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Civil Disobedience, Costly Signals, and Leveraging Injustice

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Civil disobedience, despite its illegal nature, can sometimes be justified *vis-à-vis* the duty to obey the law, and, arguably, is thereby not liable to legal punishment. However, adhering to the demands of justice and refraining from punishing justified civil disobedience may lead to a highly problematic theoretical consequence: the debilitation of civil disobedience. This is because, according to the novel analysis I propose, civil disobedience primarily functions as a costly social signal. It is effective by being reliable, reliable by being costly, and costly primarily by being punished. My analysis will highlight a distinctive feature of civil disobedience: civil disobedients leverage the punitive injustice they suffer to amplify their communicative force. This will lead to two paradoxical implications. First, the instability of the moral status of both civil disobedience and its punishment to the extent where the state may be left with no permissible course of action with regard to punishing civil disobedience. Second, by refraining from punishing justified civil disobedience, the state may render uncivil disobedience—illegal political activities that fall short of the standards of civil disobedience—potentially permissible.

Keywords: civil disobedience, punishment, costly signals, paradox, fair play theory.

Many of those who have engaged in civil disobedience have faced legal punishment: leaders of the Hong Kong Occupy Central, Black Lives Matter activists, Occupy Wall Street participants, Civil Rights activists, Henry D. Thoreau, and as some have argued, Antigone of Thebes (Daube 2011; Tiefenbrun 1999). But there seems to be something deeply problematic about the treatment these civil disobedients have received. Many of them have sought to bring

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forth much needed political change without violating the demands of morality (Brownlee 2012; Celikates 2016a; Markovits 2005; Rawls 1999; W. Smith 2013). Imposing such harsh sanctions seems a poor way of repaying those who have fought for racial, gender, social and economic equality and against unjust wars and tyranny, especially when these problems persist precisely because ordinary citizens and the state did nothing to prevent, and even actively played a role in perpetuating, the injustices in question and, hence, made civil disobedience necessary in the first place. In light of these considerations, it may seem obviously true that when civil disobedience is justified, punishment is inapt. Indeed, the High Court of Taiwan has found the leaders of the Sunflower Movement—the 2014 mass civil disobedience—"not guilty on the basis that their actions were justified civil disobedience."[1] Surely, this is the model we should strive to adopt.[2]

That being said, I shall argue that the claim that the state should refrain from punishing justified acts of civil disobedience turns out to have certain implications that are surprising in themselves. The central idea is that punishment plays an indispensable role in contributing to civil disobedience's overall ability to serve as a *costly signal*: one that allows civil disobedients to distinguish themselves from speakers who lack the relevant sincerity and seriousness, which in turn constitutes the reliability and effectiveness of their communicative act. Without punishment, the effectiveness of civil disobedience is compromised. Spelling out this unfortunate consequence will help us better understand the nature of civil disobedience: civil disobedients leverage the punitive injustice they suffer to amplify their communicative force. This will lead to two further implications. First, the moral status of civil disobedience and punishing it appear to be unstable: refraining from punishing civil disobedience may render civil disobedience ineffective, and thus unjustified, and thus liable to be punished; but punishing civil disobedience can make civil disobedience effective, and thus justified, and thus not liable to be punished. Here, the requirements of justice may generate an impossibility where under specific circumstances, the state is left with no morally acceptable course of action. Second, the state may render uncivil disobedience justified by adhering to a requirement of justice, namely, to not punish justified civil disobedience.

1. Hioe, B. (14 March 2018). Not Guilty Verdict Upheld for Sunflower Movement Protesters after Appeal by Prosecutors. *New Bloom*. https://newbloommag.net/2018/03/14/second-ruling-sunflower/. See also Jones and Su (2017) for a democratic confrontational argument for the justifiability of the Sunflower Movement and a democratic harmony argument against punishment.

2. Some go a step further and argue that regardless of whether civil disobedience is justified, it ought not to be punished merely because of its illegality, as there's a moral right to civil disobedience, either grounded on the right to conscience (Brownlee 2012; 2018) or the right to political participation (Lefkowitz 2007; 2018). I will engage with these possibilities later in the paper.

The paper is in four sections. Section 1 provides an argument for the claim that the state should refrain from punishing justified acts of civil disobedience. Section 2 discusses the key claim that civil disobedience functions as a costly social signal and explains how punishment is vital for it to do so. Section 3 spells out the problematic implications. Section 4 briefly spells out a further troublesome implication for anyone who endorses the right to civil disobedience.

1. The Injustice of Punishing Justified Civil Disobedience

Civil disobedience may be defined as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government" (Rawls 1999: 320).[3] The legitimate targets of civil disobedience are the nontrivial flaws in the law or other social institutions. These flaws may be severe injustices (Rawls 1999), that the public in general ignores the voices of the marginalized and certain important considerations (Markovits 2005; W. Smith 2011; 2013), or that the system and laws came into existence through a process that lacks political legitimacy (Simmons 2010). A particular act of civil disobedience is justified when performed as a last resort and shows reasonable prospects of success to address these flaws, and furthermore display a willingness for future cooperation through accepting punishment and insisting upon nonviolence (Sabl 2001). Despite being illegal, civil disobedience does not violate the presumed duty to obey the law when it serves as the last resort to remedy severe injustices or democratic failures. In such cases, the moral considerations that normally demand obedience instead support fixing the law through civil disobedience (Delmas 2014a; 2014b; Markovits 2005; W. Smith 2011; 2013).

Civil disobedience is illegal, and illegal activities that are caught are normally punished. But is the state justified in punishing justified civil disobedience—activities that are so very distinct from "ordinary offending" (Brownlee 2012)? To properly answer this question, we need to bear in mind that punishment itself requires moral justification, as "punishment is probably the most awful thing that modern democratic states systematically do to their own citizens" (Tadros 2011: 1). We need to closely examine what potentially justifies punishment and see whether those justifications apply to punishing justified instances of civil disobedience. Here I will primarily focus on the fair play theory, as it

3. There have been reasonable attempts to expand the notion of civil disobedience. However, insofar as civil disobedience is understood as a *communicative* act, the definition doesn't have much implications on this paper.

provides a unified account of why we have a duty to obey, why illegal activities normally warrant punishment, and how civil disobedience can be justified. All these will add up to the conclusion that civil disobedience, if justified, ought not to be punished. I will then briefly consider other theories of punishment and the possibility that punishing civil disobedience can be justified on special considerations.

1.1. The Fair Play Theory

The basic idea of the fair play theory of political obligation is that when people voluntarily benefit from a cooperative scheme, they have a duty to do their fair share in contributing to the cooperative scheme (Hart 1955; Klosko 2004). Enjoying the fruits of the cooperative scheme but refraining to contribute is free riding. While free riding does not necessarily threaten the efficiency or stability of the cooperative scheme (though it sometimes does), it involves a form of "unfair self-selection" (Simmons 2001: 30) or "objectionably preferential treatment" (Cullity 1995: 22) to oneself, and is thus morally dubious.

When the law is sufficiently just, a duty of fair play is present and grounds the *pro tanto* duty to obey the law. This is because the law specifies the terms of a fair cooperative scheme under which all citizens benefit. There may be different ways to understand the benefits this cooperative scheme provides. For example, it can be the most efficient way individuals can rescue each other from the threat of the state of nature (Wellman 2005), or to safeguard the rule of law—that which enables individuals to exercise their individual autonomy (Dagger 1997; Moraro 2019; Raz 1986). In virtue of benefiting from this cooperative scheme, individuals acquire a fair play duty to obey. Refusing to obey the law constitutes a *pro tanto* wrong by accumulating an unfair advantage: enjoying the benefits but not doing one's fair share.

This leads to the grounds of punishment. When an individual hoards an unfair advantage, fairness demands that the unfair advantage be relinquished. It is the business of the state to get back from the perpetrator through inflicting punishment. "Justice—that is, punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt" (Morris 1968: 487). The emphasis here is on getting back the unfair advantage. For punishment to be just, the punished must have gained unfair benefits. In the following, I will show that despite its illegal nature, sometimes civil disobedience has gained no unfair advantages, and can thereby be justified against both the duty to obey and punishment.

In cases where the law fails to meet the standards of fairness, but rather involves exploitative cooperative schemes, those who are on the privileged end

of the law no longer contribute to and benefit from a fair cooperative scheme. Rather, they are enjoying unfair advantages over those who are on the other end of the law. In such cases, Candice Delmas (2014a) argues that in order to avoid accumulating unfair advantages, in principle the privileged have three options to fulfil their duty of fair play: "exit, restitution, and radical reform." However, as "exit is often excessively difficult, and is generally undesirable" and "restitution is often practically impossible, and is generally insufficient" (2014a: 476), promoting radical reform is the only reasonable way to fulfil one's duty of fair play. When legal methods of promoting radical reform are infeasible, civil disobedience is then sometimes the most fitting way to fulfil the duty of fair play. In this way, civil disobedience is justified *vis-à-vis* the duty to obey the law. Here, instead of demanding obedience, the duty of fair play demands civil disobedience.

Another way to justify civil disobedience on fair play is to point out that those who engage in civil disobedience perform an important and essential service to the cooperative scheme of the law. Piero Moraro points out that "cooperative schemes generally involve a division of labour, whereby all members must do their part to support the provision of the good," where one crucial way to contribute "involves identifying possible risks that may endanger the provision of the good" (2019: 302). Legal protests can often perform this important task, but they do not always work. In cases where legal protests prove to be futile, civil disobedience may become the best option to perform this task. Here, despite breaching the law, those who engage in civil disobedience do not accumulate any unfair advantage to themselves, but instead do their part (and often much more) in the cooperative scheme. Civil disobedients normally voluntarily accept additional burdens: the time and effort spent in planning the movement, the hostility from the general public, the risks of facing police brutality, and legal punishment and criminal records (2019: 306). In comparison to their law-abiding counterparts, civil disobedients have incurred no fewer burdens in supporting the cooperative scheme.

Either way, civil disobedience is justified *vis-à-vis* the duty to obey the law when it is performed not to acquire unfair advantages over one's fellow citizens, but to promote much needed radical reform or to highlight and resolve severe threats to the cooperative scheme. When civil disobedience is thus justified, it is also not the appropriate target of legal punishment. Legal punishment is to balance benefits and burdens through getting back from free riders. Actors who engage in justified civil disobedience do not gain unfair advantages, and there's nothing to get back from them. Therefore, punishing justified civil disobedience contradicts the fair play theory: "*it would be unfair to impose additional burdens upon them in the form of a legal sanction*" (Moraro 2019: 306, italics original).

1.2. Other Theories

I acknowledge that there are other plausible theories of the duty to obey. However, similar to how fair play can justify civil disobedience, other theories such as those grounded in a natural duty of justice (Delmas 2014b; Wellman 2005) or in democratic authority (Markovits 2005; W. Smith 2013) allow noticeable space for civil disobedience to be morally justified. The rationale is identical to that of the fair play justification. When laws are nontrivially flawed, obedience no longer contributes to the realization of the underlying values these theories build upon. Instead, sometimes civil disobedience serves as the best way to respond to those underlying values, in particular when legal methods prove to be futile and civil disobedience shows reasonable prospects of success. In such cases, civil disobedience is morally justified.

There are also a number of plausible theories of punishment. While I do not intend to exercise each in full detail, similar arguments can be made against punishing justified civil disobedience. The plausible theories of punishment converge on a simple common feature relevant to our discussion: those who are liable to punishment are those who have engaged in prior wrongdoing. For instance, while deterrence theorists hold that the purpose of punishment is to deter crime, they hold that only those who have engaged in wrongdoing and thus have either acquired an enforceable duty to protect others (Farrell 1985; Tadros 2011) or who have forfeited their own rights against harsh treatment can be used as means of deterrence (Wellman 2012; 2017). Retributivist hold that wrongdoers deserve suffering and it is the business of the state to inflict suffering on, and only on, those who have engaged in wrongdoing (Kleinig 2012; Moore 1987). Communicative theorists point out that blame is necessarily expressed through punishment (Duff 2010; Feinberg 1965), and for blame to be apt the target of blame must be blameworthy.

Relevant to civil disobedience, the common implication of these theories is that if an act of civil disobedience is justified, then it would be unjust to punish it. If an act of civil disobedience is morally justified, disobedients do not commit any type of wrongdoing that creates any enforceable duty to protect others, that forfeits one's right against harsh treatment, that deserves suffering, or that makes one blameworthy. Punishing justified civil disobedience, accordingly, would be punishing those who have not made themselves liable to be punished in the ways proposed by these theories of punishment.

An additional note on blame. In order for the state to appropriately punish, it must also have the moral standing to blame. There are many ways people may lose the standing to blame, say, if they have committed similar wrongs, or were complicit in or have facilitated the wrong in question. Similarly, if the state has failed to protect the rights and interests of certain groups, and the disadvantages

they suffer put them in difficult situations where illegal activities become serious options, the state loses the authority to punish these people. The state is responsible for the plight of the disadvantaged, and is thus at least partially responsible for the crimes the disadvantaged commit. Blaming the disadvantaged through punishment "whilst refusing to answer to [them] for the wrongs that [they have] suffered (and still suffer) at our collective hands" (Duff 2010: 139) is illegitimate. This has a further implication on the punishment of civil disobedience. It is often the state's failure to protect the rights and interests of certain groups, or failure to address serious flaws within the system, that made civil disobedience a serious option. Thus, within a certain range, even if an instance of civil disobedience is not fully justified, it may still be inappropriate for the state to exact punishment. It lacks the proper moral standing, and is as guilty as, if not guiltier than, those who have breached the law.

1.3. Other Special Considerations in Favor of Punishment

But is not civil disobedience special in the sense that those who engage in it must submit themselves to punishment? This may generate special considerations that make punishing justified civil disobedience permissible. Here I will consider two possibilities: that civil disobedients have consented to be punished; and that we need and can issue a special verdict, "guilty but civilly disobedient" (GBCD).

1.3.1. Consent

Consent has the moral power to alter normative statuses, typically making otherwise impermissible actions permissible. It may be that in virtue of engaging in civil disobedience, disobedients consent to be punished, and in virtue of their consent, punishing civil disobedience becomes permissible even if normally it is unjust to punish justified actions. To see whether this is correct, we need to go through at least two questions. The first is whether consent has really been given. It is not particularly clear that civil disobedients have openly declared something like "I consent to be punished." Instead, it might be thought that civil disobedients have tacitly given consent to be punished when they have voluntarily breached the law with the knowledge that their illegal actions would lead to punishment, and have furthermore submitted themselves to punishment.

A complete account of what makes voluntary actions consent-giving is clearly beyond the scope of this paper. However, there are certain conditions necessary for consent to be valid. The most prominent one is that there must be

a reasonable set of options. If an actor chooses among a small set of undesirable options imposed upon her, when eventually one option is chosen, it can hardly be said the consequences suffered are morally unproblematic because they're the product of consent. This is essentially how tacit consent theories fail: voluntarily remaining in a state does not amount to consenting to the rule of the state, because for most people leaving just is not a feasible option (Simmons 2005). Apply this to civil disobedience. If civil disobedience is justified, it was chosen among a set of undesirable options: suffer injustice or disobey. This set of undesirable options was imposed upon the disobedients by the negligence or active oppression of the state or the majority. Choosing one or another is in no way consent-giving; otherwise, those who do not disobey consent to oppression, which is absurd. Therefore, civil disobedients normally have not given valid consent to be punished.

The second question we need to ask is whether consent can fully justify punishment. It is debatable whether consent can forfeit each and every right, or whether there are limits to consent (Anderson 2000; Baker 2009; Schaber 2020). Relevant to the discussion here, there is reason to doubt whether consenting to punishment can make punishment permissible. Consider, for example, someone who suffers from extreme poverty or simple boredom, and goes to whatever relevant authority, declares that she wants to be punished, to be locked in prison either to be fed or experience something new. Either way, it seems highly inappropriate for the state to actually punish that person. There are a few explanations that can capture this intuition: that punishment should be reserved for the guilty; that punishment implies blame, is apt only towards the blameworthy, and consenting to being blamed cannot make one blame worthy; that the state should support this person in more appropriate ways than putting her in prison. All these explanations suggest that even if (however unlikely) civil disobedients have given valid consent to be punished, the state still should not punish them.

1.3.2. "Guilty but Civilly Disobedient"

Matthew R. Hall (2006) proposes a special verdict for civil disobedience, what he calls "guilty but civilly disobedient" (GBCD). The GBCD verdict is reached when the offenders are found to have breached the law but in a way that meets the standards of civil disobedience: conscientiously, openly, respectfully, non-violently, and with minimum force and disruption. The verdict allows us "to recognize officially the special status of civil disobedience without having to do so in a hidden or backdoor manner" (2006: 2116). The merits of having this distinctive verdict include properly recognizing the distinction between civil disobedience

and ordinary offending, satisfying those who believe that civil disobedience is no less of a criminal offence, and maintaining the uniformity of law enforcement through punishing offenders.

An additional appeal of GBCD is that the state can pass sentences on civil disobedients without the blame normally attached to punishment. This effectively circumvents the problem communicative theories present against punishing civil disobedience. Since GBCD does not blame, it neither blames the blameless nor has problems with the standing of blame. Nevertheless, it still imposes harsh treatment on those who have not made themselves liable to or deserving of punishment. Thus, GBCD may be better than merely finding civil disobedience guilty of criminal offences, but falls short of being fully satisfactory.

In short, civil disobedience may not be special in the relevant way that makes punishment appropriate.

2. How Civil Disobedience Works

Punishing justified civil disobedience is unjust. The solution should be simple: the state ought to refrain from punishing justified civil disobedience. By adhering to this demand of justice, we may think that we can have the best of both worlds: civil disobedients help the society to fix severe injustices, and they no longer receive the harsh and unjust treatment of punishment as a "reward" for their work. This picture, however, is too good to be true. We shall see this once we properly understand how civil disobedience works as a costly social signal.

2.1. Civil Disobedience as a Costly Social Signal

The basic idea of costly signals is that there are signals—observable traits other entities can alter behavior upon—that the sender actually or potentially incurs nontrivial costs to produce (Zahavi 1975). These signals are typically honest—reliable indicators of the unobservable traits; for individuals without the relevant unobservable traits cannot afford to produce those signals. Paradigm examples include the flamboyant tail of a male peacock, stotting—the high jumping of a gazelle when spotting cheetahs, and the begging behavior of chicks. In each case, individuals without the underlying traits would not benefit from producing the signals. A less than strong and agile male peacock would become easy prey when dragging around such an obvious attraction (Zahavi 1975). A gazelle that cannot run away sufficiently fast would better start running instead of stotting (Alcock & Rubenstein 2019). A less than hungry chick would not benefit as much from being fed for the exhausting intense begging (J. M. Smith & Harper 2003).

Since the "handicap"—the self-imposed cost—is difficult to fake, it prevents dishonesty. Costly signals are thus reliable indicators of unobservable traits.

Signaling theory is applicable to the social context, and many have employed the notion of costly signals to explain social interactions, for instance, on getting a higher education to look more competitive on the job market even if the education is irrelevant to the job (Spence 1973), on donation and pro-sociality signaling (Brokensha, Eriksson, & Ravenscroft 2016), on warranty and the quality of the product (Cowen & Tabarrok 2015), and on the existence and persistence of certain inefficient honor norms and honor violence (Thrasher & Handfield 2018), just to name a few. My aim here is to provide an account of social signaling that explains how civil disobedience works. The gist is that civil disobedience is a reliable indicator of issues the society should pay more attention to because it is costly, and it is costly primarily because it is punished.

As previously mentioned, even liberal democratic societies suffer from nontrivial flaws in their systems. While liberal democratic societies have many mechanisms to detect these flaws, and incorporate several legal channels for citizens to bring forth their cases, a number of these flaws remain unresolved by any normal methods. There are a handful of explanations for such failures. One plausible explanation, which is also the assumption I make in this paper, is that while we are somewhat inclined to act morally when we can easily see what morality demands, we are quite good at arranging our surroundings such that we do not see what morality demands (Anderson 2010; Dana, Weber, & Kuang 2007; Young 2002). Civil disobedience breaches this barrier of (willful) ignorance, draws attention to important issues, and thus facilitates political change.

Civil disobedience is by no means the only channel to do so. People voice their concerns through a variety of methods. We can call or write to our local politicians. We can like posts or participate in polls on social media. We can attend rallies and join legal protests. While it may seem good that we have such a variety of options, all these different channels of political participation also produce a fair amount of "noise:" what has been raised may not deserve the attention of the public, but might be trivial concerns that can wait or should be entirely ignored. Afterall, nothing prevents those who have trivial or even objectionable demands from employing these methods. Furthermore, public attention may be viewed as a scarce resource different groups compete to secure (Markovits 2005; W. Smith 2013). While the public may be inclined to focus their attention on urgent and significant issues, they do not display the competence to distinguish between the important and trivial cases that are brought forward through the variety of channels.

As a costly signal, civil disobedience stands out, as Leslie G. Jacobs (1998) puts it, as a "moral shout" among all the noise. Civil disobedience is publicly and deliberately illegal, and many of the disobedients submit themselves to punishment as part of the movement. In this way they demonstrate a seriousness

and sincerity other less costly means of political participation lack. To those who engage in civil disobedience, their case is so important, and furthermore so reasonable, that making the case is worth the costs incurred. They are confident enough that once they draw the attention of the public, there are reasonable prospects that others will take them seriously and consider their pleadings so that their self-sacrifice will not be in vain. In contrast, those who lack the relevant seriousness and sincerity would be unwilling to incur significant costs to make their case. The costs would not be worth it for them, either because their case would be quickly dismissed by the public upon closer scrutiny, or because even if the action happens to bring about the social change they desire, the change itself is not significant enough to outweigh what they have suffered.

There are many ways to produce costly social signals. The previously mentioned donation, or probably simply spending a large amount of money to purchase advertisement may be to some extent effective. However, there is something special about, though not unique to, civil disobedience. Unlike spending, which can be costly to most of us but insignificant to the affluent, there is something more equal about incurring costs in domains core to human functioning. Regardless of their social or economic status, individuals more or less value their own health, life, and freedom equally. It is thus easy to feel how much one has sacrificed when one willingly gives up these interests. Furthermore, these interests are for the most part non-transferable. Unlike incurring monetary costs, with (probably) rare exceptions, no one can sponsor or reimburse the health, life, or freedom of others. This makes the self-sacrifice more salient. Just like hunger strikes and in very extreme cases self-immolation, which incur costs by sacrificing one's health and life (and not to mention the excruciating pain suffered), civil disobedience incurs cost by sacrificing one's freedom by being jailed and sometimes risking one's own life when performed in more oppressive regimes. Civil disobedients incur certain costs, while others without the relevant sincerity and seriousness steer clear of these costs. By speaking in ways others are unwilling to speak, this costly social signal serves as reliable indicators for the public to more easily identify what it should pay attention to. Thus, civil disobedience is effective by being reliable, reliable by being costly, and costly by being punished.

This analysis leads us to a serious concern. The effectiveness of civil disobedience as a social signal hinges upon being punished. Without punishment, civil disobedience can no longer serve as a costly social signal. Without being able to serve as a costly social signal, its reliability is greatly diminished, and can no longer achieve the function of the "moral shout" that brings worthwhile issues to the attention of the public. Thus, if we intend to refrain from treating civil disobedients unjustly by refusing to punish them, we might actually be doing them a disfavor. We would effectively disarm social struggles by rendering an otherwise effective means of protest ineffective. As a matter of fact, ignoring and

refusing to arrest activists is a known strategy government agents employ to trivialize social movements, and "perhaps only those who have tried unsuccessfully to get arrested can know how frustrating this tactic can be" (Edmundson 2007: 58). (The Suffragettes, for example, had to attack and spit at the police to provoke arrest [Crawford 2003].) While in comparison, we may have drastically different intentions when we advocate against punishment, we may be in effect trivializing civil disobedience the same way oppressive government agents refuse to arrest protestors and thereby deny protestors the dramatical effect they seek.

To further the problem, rendering civil disobedience ineffective is highly undesirable. Civil disobedience strikes a sweet spot by providing a channel to individuals whose concerns were ignored to voice their concerns, so that they will not have to engage in something more drastic and disruptive. Should we shut down this channel, we would be putting those in need in a difficult position: should they engaging in something more costly to themselves? That is hardly attractive to the oppressed. Should they resort to more drastic and disruptive activities? There may be moral concerns over whether this is acceptable; and even if it is, it seems much less desirable compared to less harmful measures. Should they simply give up and remain silent? That would leave serious flaws in the society unresolved and demanding the oppressed to continue to endure.

In all, instead of arriving at a wonderful picture where justice simply prevails, by adhering to the demands of justice and refraining from punishing civil disobedience, we inevitably arrive at a rather grim picture. Civil disobedience, an important means of social struggle, is debilitated by our attempt to fulfil an important requirement of justice.

2.2. Is Punishment Necessary for Effectiveness?

It may be objected that I have sketched this grim picture too quickly. Perhaps civil disobedience works differently from what my costly social signal account describes. Here I will consider two alternative possibilities: civil disobedience may work but not as a costly signal; and civil disobedience may still be costly even without actually being punished due to the costs of trial, arrest, the risk of punishment, and penalties.

2.2.1. Effective without Costs

There may be an alternative story of how civil disobedience works, one that has nothing to do with costs. Perhaps civil disobedience is effective because it draws sufficient attention to, and forces the public to consider, previously ignored facts

or points of views. Civil disobedience, after all, is an illegal protest, and is thus quite different from legal protests. Perhaps the illegality alone suffices to make the movement salient enough. Civil disobedience is also disruptive. It sometimes blocks the traffic of the busiest intersections. It sometimes occupies the central business districts, governmental buildings, or museums and other tourist attractions. These acts are difficult to ignore, will often attract a fair amount of media coverage, and disobedients can take advantage of these opportunities to advertise their cause. Furthermore, civil disobedience sometimes does attract a fair number of participants. The sheer numbers represent the bargaining power the movement has, and perhaps it is the coercive force the numbers represent that brings about social change.

The mere illegality and the disruption may indeed contribute to the effectiveness of civil disobedience. The number of participants may also help. Granted, these factors seem to be insufficient to properly explain the success of civil disobedience. Illegality and disruption generate publicity, but publicity alone does not seem to be a decisive factor; otherwise advertisement campaigns that bombard the public with certain messages would probably suffice, and there will be no need for large-scale demonstrations. Furthermore, in order to mobilize a large enough crowd, civil disobedience needs to first get enough people on board. How that is achieved requires additional explanation. If we leave the sincerity and seriousness demonstrated by the acceptance of punishment out of the picture, it will be more difficult to explain how civil disobedience is taken seriously by the public instead of being dismissed as another noise in the forum.

2.2.2. Costly without Punishment: Arrest and Trial

The costs associated with engaging in illegal activities are not exhausted by punishment. Riot police are often armed with batons, tear gas, pepper spray, rubble bullets, and water cannons. The arrest disobedients go through is often quite brutal. Standing trial is time consuming. It can also be extremely burdensome (financially and otherwise) for those who lack proper legal resources. The uncertainty that lingers through the trial is also quite depressing. Furthermore, in certain cases where civil disobedients evade legal punishment, the costs they incur may even surpass those who undergo legal punishment, as in the case of Edward Snowden, where fleeing the country, being branded a "traitor," and living the life of an exile is sufficiently costly.[4] Thus the objection: even without punishment, civil disobedience can still be costly enough to be a costly signal.

4. There is disagreement on whether whistleblowing in general, or the case of Edward Snowden in particular, counts as civil disobedience (Boot 2019; Delmas 2015; Scheuerman 2014).

However, a few things need to be taken into consideration. First, however costly arrest and trial may be, punishment in addition to arrest and trial is always more costly than mere arrest and trial. Furthermore, in comparison, punishment is normally the most significant portion of the costs. By removing the most significant portion of the costs, there is an unignorable risk that the costs would be insufficient for civil disobedience to be a costly signal that demonstrates sincerity and seriousness. Even if civil disobedience is not thereby rendered completely ineffective, it is surely compromised.

Second, remember that the conclusions we have arrived at through examining the theories of punishment is that civil disobedience, if justified, ought not to be punished. This is to establish a norm that civil disobedience, if justified, will not be punished. If we institutionalize this norm, then however costly arrest and trial actually are, they will just seem like mere routines: civil disobedients are arrested and tried with knowledge that they will not be punished. This trivializes the whole act, and will make it harder for civil disobedience to be taken seriously.

Third, it may well be that without punishment civil disobedience is still sufficiently costly, because arrest and trial can be extremely costly. However, brutal arrest and overly burdensome trial are unjust. If our solution to the effectiveness of civil disobedience hinges on these unjust practices, we will be solving one problem by creating another one. To avoid the undesirable consequences of adhering to a requirement of justice, we flout another requirement.

Fourth, the case of Snowden may be more an exception. He would have faced the charges under the Espionage Act, which would most likely land him in prison for at least 30 years, should he have not chosen to flee. The severity of the potential sentences at least partially explains his choice to flee. But in choosing exile, he also suffered extremely burdensome personal costs. However, as some (Delmas 2015; Scheuerman 2014) have argued, his act of whistleblowing was justified, and the punishment he would have faced would be unjust. If the norm of not punishing justified acts of civil disobedience were strictly adhered to, he would not have to face the severe unjust punishment, and may not have needed to flee. Thus, while it is quite true that Snowden did incur severe costs without punishment, the costs he would have suffered if the state adhered to the demands of justice—in this case refraining from punishing him—would be significantly different, and presumably much lower.

2.2.3. Costly without Punishment: The Risk of Punishment

In a society where civil disobedience is normally punished, those who engage in civil disobedience will expect to face punishment. Even if some instances of civil disobedience are not punished because they are justified, this expectation will

still remain. Thus, civil disobedience will still be costly without actual punishment, as the risk of being punished is a high enough cost.

At first glance, this might seem plausible. Indeed, if we know that other instances of civil disobedience will be punished, and if it's in our power to decide whether a particular instance of justified civil disobedience is to be punished, we should rule against punishment. The disobedients have successfully demonstrated their sincerity and seriousness when they did what they did in the face of the risk of punishment. However, we are talking about institutionalizing the treatment of civil disobedience. If we establish a norm that civil disobedience, if justified, is not to be punished, then insofar as those who engage in civil disobedience are confident that they will be judged as justly breaching the law, no expectations of being punished will remain. The risk of punishment is thus no more, and the cost is thereby removed.

It might be thought that there are often reasonable disagreements over whether any particular instance of civil disobedience is justified, and even out of good faith the court can make mistakes and wrongfully punish justified civil disobedience. Thus, we can at most imperfectly follow the norm that civil disobedience, if justified, is not punished. Thus, there will always be false positives, and there will always be the risk of punishment.

We can admit that there will always be the risk of punishment. However, the relevant consideration is how severe the risk is. The more the court can reliably identify justified instances of civil disobedience, the lower the risk. If the court can generally successfully identify and refrain from punishing justified civil disobedience, even if occasionally there are some errors, the expectation of punishment may be too low for civil disobedience to serve as a costly signal. On the other hand, if the court constantly judges justified civil disobedience as unjustified and proceeds to punish, the risk of punishment may indeed suffice for civil disobedience to serve as a costly social signal. However, we may question whether the practice of the court is just. Given that there are reasonable disagreements, the court ought to know that punishing what it sees as unjustified civil disobedience runs a significant risk of punishing those not liable to be punished. The more the court is committed to refraining from punishing those not liable to be punished, the more it will be reluctant to punish borderline cases. This tendency will again lower the risk of punishment and undermine civil disobedience's ability to serve as a costly social signal. Thus, the choice is again to run the risk of perpetrating injustice or to undermine civil disobedience.

2.2.4. Costly without Punishment: Penalties

Punishment may not be the appropriate response to civil disobedience. This is because, in part, as earlier argued, punishment necessarily conveys blame. This

has led some to consider imposing penalties on civil disobedience instead (Lefkowitz 2007; 2018; W. Smith 2013).[5] There are many forms of penalties, for example, temporary incarceration, community services, and, of course, fines. Here I will focus on the last possibility, as I don't see how the first two can be remotely costly enough to allow civil disobedience to effectively serve as a costly signal. However, fines may seem to be a genuine possibility. David Lefkowitz writes, "fines must be set high enough to impose a genuine sacrifice for those who carry out acts of public disobedience. At the same time, they should not be set so high that they discourage almost any protest at all" (2018: 277).[6] How does this possibility fare?

Similar to other forms of penalties, we may question whether fines can be sufficiently costly. A relatively low fine that can be easily paid off certainly doesn't suffice. On the other hand, if the state imposes fines that are as costly as the punishment civil disobedience would otherwise incur, then the severity of the fine may make the imposition unjust. So here we face a practical difficulty: can we genuinely strike a balance? It may be possible, but here are four further obstacles against the very idea of fining civil disobedience.

First, as previously mentioned, monetary costs may be burdensome to some, but near costless to the affluent. We may then worry that a fixed fine will in effect make civil disobedience a luxury affordable only by the most advantaged. Lefkowitz indeed has considered this very possibility when defending fining civil disobedience, and proposes that "this may require calculating fines as a percentage of an individual's annual income or net worth" (2018: fn. 9). A fine indexed to wealth or income may be a genuine possibility. However, it leaves us with two problems. First, we need a concrete policy proposal to evaluate the feasibility of this possibility. Second, and more importantly, associating civil disobedience with money will create additional complications, or so I shall argue.

Second, fines can be crowdfunded. This by itself may be unproblematic. Incurring a fine through civil disobedience, but then being reimbursed by sympathetic citizens may simply show that one's action is widely endorsed by the general public. However, the affluent may also singlehandedly sponsor many civil disobedients, or even hire mercenaries to disobey. This will really mess up the reliability of the costly signals of fines. The willingness to incur a fine no longer indicates sincere moral convictions, because the fine can be easily paid off by someone who lacks the relevant sincerity and seriousness. The willingness to

5. Some theorists argue that regardless of whether civil disobedience is justified, it ought not to be punished. Lefkowitz and Smith, as cited in the main text, however, argue that it is permissible to impose a fine on civil disobedients. I draw from this literature and consider whether fines can save civil disobedience. I will engage with the right to civil disobedience near the end of this paper.

6. I would like to thank an anonymous referee for pointing out this possibility.

engage in civil disobedience may then become more an indicator of the ability to attract external funding.

Third, fines may seem more a fee (Holmes 2009), and we need to worry about what Michael Sandel (2012) calls "corruption:" putting price tags on things that were otherwise good degrades or at least alters their value. With regard to civil disobedience, if it can be paid off, then it seems to be an act that is associated with monetary value. There is, then, a genuine risk that civil disobedience becomes a commodity. To be somewhat uncharitable, the serious act of engaging in civil disobedience is, at least from the perspective of a bystander, indistinguishable from paying to enter a theme park. This altered perception of civil disobedience may be one of the worst things that can happen to civil disobedients.

Fourth, and perhaps because of the two previous concerns, the civil disobedient may refuse to pay the fine. The refusal to pay itself may even be a further act of civil disobedience, as it can be performed as a public act of protest. We will then need to spell out whether the refusal to pay is a justified act of civil disobedience. I contend that it can be. If the original act of civil disobedience was justified, and paying the fine would undermine the communicative effort of civil disobedience, then the civil disobedient must refuse the fine. We need, then, decide whether we are to punish or penalise. The former is unjust. The latter leads us in circles.

3. Leveraging Injustice

Civil disobedience is effective insofar as it serves as a costly signal, and can serve as a costly signal mainly because it is punished. However, punishing justified civil disobedience is morally unacceptable. Furthermore, by treating civil disobedience justly and refraining from punishing justified instances of civil disobedience, the state runs the risk of undermining the effectiveness of civil disobedience. We may have to conclude that this is an unfortunate and unavoidable consequence of adhering to the demands of justice. By spelling out this unfortunate and unavoidable consequence, we may have also arrived at a position to better understand civil disobedience and its paradoxical nature.

Here, a key feature of civil disobedience is revealed. Distinct from other types of costly social signals such as hunger strikes and self-immolation, civil disobedience functions not only by attempting to highlight the fact that one has been treated unjustly through bearing significant costs, but come to bear those costs *through* being unjustly punished. While it is uncontroversial that it is extremely unjust that some have to go through the suffering and pain of hunger strikes or self-immolation to bring forth their case, it is not clear that in virtue of being, for the lack of a better term, the object of hunger strikes or self-immolation, one

suffers additional injustice. In these cases of self-harm, one is also the subject issuing the harm. In contrast, to be the object of unjust punishment is to suffer from additional injustice. But what's astonishing about civil disobedience is that the additional injustice disobedients suffer fuels their communicative force, or to say, amplifies the volume of the "moral shout." In short, justified civil disobedience leverages the punitive injustice it suffers into communicative force.

Of course, civil disobedience may not be unique in terms of leveraging injustice. When it comes to revolutions and nonviolent resistances, the prospects of success may increase when governments resort to indiscriminate violence. This is because indiscriminate violence sometimes helps rebels overcome a collective action problem on recruiting: not participating is normally safer than participating in a revolution, but when the government resorts to indiscriminate violence, not participating is no longer safer; in contrast, given that the rebels may selectively provide protection and other resources, participating becomes more prudent than not participating (Kalyvas & Kocher 2007). Or it may be that indiscriminate violence sparks moral outrage that mobilizes otherwise apathetic citizens (Chenoweth & Stephan 2011; Smithey & Kurtz 2018). Nevertheless, leveraging injustice is a distinctive feature of civil disobedience, and will lead to two paradoxical implications.

The first is that the moral status of civil disobedience and of its punishment may become unstable. Civil disobedience is illegal. Civil disobedience is disruptive, and imposes costs on others against their will. Civil disobedience may be justified despite these apparent wrong making features when a particular instance has a reasonable prospect of success, either to bring about much needed social change or at least successfully raise awareness about certain plights. When there's no prospects of achieving either, there seems to be no clear way how civil disobedience can be justified, and engaging in civil disobedience is engaging in pointless wrongdoing.

Not punishing civil disobedience debilitates civil disobedience, as it can no longer achieve anything through being a costly signal. Thus, in a society where it has been established that justified civil disobedience is not to be punished, engaging in civil disobedience is wrong due to futility. Engaging in civil disobedience ceases to be admirable, regardless of how important and just the cause is. When there is no risk of any punishment, there is insignificant self-sacrifice involved, and disobedients can no longer leverage injustice to boost their communicative force. Individuals who genuinely care about bringing forth social change may have to resort to something else, something that works. Here, civil disobedience is rendered misguided and simply wrong.

However, and here's the paradoxical part, once civil disobedience is rendered ineffective, misguided, and thus simply wrong, punishing civil disobedience no longer remains indisputably unjust. The state may still lack the moral

standing to punish, but punishing futile civil disobedience would no longer be punishing those who have not engaged in wrongdoing. Thus, it may become permissible to punish civil disobedience, insofar as there is some way to circumvent the problem of standing, say by issuing the "guilty but civilly disobedient" (GBCD) verdict. By not punishing justified civil disobedience because the punishment would be unjust, the state can make it the case that punishing civil disobedience is no longer unjust, as the otherwise justified civil disobedience becomes futile and thus wrong. Thus, by adhering to a requirement of justice, the state circumvents the requirement.

However, once it is no longer unjust to punish civil disobedience, and should the state act accordingly and adopt a readiness to punish civil disobedience, the moral status of civil disobedience may alter yet again. Once the expectation of punishment is restored, civil disobedience can again serve as a costly signal, and the effectiveness of civil disobedience is restored. In scenarios where futility is the only factor that renders a particular instance of civil disobedience unjustified, that instance now becomes justified. Thus, the appropriate response to an unjustified act of civil disobedience makes the otherwise unjustified act justified.

However, once it is again justified to engage in civil disobedience, punishment becomes unjust. Adhering to the judgment that punishment becomes unjust, civil disobedience becomes unjustified, and then punishment becomes just, and adhering to that, civil disobedience becomes justified, and so on and so forth. We thereby arrive at two instabilities: whether it is just to punish civil disobedience, and whether civil disobedience is justified. This is the first paradoxical implication of civil disobedience leveraging injustice, and it occurs only and precisely when the state intends to adhere to the demand of justice regarding the punishment of civil disobedience.

The major upshot of these instabilities is that under specific circumstances, the requirements of justice may generate an impossibility. If, the state is to punish all unjustified civil disobedience, and refrain from punishing all justified civil disobedience, then when the only factor determining whether a particular instance of civil disobedience is justified is whether it is punished, the state is left with no acceptable course of action. It will either have to choose between punishing justified civil disobedience, which is made justified by punishment, or not punishing unjustified civil disobedience, which is made unjustified by withholding punishment. This shows that intuitively plausible requirements of justice regarding punishing civil disobedience can't jointly hold.[7]

7. Those who endorse a moral right to civil disobedience can avoid this impossibility, but at the cost of rendering all civil disobedience ineffective. (Further discussion in Section 4.) This will make their account more vulnerable to the second paradoxical implication.

The second paradoxical implication is that by adhering to the requirement of justice with regard to punishing civil disobedience, the state makes room for more radical protests. This may be somewhat unexpected. It may be intuitive that when the state sinks lower on the scales of justice, more radical measures are warranted. Rawls, for instance, acknowledges that if there were to be "outrageous violation of equal liberty, say by forbidding the religion of a weak and defenseless minority . . . even civil disobedience might be much too mild" (1999: 328). Furthermore, when the state improves its standing by adhering to more requirements of justice, it may regain its political legitimacy (Galoob & Winter 2019). In contrast, the thought that the state can turn drastic measures into appropriate options by adhering to certain requirements of justice just seems incorrect.[8] But here's how.

Recall that civil disobedience is called for when there are some nontrivial flaws in the system that need to be fixed. These flaws may include, as Rawls (1999) points out, severe violations of basic liberties or of fair and equal opportunity. Or they may include issues that spring from globalization (Markovits 2005), war, nuclear weapons, and the preservation of environmental goods (W. Smith 2011), and animal rights (Celikates 2016b), just to name a few. Civil disobedience serves as the appropriate response to these various issues when nothing short of civil disobedience has reasonable prospects of solving them. What would happen if civil disobedience proves to be futile?

There are a number of possibilities. The first possibility is that there's an impasse. It is unfortunate that civil disobedience cannot solve whatever problem that needs to be solved, and it just happens that nothing else can do the job. This possibility is not particular interesting. It's just something unfortunate if it ever occurs.

The second possibility is that there's a *moral* impasse. That is to say, while there may be ways to achieve the same or similar goals, those ways are morally prohibited. Genuine moral impasses in other contexts include, for instance, when the only means that may frustrate a minor unjust aggression is to resort to lethal force. To kill someone when that person is about to slap you on the face for no good reason is wrong even if killing is the only way to prevent being slapped on the face. This is because while slapping you on the face is morally wrong, the disvalue of killing even an unjust aggressor is disproportionate to the value promoted by preventing the slap. With regard to debilitating civil disobedience,

8. It seems possible to argue that the state does not become more just merely by adhering to particular requirements of justice. Estlund (2019: Ch. 14) points out that piecemeal improvements may sometimes lead to something worse, and to suppose that this is never the case commits what he calls "the fallacy of approximation." This is compatible with my claim that the state can make uncivil disobedience permissible by adhering to a demand of justice, and the fallacy of approximation may help to make my claim more plausible.

it may be that while there are more drastic measures that can solve whatever that needs to be solved, none of them are morally permissible. I contend that this will not too often be the case, as more likely at least one of the following two possibilities may hold.

Third, it may be that there are other costly signals one can adopt. There are different forms of self-harm, and some are extremely dramatic. Self-immolation as a form of protest has been adopted in various regions including Vietnam (Murray Yang 2011), Tibet (Whalen-Bridge 2015), and Australia's refugee camps in Nauru.[9] I am not suggesting that costly signals in the form of self-harm are always effective. Instead, I am merely suggesting that they may sometimes be as effective as certain instances of civil disobedience in terms of speaking in ways individuals without the relevant sincerity and seriousness are unwilling to speak. In addition, I am not suggesting that this is in any way a good option. It is extremely unfortunate that the oppressed sometimes can only voice their concerns by bearing extreme costs. Should there be other available options, those options would most likely be preferable. Being too ready to encourage self-immolation as if it were fireworks is irresponsible if not outright evil.

The fourth possibility is that activities that fall short of civil disobedience may become morally permissible. Civil disobedience, if available, is permissible if the injustice it aims to address is severe enough, and furthermore when it is the last resort in the sense that legal channels prove to be futile or unable to respond in time. More simply, civil disobedience is permissible when proportionate and necessary. Now, if civil disobedience is rendered futile, it is natural to ask what else works, and whether those options that work fall within the boundaries of proportionality. These options, if they genuinely exist, first, will not depend on being punished for their effectiveness, and second, may consist in flouting one or several norms of civil disobedience by being "covert, evasive, anonymous, violent, or deliberately offensive" (Delmas 2018: 17), and may be rightly labeled uncivil disobedience. To determine whether such activities are proportionate, we need to see what costs or harms they inflict on others, and how severe the injustice they aim to prevent is. I admit that it is not impossible that the severity of the injustice in question just happens to be severe enough to make civil disobedience proportionate but anything beyond civil disobedience disproportionate. It may be possible, but highly unlikely: it would be an odd coincidence that all sorts of different possible injustices that can be fixed by justified civil disobedience are all unjust to the exact same degree. Furthermore,

9. Doherty, B. & Davidson, H. (3 May 2016). Self-immolation: desperate protests against Australia's detention regime. *The Guardian*. https://www.theguardian.com/australia-news/2016/may/03/asylum-seekers-set-themselves-alight-nauru

consider the injustices civil disobedience has targeted in the past and are aiming to fix now: racial segregation, disenfranchisement, extreme social and economic inequality, and the climate crisis, just to name a few. Given the scale and severity of these issues, one may rightly wonder why nothing beyond civil disobedience can ever be permissible.[10]

In sum, a core feature of civil disobedience is that it functions primarily by leveraging injustice. This core feature leads to two unexpected and even paradoxical implications. First, the moral status of civil disobedience and its punishment becomes unstable insofar as the state intends to punish all and only the instances of unjustified civil disobedience. This leads to an impossibility where under specific circumstances, simply no course of action with regard to punishing civil disobedience is morally acceptable. Second, the state's reaction to civil disobedience may create room for uncivil disobedience. This can happen not just when the state responds unjustly and harshly to civil disobedience, but also when the state adheres to a demand of justice and refuses to punish civil disobedience. In the latter case, by rendering civil disobedience futile, the state makes other options potentially justifiable.

4. The "Irrespectability" of the Right to Civil Disobedience

Some support a right to civil disobedience. Brownlee (2012), for instance, holds that this right is grounded on one's right to conscience. She further argues that in virtue of possessing this right, the state has a duty to refrain from interfering with civil disobedience. This duty implies that neither punishment nor penalties are morally acceptable, as either violates the right to civil disobedience. In contrast, Lefkowitz (2007; 2018) argues that civil disobedience ought not to be punished, but may be permissibly penalized. This is, in part, to ensure that civil disobedience isn't carried out frivolously. William Smith (2013) further points out an important reason to issue the fine: it indicates the state's acknowledgment that civil disobedience has been engaged in. I do not intend to weigh in. Instead, I will simply spell out a troublesome implication my costly signal account has on this right.

Now, I have already argued that there are substantial obstacles against fining civil disobedience (in 2.2.4). Whether these obstacles can be overcome depends on whether feasible concrete options are proposed in the future, but without actually seeing these proposals, I think it better to set aside the possibility of

10. Some may be tempted to insist that activities that fall short of the standards of civil disobedience are never permissible. I have argued elsewhere that we shouldn't overplay the importance of civility, but just focus on whether an act of disobedience is justified (Lai 2019).

fines, at least for the moment. So, we are again left with two options, to punish, or not to punish civil disobedience. If there indeed is a right to civil disobedience, then punishing civil disobedience is unjust, as it fails to respect this right. However, if my account of costly signals is plausible, then not punishing civil disobedience also fails to respect the right to civil disobedience: in virtue of not punishing, the state undermines civil disobedience, and makes the possession of this right utterly meaningless. In short, neither punishing nor not punishing civil disobedience respects the right to civil disobedience. If the right to civil disobedience is a genuine right, then, it is an "irrespectable" right. Regardless of what the state does, it fails to respect that right.

Conclusion

I have argued that punishing justified civil disobedience is unjust. It goes against all the plausible ends of punishment, and there's nothing special about civil disobedience that makes punishing justified civil disobedience morally unproblematic. However, should we follow this requirement of justice and refrain from punishing justified civil disobedience, we will create an unfortunate consequence: civil disobedience is rendered futile. This is because civil disobedience is most effective as a costly social signal, and it is costly through being punished. Through understanding the unjust nature of punishing justified civil disobedience, we arrive at a better understanding of civil disobedience: civil disobedients leverage the punitive injustice they suffer to amplify their communicative force. This fact points us to two paradoxical implications: first, the moral status of civil disobedience and its punishment may become unstable, and the attempt to refrain from punishing all and only all justified civil disobedience undermines itself by generating an impossibility; second by adhering to a demand of justice, namely, not punishing justified civil disobedience, the state can create room for uncivil disobedience.

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