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Civil Liability for Civil Disobedience

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In January 2023, climate activists trespassed on the site of the German energy firm RWE's Garzweiler coal mine to protest against its plans to expand operations there. The police eventually removed the protestors (including Greta Thunberg), many of whom were charged with committing criminal offenses. A few weeks after the occupation, RWE announced plans to seek compensation from the protestors for the injuries they inflicted on the firm, which included damage to vehicles and other equipment.¹ Should the law permit it to do so? More generally, should a liberal-democratic State hold civil disobedients legally liable to compensate the private actors they target for the pecuniary injuries they inflict upon them? If not, why not, and who should bear those costs instead? These are the questions I propose to explore in this essay.

In part, I simply aim to raise the question of who should bear the costs created by civil disobedience, one that is particularly pressing for those (like me) who have sought to offer a moral defense of such conduct. Surprisingly, this question has received almost no attention from theorists of civil disobedience.² But I will also hazard a preliminary answer to it. As long as they engage in a suitably circumscribed form of civil disobedience, one I contend a liberal-democratic state ought to legally tolerate, civil disobedients should not be held civilly liable for the damages they inflict. Rather, the political community ought to bear those costs, as one element of the burden it must bear in order to best realize its members' rights to political participation.

I. In defense of legal toleration for suitably circumscribed civil disobedience

I understand civil disobedience to consist paradigmatically in deliberate disobedience to one or more laws of a state for the purpose of advocating a change to that state's laws or policies.³ My defense of civil disobedience here begins *in medias res*. I take my audience to be members of a liberal-democratic political community committed to a regulative ideal of reciprocal regard for

¹ "RWE to seek compensation from anti-coal protestors," *Deutsche Welle*, 21 January 2023, <https://www.dw.com/en/germany-rwe-to-seek-compensation-from-anti-coal-protesters/a-64475355#:~:text=The%20energy%20company%20said%20protesters,coal%20mine%20in%20the%20village>. For other recent examples, see *Ben Smees*, "Aurizon sues environmental activists and seeks \$375,000 after protests stop coal trains," *The Guardian*, 13 March 2019, <https://www.theguardian.com/australia-news/2019/mar/14/aurizon-sues-environmental-activists-and-seeks-375000-after-protests-stop-coal-trains>; "Climate activist convicted for Credit Suisse red paint protest," *Reuters*, 20 February 2020, <https://www.reuters.com/article/us-climate-change-protests-credit-suisse/climate-activist-convicted-for-credit-suisse-red-paint-protest-idUSKBN20E292>. All articles last accessed 12 October 2023.

² *Ten-Herng Lai* and *Chong-Ming Lim* consider this question in a related but distinct context, namely for purposes of identifying the (most) appropriate targets for uncivil disobedience. See "Environment Activism and the Fairness of Costs Argument for Uncivil Disobedience," *Journal of the American Philosophical Association* (2023), 490-509.

³ *David Lefkowitz*, "On a Moral Right to Civil Disobedience," *Ethics* 117 (2), 202-233. Reasons of space preclude connecting the argument I present here to the many excellent recent contributions to the philosophical literature on civil disobedience. For a helpful guide to that literature, see *Candice Delmas* and *Kimberley Brownlee*, "Civil Disobedience," *Stanford Encyclopedia of Philosophy*, 2021: <https://plato.stanford.edu/entries/civil-disobedience/#AccCivDis>.

one another as autonomous agents.⁴ In order to make good on this commitment, the political community must among other things accord each of its members a right to political participation. This is so for two reasons. First, to deny a person any say vis-à-vis the norms that ought to structure her interactions with others qua members of a common political community is to refuse to acknowledge her as an autonomous agent. That is, such treatment cannot be reconciled with a good faith commitment to the community's "foundational" regulative ideal. Thus, members' recognition of one another as autonomous agents provide a non-instrumental justification for according each a right to political participation.⁵ Second, in virtue of their commitment to the aforementioned regulative ideal, individuals have a duty to engage in a good faith effort to discern or determine what counts as, or constitutes, reciprocal regard for one another as autonomous agents. Among other things, this requires that they identify modes or methods of inquiry that conduce to success in this undertaking. At present, we have good reasons to conclude that democratic political processes, broadly understood, are among these methods of inquiry. Thus, there is also an instrumental justification for according each member of the political community a right to political participation: doing so facilitates productive inquiry into the concrete demands of the community's commitment to the ideal of reciprocal regard for one another's status as autonomous agents.

The right to political participation is an intermediate principle that lies between the community's "foundational" regulative ideal and the more specific and relatively concrete normative incidents (e.g., rights and duties) set out in the community's law at a particular point in its historical development.⁶ The latter serve to fill in the content of the right to political participation, to specify the sort of activities the community should permit, require, or forbid its members to engage in, given its commitment to their exercising a say in what the community's law ought to be. I will assume that these include a range of familiar legal rights, such as a right to vote in elections for certain offices or on certain pieces of legislation, a right to freedom of (political) speech and (political) assembly, and a right to freedom of the press. But in addition, I maintain that in some circumstances, including those that prevail in contemporary moderately well-functioning liberal democracies, the best constructive interpretation of a right to political participation includes a quasi-permission to engage in suitably circumscribed civil disobedience.⁷

This is so for several reasons.⁸ Legal means for contesting inadequate or unjust laws or policies may take too long, say because many citizens are unaware of, or presently unable to appreciate, certain relevant information. In the time it will take to construct a majority supporting the reform of those laws, significant and perhaps irreversible injustices may take place. By engaging in acts

⁴ To characterize a creature as an autonomous agent is to attribute to her a capacity to set her own goals or ends, as well as to choose the means to them.

⁵ Indeed, reciprocal regard for one another's status as autonomous agents entails that members of the political community ought to strive to ensure that all members enjoy an *equal* say regarding the community's norms, *unless* a specific inequality can be justified by appeal to that same regulative ideal. The instrumental justification for a right to political participation described in the text provides one route to justifying certain inequalities in community members' influence over the existence and content of its norms.

⁶ The same is true for the political community's non-legal norms of good or virtuous citizenship.

⁷ As I explain below, the permission is "quasi" because it takes the form of a legal defense. Suitably circumscribed civil disobedience is not legal, but neither is it conduct for which an individual ought to be punished.

⁸ The claims advanced in the following paragraphs are defended at greater length in *Lefkowitz*, *Ibid*, 213-223, and *David Lefkowitz*, "In Defense of Penalizing (but not Punishing) Civil Disobedience, *Res Publica* (2017): 1-17.

of civil disobedience, would-be reformers may reasonably hope to speed up the process by which a new majority can be created. In addition, civil disobedience is an especially effective mechanism for the expression by a minority of the intensity of their views.⁹ Civil disobedients' willingness to risk the state's imposition of various costs on them, and possibly the anger of their fellow citizens, can often communicate the strength of their convictions or preferences in ways that legal means for political participation cannot. If the majority feels less strongly about the particular law or policy at issue, they may be willing to reconsider, and perhaps even reverse, their earlier decision. In short, a legal norm-governed practice of political contestation that tolerates suitably circumscribed civil disobedience will provide a superior means for moral inquiry into what counts as members' reciprocal regard for one another as autonomous agents than will a practice that does not, but that is alike in all other respects.

While the foregoing argument appeals to the instrumental justification for a right to political participation, legal toleration of suitably circumscribed civil disobedience can also be defended on the basis of the non-instrumental value of according such a right to all members of the political community. Briefly, due regard for members' status as autonomous agents requires that a political community strive to reduce the degree to which it is a matter of luck whether they attract majority support for their views regarding what counts as fidelity to the community's "foundational" regulative ideal. A political community will better realize this goal if it both accords its members a range of legal rights that facilitate political contestation and tolerates suitably constrained forms of civil disobedience than if it only does the former.

The constraints on civil disobedience that render it suitable for toleration follow from its justification as a valuable form of political contestation. For example, only acts of public communication fall within the scope of permissible civil disobedience. Illegal acts that cannot be plausibly construed as a good faith attempt to communicate to other members of the political community a disobedient's belief that a given law or policy ought to be reformed need not be tolerated. Furthermore, permissible civil disobedience encompasses only non-coercive political acts, since coercing the political community or the State (construed as either the political community's agent or its fiduciary) into abandoning or adopting certain policies is incompatible with regard for its members' status as autonomous agents.¹⁰ Finally, I maintain that toleration of suitably circumscribed civil disobedience only precludes punishing those who engage in such conduct, not penalizing them. Whereas the former response necessarily expresses moral condemnation of an illegal act, the latter response does not.

Both instrumental and symbolic considerations justify the State's right to penalize those who engage in civil disobedience. Beginning with the former, penalizing civil disobedients can contribute to the stability of the State, and so its ability to facilitate interaction on terms that many or most members of the political community (provisionally) take to constitute relationships of reciprocal regard for one another's status as autonomous agents. While citizens should be permitted to disobey the law to contest *any* law or policy, imposing some costs on those who

⁹ Depending on the design of the decision-making institutions in a given political society, the majority view may not be expressed by legal means (or realized in the law), in which case the justification for employing public disobedience described in the text will apply to the majority, rather than the minority.

¹⁰ To be clear, not all political communities or States are committed to this regulative ideal. My concern in this essay is with those that are.

engage in suitably circumscribed civil disobedience makes it more likely that actions with the potential to reduce the State's ability to govern successfully will only take place when individuals judge a law or policy to be especially unjust. In addition, by accepting a penalty such as a fine for engaging in civil disobedience agents can symbolically recognize the costs their illegal conduct imposes on others, and perhaps more importantly, symbolically disavow any implicit claim to a superior status or standing within the community that might otherwise be read into their resort to illegal means to press their political judgment. To serve these ends, fines and other types of penalties must be set high enough to impose a genuine sacrifice for those who carry out acts of suitably circumscribed disobedience. At the same time, they should not be set so high that they discourage almost any protest at all. Moreover, the State must make a good faith effort to ensure that the general public understands its treatment of civil disobedients as the imposition of a penalty, rather than as punishment; that is, that its treatment is not intended to express condemnation of the disobedients' conduct. One way it can do so is by creating a legal defense for suitably circumscribed civil disobedience, one that defendants can invoke in court to rebut charges of criminal conduct (i.e., conduct that merits legal punishment).

Even if civil disobedients should not be held criminally liable for their conduct, should they be civilly liable to compensate any parties who suffer setbacks to their legally protected interests as a result of the disobedients' illegal conduct? If not, why not, and who should bear those costs instead? I propose to address these questions by focusing on cases somewhat like those described in the introduction: legally tolerable acts of civil disobedience that intentionally target private actors, and that impose some form of non-reputational economic or pecuniary injury on those actors.¹¹ I examine three answers to the question of who should bear these costs: the civil disobedients; individuals qua market actors; and the political community (or individuals qua citizens).¹²

II. *Against Civil liability for Civil Disobedients*

Perhaps we should treat the costs civil disobedients inflict on their targets as ordinary torts. If we adopt a corrective justice rationale for tort law, we should hold that the civil disobedient has a duty to compensate her target for the injury she suffered as a result of the former's illegal conduct. In doing so, we recognize the civil disobedient's status as an autonomous agent by holding her responsible for her failure to show due regard for the targets' legally protected interests. We also respect the targets' status as autonomous agents by granting them a right to the correction of the wrong done to them.¹³ The same conclusion follows, albeit for different reasons, if we adopt an economic rationale for tort law. By forcing civil disobedients to internalize the costs of their conduct, we advance the aim of using our limited resources in the

¹¹ "Somewhat like" because (some of) the illegal conduct in those cases may fall outside the ambit of tolerable civil disobedience, and "non-reputational" because private actors have no claim to compensation for injuries they suffer as a result of non-defamatory communication that, e.g., leads some of their customers to shop elsewhere.

¹² I will not consider a combination of these answers here, except to note that an instance of civil disobedience may include a number of illegal acts, only some of which fall within the ambit of legally tolerable civil disobedience. In such cases, it may be that the disobedient should be legally liable to compensate for the injuries caused by acts outside the ambit of legally tolerable civil disobedience, but not for those acts that fall within it.

¹³ The targets include those whose property rights the civil disobedients violate (e.g., shareholders in an energy firm), and perhaps also those with significant authority over the exercise of those rights (e.g., senior managers, or members of a firm's governing board).

most socially efficient manner. Ideally, civil liability for civil disobedience serves to deter actors from engaging in such conduct unless they can do so without making anyone else worse off.

I contend that we should reject both of these arguments for holding the civil disobedient liable to compensate the private actor injured by her illegal conduct. The corrective justice argument assumes that the civil disobedient has acted wrongly; that is a necessary condition for her owing the private actor she targets compensation for the injury she inflicted on him, her, or them. If the argument set out in the previous section succeeds, however, then the civil disobedient does no wrong in violating the law, so long as her act is public and non-coercive. Rather, her conduct falls within the scope the right to political participation enjoyed by all members of the political community, and as such it does not constitute a failure to exhibit proper regard for the target's status as an autonomous agent. As in the case of the criminal law, the civil disobedient should have recourse to a legal defense for her conduct, one that shields her from any duty to compensate.¹⁴

As for the economic argument, even if we should design the law of torts so that it advances the socially efficient use of resources, it must do so in a manner that is consistent with the political community's fundamental commitment to the treatment of all its members as autonomous agents. Recurring again to the argument set out in the previous section, that requires that we design the legal norms governing civil disobedience so as to produce the optimal incidence of civil disobedience. We should be very wary of saddling agents who engage in legally tolerable civil disobedience with a duty to compensate the private actors they target, since doing so will likely have a "chilling effect" on members' willingness to engage in it.¹⁵ Assuming that there is already a public law response to civil disobedience in place that is designed to yield the optimal incidence of civil disobedience, adding a civil duty to compensate will deter too much. Moreover, insofar as making civil disobedients civilly liable for the costs they impose on their targets makes engaging in such conduct conditional on a willingness to pay, it likely also makes it conditional on the ability to pay. This outcome clearly conflicts with the aim of diminishing the impact that luck has on citizens' ability to engage in effective political contestation, consistent with stable government.

But why not employ private law to do the work of deterring civil disobedience, rather than relying on public law to do so? There are several reasons. First, tort law is not well-designed to serve the goal of facilitating the optimal incidence of civil disobedience. That is because damage awards track the pecuniary value of the injury suffered by the plaintiff, which likely differs from the "price" for engaging in civil disobedience that will yield the optimal incidence of such acts. Second, given that goal, there may be compelling reasons to include non-pecuniary measures among the eligible responses to civil disobedience. For example, a brief loss of certain rights,

¹⁴ Note that the conditions for legally tolerable civil disobedience provide a standard of due care to which actors must conform. So, for example, if a politically motivated actor's illegal act is judged to be an attempt to coerce the target, then she may be held liable to compensate the target for the injuries she inflicted on the grounds of a failure to exercise due care when engaging in civil disobedience.

¹⁵ Legal and political efforts to counter strategic lawsuits against political participation provide a useful guide here. See, e.g., *Byron Sheldrick*, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression*, Waterloo: Wilfred Laurier University Press, 2014; *Judit Bayer, Petra Bárd, Lina Vosyliute, and Ngo Chun Luk*, "Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A Comparative Study" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4092013 (last accessed 12 October 2023).

such as freedom of movement, may be the best response to civil disobedients with limited financial resources. Finally, the most important shortcoming of relying on private law to control the incidence of civil disobedience is that it deprives the political community (acting via the instrument of the State) of the opportunity to acknowledge the civil disobedient's act as an exercise of her right to political participation (and so one for which she ought not to be punished), and conversely, the civil disobedient's opportunity to express her commitment to the rule of law, and so the regulative ideal of reciprocal regard for members' status as autonomous agents.¹⁶

III. *Public Compensation for the Costs of Legally Tolerable Civil Disobedience*

If the civil disobedient should not be held legally liable to compensate the private actors she targets for the costs she imposes on them, then who should bear those costs? One possibility is that the targeted actors should do so, unless they are able to pass those costs on to others who value the goods and/or services they provide. In the case of an energy firm targeted by climate action protestors, for example, the full costs inflicted by the civil disobedients might be passed on to its customers.¹⁷ Call this the *market answer* to the question "who should bear the costs of legally tolerable civil disobedience?" It holds that the costs of suitably circumscribed civil disobedience should be distributed across individuals in their roles as producers and consumers of goods and services via ordinary market mechanisms. A second possibility is that the political community, acting via the institutions of the State, should compensate the private actors targeted by civil disobedients for the injuries they suffered as a result. Call this the *political answer* to the question "who should bear the costs of legally tolerable civil disobedience?" It holds that the costs of civil disobedience should be distributed across individuals in their roles as members of the political community, or citizens, via ordinary legal-political mechanisms for doing so. Examples of such mechanisms include a state-funded insurance scheme, or the provision of tax credits to firms that can demonstrate that they suffered non-reputational injuries as a result of being targeted by civil disobedients. Leaving aside the details of implementation, the public actor approach holds that the political community should draw on the resources it can justly claim to compensate private actors for the injuries they suffer as a result of legally tolerable civil disobedience.¹⁸

¹⁶ On the relationship between the rule of law and the regulative ideal of reciprocal regard for members' status as autonomous agents, see *Lon L. Fuller, The Morality of Law*, Revised Edition, New Haven: Yale University Press, 1969, 187-242; *David Lefkowitz, "What Makes Law? Dworkin, Fish, and Koskenniemi on the Rule of Law,"* in T. Bustamante/M. Martin eds: *New Essays on the Fish-Dworkin Debate*, Oxford: Hart Publishing, 2023, 363-380.

¹⁷ Alternatively, the costs might be absorbed by the firm's employees or its suppliers. Firms might also purchase insurance to protect themselves against the unanticipated costs of being targeted by civil disobedients, which might enable the firms to pass on those costs to individuals who are not among its customers, suppliers, or employees.

¹⁸ The phrase "distributed across individuals in their role as ---" should not be read as holding that all of the individuals who participate in the market or who are citizens of the state should bear a share of the costs. Rather, each type of normative order includes principles for distributing costs across individuals. While action on the basis of those principles *may* entail that all participants in the market or the polity bear a share of the costs, or even an equal share, it need not do so. To illustrate, some actors in the market may be able to pass on to other individuals all of the costs that a civil disobedient directly or indirectly imposes on them. Or again, a political community may judge that it does better at living up to its commitment to political equality if it exempts its least advantaged members from paying taxes, some of the proceeds of which are used to compensate targets of civil disobedience. The key point is that we can distinguish between the claim that some collective body of actors should bear the costs

It is possible that the same natural person may bear the same burden regardless of whether we adopt the market or the political approach to distributing the costs of civil disobedience. This will be true if, for example, the costs that a firm targeted by civil disobedients cannot pass on to other actors are equal to those the firm would bear were the state to raise the funds necessary to compensate it by raising the firm's taxes. This does not make the choice between these two approaches moot, however. That is partly because it is a contingent matter whether their adoption will impose the same burdens on the same natural persons. It may turn out instead that at a particular period in a particular society's history the private actor approach will saddle the less advantaged members of the political community with most of the costs, while the public actor approach will impose most of the costs on the more advantaged members of the political community. Still, this sort of contingency is not necessarily problematic. More important is the fact that a political community's choice between the market and the political approaches determines the sort of reasons available to actors to justify or to challenge an existing or a proposed distribution of the costs. Briefly, the market approach licenses only prudential (or self-interested) reasons advanced in the form of hypothetical imperatives, while the political approach licenses moral reasons advanced in the form of categorical imperatives, treatment to which actors are entitled in virtue of their political community's commitment to due regard for its members' status as autonomous agents. Thus, in asking who should bear the costs of civil disobedience, we are not asking which individual human beings should do so, but rather under which normative description, or in virtue of which normative role, should individuals bear the costs of civil disobedience.

I contend that the same considerations that justify legally tolerating suitably circumscribed civil disobedience also entail that the political community ought to compensate private actors targeted by civil disobedients for the injuries they suffer as a consequence. In offering public compensation for these injuries, the political community acknowledges the perpetrator's act as a contribution to its political discourse, its ongoing attempt to identify specific terms for interaction that constitute its members as autonomous agents. It may be tempting to respond that in granting its members various legal rights to participation in this process, the political community already fulfills its duty to recognize the disobedient's status as an autonomous agent. But true recognition requires more than formal rights, or even a practice that makes legal forms of participation somewhat effective. Instead, it requires that the political community strive to design its practices of moral inquiry so that, as far as is possible, any differences in the effective opportunities it accords its members to participate in their collective government owe to their contribution to realizing reciprocal regard for autonomy. Put another way: if a political community fails to mitigate the impact of luck on its members' ability to engage effectively in its practices of political contestation, and if it cannot justify this failure in a manner that credibly invokes its "foundational" regulative ideal, then those members disadvantaged by its current practices may rightly view them as an affront to their status as autonomous agents.

As I noted in section I, members of a political community premised on the regulative ideal of reciprocal regard for one another as autonomous agents have a standing duty to sustain and continuously improve their methods of moral inquiry; again, the practices and institutions

– the participants in the market, the members of the political community – and claims regarding what counts as an appropriate distribution of those costs across the individuals who make up that collective body.

whereby they seek to improve their understanding of, and conformity to, this ideal. If, holding all else equal, a political community that tolerates suitably circumscribed civil disobedience will do better over time at realizing reciprocal regard for one another's autonomy than will one that does not, then the actors committed to that ideal should be prepared to pay the costs entailed by this particular component of their practice of political contestation. Indeed, it would be unfair to saddle individuals qua private actors with the costs of providing this public (i.e., political) good.

A comparison to the design of an institutionalized practice of voting may serve to buttress this claim. Suppose that a polity provides – and pays for – some number of polling places such that (a) all members are able to vote, but (b) the opportunity cost for some voters is far higher than it is for others. Examples might include operating far fewer polling places in some urban areas than others so that it takes much longer to cast a ballot at the former than at the latter, or providing fewer polling places in rural areas than in urban ones so that rural voters have to expend significantly more time and money to vote than do urban ones. Insofar as voting is a valuable means for members of the political community to communicate their judgments regarding the ends the political community ought to pursue, and how it should do so, the present system is a sub-optimal means for enabling members of the community to learn from their fellow citizens. All else equal, it would be better if the institutionalized practice of voting were reformed so as to reduce the opportunity costs of voting, particularly for those most burdened by the present practice, but ideally for all. Since all members of the political community have a standing duty to improve their collective practices of moral inquiry, they (collectively) have a duty to bear the costs involved in reforming their voting practice, e.g., by opening more polling places. Of course, there will surely be competing considerations to which members of the political community should also be responsive in virtue of their commitment to the regulative ideal of reciprocal regard for one another as autonomous agents, and these may (provisionally) justify preserving the current institutionalized practice of voting. I examine below how this observation might bear on the public provision of compensation for injuries caused by legally tolerable civil disobedience. Here I simply seek to defend the principle that the political community has a duty to bear these costs, or what is the same, to point out the inappropriateness of treating the burdens imposed by legally tolerable civil disobedience as if they were only a matter of private concern to actors as producers and consumers, but not as citizens.

IV. Responses to Operational Objections to Public Compensation

Even if it is justifiable in principle, however, operational considerations may militate against implementing a policy of compensating private actors for injuries they suffer as a result of legally tolerable civil disobedience. In what follows, I offer responses to a number of concerns that might be raised once we begin to think carefully about the practical consequences of adopting such a policy.

One objection is that it will reduce or even eliminate disobedients' ability to pressure actors to change their behavior by making it costly for them (to continue) to perform certain acts. This objection fails for two reasons. The first is empirical: as we have already noted, the targets of civil disobedience may be able to pass on to other actors the costs imposed on them, thereby rendering ineffective the disobedients' attempt to shape the target's conduct by raising the costs of engaging in certain activities. The second reason is normative: a necessary condition for

permissible civil disobedience – the sort a political community ought to legally tolerate – is that it be non-coercive. That is because it is justified as a form of *moral* address, an attempt to engage with other members of the community as creatures capable of evaluating and responding appropriately to the claim that certain laws or policies fail to accord with the best constructive interpretation of the community’s “foundational” regulative ideal. In contrast, coercion addresses agents as *prudential* actors; specifically, it provides the threat of some harm or evil as a reason to perform or not perform a particular act. Civil disobedience often imposes costs on others, of course; indeed, that is a primary reason why it can serve as an effective tool of political and moral communication. Nevertheless, would-be civil disobedients must make a good faith attempt to ensure that the magnitude and duration of the costs they impose on others fall short of what could reasonably be described as coercive.

Some might argue that the actors targeted by civil disobedients are often working hand in glove with public officials to enact or perpetrate the laws or policies to which the disobedients object. Insofar as a private actor is a driving force behind the problematic law or policy – drafting the legislation, lobbying for its adoption, supporting the electoral campaigns of officials who are prepared to enact it, etc. – they bear a much greater responsibility for the (alleged) injustice than do ordinary voters or taxpayers, and so they ought to be the ones to bear the costs the civil disobedients’ impose. Yet even if we ignore the possibility that the target may pass on these costs to others, it is hard to see why a private actor’s success at advancing the adoption by democratic means of some part of what they take to be a permissible law or policy should make them liable to bear the costs of civil disobedience. The fact (if it is one) that they have a sizeable financial and/or organizational advantage over their opponents in advancing their vision provides part of the rationale for legally tolerating civil disobedience, but it does not speak directly to the question of who should bear the resulting costs. Indeed, I suspect that behind this objection lies the conviction that the political community in question is insufficiently democratic; that is, that its existing practices for selecting officeholders and/or for legislative and administrative rulemaking fail to exhibit at least a threshold level of fidelity to equal regard for its members’ status as autonomous agents. Where this is the case, however, there is no duty to obey the law, no need to interact with others on the basis of law because doing so constitutes regard for their status as autonomous agents.¹⁹ My focus in this essay, however, is on the practice of civil disobedience in a community that does exhibit such a commitment, even if rather imperfectly.

Another worry with the provision of public compensation to private actors injured by legally tolerable civil disobedience is that it will create a moral hazard. Freed of the burden of paying their targets for the costs they impose on them, actors will too frequently resort to civil disobedience, and so generate a sub-optimal practice of political contestation. Two considerations militate against this outcome. The first is that civil disobedients may still be penalized for their illegal conduct, and the State should aim to design its practice of penalizing civil disobedients so that it alone serves to produce the optimal incidence of civil disobedience. Second, actors often have strategic reasons to be sparing in their resort to civil disobedience, insofar as repeated recourse to it can render civil disobedience an ineffective or even counter-

¹⁹ In such a political community, one we might describe as fundamentally illegitimate, the justifiability of both specific acts of civil disobedience and the response to them concerns either the mitigation of the evils enabled by the community’s norms or the contribution such acts make to transforming the community into one that is premised on a commitment to reciprocal regard for one another’s status as autonomous agents.

productive means for political contestation. We should also bear in mind that a campaign of civil disobedience might be quite costly to a political society in some ways, say in its impact on the society's economy, and yet not constitute a sub-optimal practice of political contestation.

Given that the argument for tolerating suitably circumscribed civil disobedience rests on its communicative value, we must consider the impact that public compensation will have on the utility of civil disobedience as a means for agents to call attention to their grievances, and perhaps also to their reasons for demanding reforms. It may be that on average individuals will be more likely to pay attention to acts of civil disobedience if the public bears the costs those acts create, since as taxpayers and beneficiaries of government spending they are the ones who will bear the costs.²⁰ Plausibly, people are more likely to advert to acts they perceive as directly affecting them than ones they do not perceive as doing so, and the latter description may apply to civil disobedience that targets private actors if the costs it generates are distributed via the market. If the public provision of compensation does enhance the attention-grabbing capacity of civil disobedience, this could make it a more effective tool for political contestation.

Of course, the market might also serve to distribute the costs created by civil disobedience widely amongst the population of a political community and do so in a manner that calls this fact to their attention. For example, a firm or an industry may acknowledge or even trumpet the increased costs its (potential) customers will pay as a result of the firm being targeted by civil disobedients. But it will likely frame those costs in market terms, as decreasing individuals' ability to satisfy their preferences as consumers. Viewing the costs as barriers to the satisfaction of private needs and wants may make people less likely to consider why the civil disobedients acted as they did, and so make civil disobedience less effective as a means for political communication. Thus, even if the market approach to distributing the costs of civil disobedience might serve equally or even somewhat better as a tool for raising awareness of the disobedients' action, we have a compelling reason to prefer the political approach.

Or perhaps not. For it may be that if individuals are aware that (qua citizens) they will bear the costs of civil disobedience, they may be less likely to carefully consider disobedients' reasons for objecting to a given law or policy. That is, the cost civil disobedients impose on the political community may distract its members from the message the disobedients aim to communicate, thereby reducing the effectiveness of civil disobedience as a means for political contestation. If relying on a market mechanism to distribute the costs of civil disobedience will yield greater ignorance regarding the costs that civil disobedience imposes, and so lead more people to carefully consider the disobedients' argument, then it may be preferable to a political mechanism. Whether this is so all things considered may depend on the extent to which a political community shields its members from the worst vicissitudes of the market, whatever their cause. For instance, if a political community's existing policies leave its least advantaged members extremely vulnerable to increases in the price of energy, and they are among those who will bear the costs of civil disobedience that targets firms in the energy sector, then it seems unlikely that an increase in the effectiveness of civil disobedience will warrant adopting a market approach rather than a political one to distributing the costs such acts create.

²⁰ The argument here concerns marginal gains in the number of actors attentive to acts of civil disobedience, or who consider the merits of the disobedients' case. Many acts of civil disobedience may go unnoticed by a portion of the population regardless of how the costs they create are allocated.

This example points to another challenge to operationalizing public compensation for pecuniary injuries inflicted by legally tolerable civil disobedience: competing political priorities. Assuming that a political community has limited resources to devote to the pursuit of its “foundational” ideal, we must acknowledge that every dollar it spends on compensation for civil disobedience is a dollar it cannot spend on something else (or one it cannot leave to its members to spend as they see fit). Why, then, should a political community spend its money this way, rather than on enabling political participation via legal means, or improving access to and effective representation in its courts, or fidelity to the rule of law among its law enforcement officials, and so on? Clearly this is not a question that can be fully answered without considering the particulars of a given political community at a given point in its history. Nevertheless, a few observations merit consideration.

First, we should concede that given its particular circumstances a political community may be justified at present in prioritizing other laws or policies at the expense of implementing a program of public compensation for the costs imposed by legally tolerable civil disobedience. But second, a political community committed to reciprocal regard for its members autonomy ought to accord a high priority to effective political contestation, insofar as it contributes to good law and policy making; that is, to a dynamic practice of testing law and policy over time in the pursuit of an ever-improving realization of its “foundational” regulative ideal. Put another way, the moral necessity of allocating its limited resources as best it can, not just at a time but also over time, provides a weighty reason for the political community to prioritize optimally designing its processes of moral inquiry over the other substantive demands that flow from its commitment to reciprocal regard for its members status as autonomous agents. Finally, it may be that the better a political community does in the eyes of its members at realizing this aim, the less likely they will be to engage in civil disobedience, and so the less costly it will be to enact a law that entitles private actors to compensation for injuries they suffer as a consequence of legally tolerable civil disobedience. If so, then there may be less competition between such a law and other laws or policies the community should also pursue. For instance, money spent to better enable legal means of political contestation may also reduce or even eliminate the costs associated with a legal right to compensation for costs imposed by civil disobedience.

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No doubt much more needs to be said to defend the thesis that the political community ought to compensate private actors for the costs they incur as a consequence of legally tolerable civil disobedience, and indeed, to defend the position that a liberal-democratic state ought to tolerate such conduct. However, I hope the discussion herein will serve to motivate theorists to pay greater attention to the question of who should bear the costs of civil disobedience, and to take seriously the response that it is the political community that should do so.²¹

²¹ I wish to express my gratitude to the members of the University of Richmond’s Ethics Working Group for their comments on an earlier version of this paper, not all of which I have managed to address here. Special thanks to Claudio Lopez-Guerra, Jeppe von Platz, and Stephen Simon for their detailed feedback.