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the hierarchy itself will have an acceptable place within the hierarchy. Barwise and Etchemendy's treatment of the Liar is quite deliberately *not* a traditional hierarchical account. But it appears it may nonetheless fall victim to the same difficulty: it may prove incoherent in its own terms.

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#### CIVIL DISOBEDIENCE

By EUGENE SCHLOSSBERGER

SOME recent theories of civil disobedience have been both internalist and formalist. By "internalist" I mean that the criteria used to decide whether an act of (or response to) civil disobedience is permissible assume the positive morality of the agent (the promulgator of law, enforcing official or dissenter): the key question is whether the agent thinks  $p$ , not whether  $p$  is in fact true. For example, Rawls' requirement that 'the dissenter is willing to affirm that everyone else similarly subject to the same degree of

injustice has the right to protest in a similar way,<sup>1</sup> is an internalist requirement (since it depends upon what the dissenter believes), whereas his suggestion that civil disobedience 'usually be limited to' protesting 'substantial and clear violations of justice', invokes an externalist criterion (since what must be assessed is whether the violation is in fact substantial). By "formalist" I mean that the criteria do not depend upon making substantial and particular judgments about the specific morality of the case: formalist criteria ask questions such as 'are rights involved?' rather than 'does the protested law flaunt central moral values?'. Formalist and internalist theories are attractive to many, since there is widespread disagreement about moral judgments, and because such theories (it is hoped) "reign in" potential dissenters or enforcing officials with bizarre moral views.<sup>2</sup> I will discuss a particular theory, given by Ronald Dworkin,<sup>3</sup> that is both internalist and formalist (as well a formalist feature of Rawls' remarks on civil disobedience), and raise a problem for each aspect of Dworkin's theory. The nature of these problems suggests that an adequate account of civil disobedience can be neither internalist nor formalist. I'll conclude with a few brief remarks about a non-internalist, non-formalist view of civil disobedience.

Briefly, Dworkin's view is that society should make the maximal feasible effort to accommodate civil disobedience of a statute or judicial decision intended to effect social or economic policy by a dissenter who believes (after making the requisite efforts to reach the truth) that the statute or decision misrepresents the law (e.g. the statute is unconstitutional), though a society must not tolerate disobedience of a statute or decision intended to protect rights. As Dworkin puts it, '. . . if a particular rule of law represents an *official decision* that individuals have a *moral right* to be free from some harm, then that is a powerful argument against tolerating violations that inflict those injuries,' (p. 218, italics mine), and 'fairness to others . . . does not play the commanding role here that it does when rights are at stake' (p. 219). 'The question,' Dworkin writes, 'is whether it is reasonable to suppose, from the background and administration of the law, that its authors recognized such a right' (p. 218). This view, which I'll call *DJ*, is a theory of official response to disobedience, not a theory of when one may licitly disobey. It

<sup>1</sup>John Rawls, 'The Justification of Civil Disobedience', originally presented to the American Political Science Association, September 1966, and reprinted in Richard Wasserstrom, ed., *Today's Moral Problems* (New York: Macmillan, 1975), p. 354. I will not discuss Rawls' more complex discussion in *A Theory of Justice* (Oxford: Oxford University Press, 1971).

<sup>2</sup>For example, the eccentric religious fanatic who believes that talking on Sunday is blasphemous is precluded, by Rawls' account, from barring the door to a lecture on Kant, since he is not appealing to his society's public sense of justice.

<sup>3</sup>Ronald Dworkin, 'Civil Disobedience', in his *Taking Rights Seriously* (London: Duckworth, 1977).

seems natural to extend *D1* by asserting that it is permissible to disobey a statute or decision one thinks misrepresents the law when the statute or decision is not intended to protect rights. I will call this view *D2*. A variant, *D3*, suggests that it is permissible to disobey a law when the dissenter believes the law violates rights.<sup>4</sup> *D1*, *D2* and *D3* are internalist because what counts is not whether the policy *in fact* protects or violates rights, but what the officials enforcing and/or promulgating the statute or decision *believe* the purpose of the statute or decision to be (or, for *D3*, what the dissenters believe the point of protesting the law to be). They are formalist because what counts is a distinction between utility (a policy meant to promote public welfare) and rights, not a distinction between, e.g., worthwhile and immoral goals or means. Rawls views civil disobedience (at least within a constitutional democracy) as appealing to a shared public sense of justice, a 'public act . . . to warn that, in the sincere opinion of the dissenters, the conditions of social cooperation are not being honoured' (p. 351). According to Rawls, 'one has a right to engage in civil disobedience' to protest a more or less deliberate and extended injustice, according to the shared public conception of justice, after exhausting normal political channels, 'where the injustice is a clear violation of the liberties of equal citizenship; and provided that the general disposition to protest similarly in similar cases would have acceptable consequences' (p. 355). Thus Rawls' view is, fundamentally, a formalist one, since it makes the licitness of disobedience depend not on the specific morality of the values at issue, but on the rights of equal citizenship and the most basic elements of a society's conception of justice.

Dworkin's purpose is to distinguish between intolerable acts of disobedience, such as the blocking of the schoolhouse door by the governor who thinks integration rulings illicit, and acts that should be tolerated to the extent feasible, such as draft law violation by those who deem the draft unconstitutional (and, presumably, disobeying laws forbidding blacks to sit at 'whites-only' lunch-counters). But since Dworkin's criterion depends only on whether the official promulgating or enforcing law *thinks* the law in question protects rights, it follows that if officials think that laws requiring blacks to sit at the back of the cafe protect the rights of whites not to mingle with blacks, then they are, according to Dworkin's criterion, justified in not tolerating disobedience of this law. Similarly, *D3* justifies the racist governor in blocking the steps of the schoolhouse if he thinks that anti-segregation laws (or judicial decisions) violate rights (either the purported right of whites not to mingle with blacks, or states' rights). These cases

<sup>4</sup>It is not clear how much weight *D2* and *D3* should give the factors Dworkin mentions in assessing what is maximally feasible, such as the extent to which disobedience hampers the intended policy from being implemented. For the sake of simplicity I'll ignore these factors.

seem to be powerful counterexamples to Dworkin's view.

Here it makes a difference whether *D1-D3* are meant as guides to or evaluations of conduct. Since everyone thinks her own view is correct (or it would not be her view), there is no useful distinction to be drawn when *exhorting* conduct between objective rights and what the agent being exhorted thinks are objective rights. (That is, if one tells an agent 'do what is objectively right,' she will, obviously, interpret this exhortation in accordance with what she thinks is objectively right.) However, if we adopt an internalist view of *evaluation*, our evaluations become hostage to every bizarre view of dissenters and officials. For example, if the criterion of evaluation is externalist, we may judge that an official acts wrongly and deserves censure if he prosecutes disobeyers of racial bus-seating laws, since the belief that whites have a right not to mingle with blacks is mistaken and pernicious. If the criterion of evaluation is internalist, however, the prosecutor escapes censure provided his pernicious belief is sincere.

The second problem concerns Dworkin's formalism. Dworkin's line between tolerable and intolerable disobedience is drawn not on the basis of the moral merits of the law broken, and not on the basis of the moral merits of the dissenter's position, but upon a formalist feature of the statute or ruling (for *D1* and *D2*) or the dissenter's position (for *D3*): does it protect rights? The extent to which the dissenter's moral stance is intolerable, and the extent to which the values embedded in the statute's policy are commanding, both play no role for Dworkin. This gives rise to some further counterexamples. One cannot parse civil disobedience exclusively in terms of rights (as Dworkin does) or injustice and equal citizenship (as Rawls does), since some permissible acts cannot plausibly be assimilated to either.

Suppose for example that the city of Baton Rouge proposes to raze all its historic buildings and erect pinball stands in their place. It is justifiable, I assert, to stand in front of the wrecking ball to prevent this. It seems clear that if historic preservation reflects a powerful and compelling value, then some acts of civil disobedience to prevent the destruction of historically important structures, when cheap and easy alternatives are at hand, are justifiable. (The reader who values historic preservation lightly is invited to construct a similar, alternative example.) Here I cannot plausibly argue that I or anyone else has a right to have those historic buildings stand. It is relevant, of course, that this decision adversely and irreversibly affects future generations. But it does not harm future generations to the extent of violating their rights. (I cannot claim, for example, that the continued existence of those buildings is a precondition for anyone's living a full human life.)<sup>5</sup>

<sup>5</sup>The presence of historical structures of similar vintage in nearby places prevents one from arguing that future generations will be cut off entirely from their past.

To raze these structures is not, I grant, to treat our descendants well, but it is surely stretching matters to say it is treating them unjustly. In any case, razing the buildings would not substantially violate anyone's right to equal citizenship, and so disobedience to stop the razing would violate Rawls' criterion. Finally, I need not think that razing the buildings would be a violation of law, and my disobedience might interfere with what officials take to be property rights.<sup>6</sup> In short, according to *D1*, officials should not tolerate my disobedience, and according to both *D2* and *D3* my act of disobedience was unjustified (and is not justified by Rawls' view). But this is surely incorrect. In any case, if it is wrong for me to stand before the buildings, facing the wrecking ball, it is not for the reasons Rawls and Dworkin give.

What these examples suggest is that the moral facts of the case must be judged on their own merit: the extent to which the statute disobeyed violates or impugns an important moral value is a relevant consideration. Rawls' and Dworkin's accounts miss the proclamative character of civil disobedience, the extent to which disobedience is a response to a value that demands taking a public stand of defiance. I suggest that civil disobedience must be understood in the context of citizenship. Citizenship requires participation in the public morality of the *polis*, in the public discourse that shapes the shared morality of the community, and this means that when, in important respects, the public morality ensconced in law has gone awry, one must proclaim one's disapprobation. Wantonly razing historic structures violates a value that commands my loyalty, and standing in front of the wrecking ball is a public expression of the sort of stand that loyalty to my values requires. I judge, after a process of careful moral scrutiny, that the rule of law has gone astray and needs correction, that standing in front of the wrecking ball is an appropriate sort of public stand, both because so doing does not fundamentally undermine other values, including the values of moral solidarity with my community and of proclamative obedience to law, and because it is an aptly expressive form of proclamation, an appropriate form of announcing my loyalty both to the value of historic preservation and to the ideal of the civic life. These are crucial qualifications. Acts of civil disobedience proclaim basic respect for the law and acceptance of the basic morality of the community. The appropriate response to Nazi Germany, for example, is not civil disobedience but rebellion (joining the underground). This is why standing before the wrecking ball is appropriate in a way that, say, destroying the razer's machinery is not: the latter is an attack upon, rather than participation in, the society in which one finds oneself, not only because

<sup>6</sup>I would argue that the moral fact is that property rights are not unconditional, and so I don't think one has a right, for example, to buy a Rembrandt and burn it. However, Dworkin's internalism means that the relevant factor is not the moral facts of property rights, but what enforcing officials think property rights include.

of its symbolic overtones of violence and destruction, but also because it is an invitation to anarchy rather than a gesture of respect for and loyalty to the rule of law even as one breaks the law. Civil disobedience, one might say, must be lawlike.

If these remarks do indeed articulate the basis of civil disobedience, it is impossible to evaluate acts of civil disobedience, or the response to disobedience by officials, without making substantial moral judgments about the importance of the relevant values. Thus no formalist criterion will be adequate. Internalist criteria of evaluation also miss the mark. If disobedience is justified (or even required) because my belonging to a community with a shared morality demands that I raise a public voice against violations of a value so compelling it demands confrontation, then I am subject to disapprobation to the extent that the value for which I take up rhetorical arms is not, in fact, compelling, or my protest is not, in fact, a public expression of the right sort. Similarly, tolerance should be shown those who take a public stand of defiance for a value whose compellingness is at least arguably reasonable, tolerable, and whose form of defiance is more or less appropriate. On the other hand, it is a moral failing to tolerate the intolerable. To proclaim one's loyalty to a cause by killing innocent bystanders is itself a violation of crucial and compelling values, such as the importance of individual lives, and so intolerable. To proclaim one's loyalty to Nazi values is to commit oneself to gross evil, and such a commitment is intolerable. The official who, acting as the public voice of the community, tolerates such public evil is guilty of debasing the public morality of her community. Of course, since enforcing officials are fallible in their judgments, they should be somewhat conservative in their responses. It is irrational to bet the house on a risky bet, and enforcing officials should not impose harsh punishments unless they are very sure of the intolerability of the dissenters' position. Here the official acts at her moral peril — if she judges wrongly, she deserves censure and disapprobation.

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## MORALLY PRINCIPLED DIVESTITURE?

*By* DAVID GORDON *and* JAMES SADOWSKY

**B**OTH Daniel H. Cohen ('A Reply to Cahn', *ANALYSIS* 48.2, March 1988, pp. 109–10) and Kerry S. Walters ('Morally Acceptable Divestiture' *ANALYSIS* 48.4, October 1988, pp. 216–18) have attempted to show, in our view unsuccessfully, that a problem that