snowden is also a good example of why prosecution may be a particularly inapt forum for giving an account of one's actions. The reason Snowden cites for his failure to appear in the US for prosecution is that, due to the crimes he has been charged with, he would not be able to 'defend [himself] in an open court to the public'.<sup>9</sup> Snowden's duty to answer for his crimes maybe even gives him a duty to actively *avoid* prosecution, insofar as prosecution would prevent him from communicating freely.<sup>10</sup>

This account thus leaves an answer-sized gap in Moraro's theory of civil disobedience. If one need not be prosecuted in order to answer for one's crime, what must one do in order to answer for one's crime? I cannot elaborate an entire theory of answering for civil disobedience here. How one answers this question turns on further questions about answerability in the law more generally, civil disobedience more generally, and the link between the two. However, if we are picturing answerability outside the context of a trial, as I think we should, then it may make sense to endorse a very contextual account. The sort of answers one owes might depend on the injustice that one is protesting, the laws that one has broken, the outcomes of one's protest, one's own identity and history, and many other things besides. Perhaps these questions should be resolved by extra-judicial institutions: Hannah Arendt suggests that civil disobedience should be removed from 'judicial review' and instead institutionalized through 'registered lobbyists' that represent groups of disobedients (Arendt 1972: 101).<sup>11</sup> Or perhaps it is up to the individual civil disobedient to decide, just as it is on them to decide when to break the law in the first place. No matter what, though, one lesson is clear. Just as Moraro's theory frees us from thinking that

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<sup>9</sup> <https://edwardsnowden.com/2014/01/27/video-ard-interview-with-edward-snowden/>. Accessed 19 April 2019.

<sup>10</sup> On Snowden and fidelity to the law, see also Scheuerman (2015: 447–8) and Brownlee (2016).

<sup>11</sup> William Smith provides a defense of Arendt's proposal (Smith 2010). I thank an anonymous reviewer for suggesting I mention Arendt.

answerability entails liability in the realm of civil disobedience, my argument here frees us from thinking that answerability entails prosecutability.<sup>12</sup>

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<sup>12</sup> Thank you to Nadeen Kharputly and to two anonymous reviewers for this journal for their thorough and helpful comments.