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Civil Disobedience: Moral Prerogative or Lawless Act

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How should the law respond to civil disobedience? The question brings to issue a host of conflicting principles which any sophisticated legal system must reconcile or otherwise confront. Implicit in the act of civil disobedience is the troubling circumstance that either the structure of the law or its application is in some sense deficient in propriety, equity, or morality. The task for the law is to establish a framework for resolving cases of civil disobedience in a manner which best preserves the spirit of morality, justice, and practicality. For the purposes of this work, it is necessary to define those acts which may be properly classified as acts of civil disobedience. An act of civil disobedience, nonviolent but violating a law, involves the intentional breaking of, or non-compliance with, a law perceived by the perpetrator to conflict with personal principle or conscience. Civil disobedience may also involve the violation of an unrelated law to dramatize a law claimed to be immoral, or to protest some larger injustice in society.

This paper is concerned with acts of nonviolent civil disobedience directed at particular laws that create moral conflict for the individual. The issue is ultimately a question of obligation: is the individual bound in such a way that the dictates of conscience are the ultimate determinants of duty, or are these categorical imperatives subordinate to those of the state in determining an individual’s obligation in cases where the two sets of duties conflict? Can the state make allowances for individual conscience without undermining the integrity of its legal system? Erwin Griswold articulated this question when speaking before an audience at Tulane University School of Law. In his essay, delivered on the occasion of the Third Annual George Abel Dreyfus Lectures on Civil Liberties, he defined the importance of the issue for the individual: “The ultimate sanctity of a man’s own conscience is the intellectual and volitional composite that governs his conception of his relation to Eternal Truth” (Griswold 184). Here Griswold implies that the criteria that constitute the highest demand on individual conscience are each person’s will and intellect, which determine how the individual defines her/himself in relation to those principles he/she finds to be absolute and not subject to the tyranny of worldly circumstance. He reflected on the concerns for the state when he quoted John Locke from his Essay Concerning Civil Government: “May the sovereign be resisted as often as anyone shall find himself aggrieved, and but imagined he has not right done him? This will unhinge and overturn all politics, and instead of government and order, leave nothing but anarchy and confusion” (cited by Griswold, 184). By aid of this quote, Griswold attempts to crystallize the issue for the state: If the state is contested every time citizens
believe themselves to have been wronged, will not the political process be torn asunder in the attempt to appease each individual? Will the state’s accommodation ultimately defeat the purpose of government as the state retreats before the onslaught of anarchy? This is an argument on which opponents of civil disobedience consistently rely in their attempt to call into question the legitimacy of such acts.

I intend to argue that it is not only possible, but appropriate for the state to make special but principled dispensations of justice in the adjudication of cases of civil disobedience. I will demonstrate that among competing theories of law, Dworkin’s hermeneutic concept of law provides the most appropriate theoretical framework on which to base a response which will mete the greatest possible justice to both society and the conscientious violator. My argument will proceed in two steps: (1) I will take the fictitious Smithson case and view it in light of the theories of law proposed by Hart, Fuller and Dworkin, and determine which possible response to the Smithson case each would recommend; (2) I will then measure the theories and those responses to the Smithson case against four independent criteria, thereby demonstrating that Dworkin’s interpretive framework cultivates a process of law in which the best response to civil disobedience may rationally be issued, and furthermore, that this process culminates in law which is ultimately the best that it can be.

It is appropriate briefly to frame the Smithson case. Smithson is a thoughtful, sincere individual committed to his beliefs. He has a long history of opposition to almost all forms of violence and almost all wars. Only in the most extreme of instances could Smithson imagine personally engaging in acts related to a war. Smithson categorizes the second World War against Hitler and his atrocities as such a war in which his participation might have been morally justified. The conscientious objector’s exemption is applicable only to those who demonstrate an opposition to all wars, irrespective of general or particular circumstances, and not those who can find justification for engaging in some particular war. The state’s concern here is that permitting exemption from service on less abstract grounds would result in individuals becoming the arbiters of which war they would fight in. The state maintains that authority to exercise this prerogative is vested in the state policy makers as declared by the Constitution. Smithson was arrested for failing to report; subsequently he was tried and convicted and lost an appeals decision. Smithson is now faced with either accepting the state sanction, as moral duty compels, or martial service. In either case he is subjected to the compulsion of the state, but only in the former can he avoid violating his sincere convictions. How should the state respond? To further our investigation, we need to examine how three legal theorists, H. L. A. Hart, Lon L. Fuller, and Ronald Dworkin, construe the adjudication of the Smithson case.

Hart defines the concept of law as the union of primary rules of obligation with secondary rules. The primary rules, such as criminal law, impose duties of abstention, such as those against
killing and stealing. The secondary rules create powers, both public and private, through offices. What is germane to the issue of civil disobedience in Hart's concept of law is that it does not posit acceptance by those outside the system as a condition of its proper function. Further, his concept of law proceeds in the positivist tradition, defining all moral and legal issues as mutually exclusive of each other. For law as conceived by Hart, legality and worthiness are radically distinct characteristics. This theory accords judges and administrators no interpretive function, but rather leaves to them the task of applying the law to various cases. There is little or no room for principles, either of individual or social conscience in the administration of law, precisely because these principles are not legal ones. In Hart's system, it is thus clear that the state trying a civil disobedience case, is utterly bereft of options. There is no reasonable alternative to prosecution and conviction coupled with punishment to the full extent of the law. The selection of the option of full prosecution and conviction in the Smithson case denies judicial hearing of the issues that civil disobedience raises. If there is to be any legal recognition that either some feature of the law is deficient or that the concerns of conscience and morality which provoke civil disobedience have legitimate grounds, then this recognition must come through legislative channels. Specifically, in the Smithson case, to implement this response is to recognize only that Smithson does not qualify for the exemption, without recognition of his obvious sincerity. Furthermore, Hart's theory fails to address the issue Smithson raises by relegating the objective grounds of his defense to the status of inadmissible evidence, thereby denying Smithson any prospect of justice.

Other less severe possible responses to cases of civil disobedience can in no way be accommodated by this theory, as they all involve an interpretive recognition that the moral convictions of Smithson should in some manner affect the adjudication and administration of justice in this case. In short, Hart's conventional and simplistic response commands a mechanical application of the law by the judge, and fails to recognize the issues that civil disobedience brings to bear on the legal proceedings. Although the issues of civil disobedience do not receive judicial redress, legislative redress is possible, even desirable, under Hart's system. The prospect of legislative redress, however, is cold comfort to an individual who is immediately subject to the compulsion of the state. This response does not immediately resolve the conflicting principles of a man's obligation to his conscience and his duty to the state. The issue of a growing disrespect for the law, if cases of civil disobedience are not given consideration, is not necessarily a problem for Hart's theory. As long as officials accept the system from the internal perspective, the population at large need not of necessity accept it also for it to function, at least in some minimal fashion. Ultimately, what makes Hart's theory so unsatisfactory is that it fails not only to describe how civil disobedience cases are treated in fact, but it also fails to incorporate into the legal framework any conventional notion of fairness as a foundation of justice. Rules and statutes displace discretion, which is essential to the equitable administration of justice, egalitarianism
notwithstanding.

The full prosecution response to cases of civil disobedience is indicative of a system that promotes the principle that respect for the law must be “maintained at all costs,” regardless of personal conviction. Howard Zinn debates this assertion in his book *Civil Disobedience and Democracy*. This unsophisticated assertion is intuitively appealing. However, as Zinn points out, it has two critical flaws. First, the logical extrapolation of such a position is that law has an intrinsic value, independent of concrete moral consideration. This implies that the rule of law is prior in significance to the just or unjust quality of a particular law. The individual in a democratic society is thus left in the untenable position of having to obey laws that are invalid for the individual or constitute a moral affront, for the sake of preserving the integrity of the legal system as a whole. Second, the law and order argument erroneously implies that the breaking of one law necessarily results in a weakening of society’s spirit of obedience, the violation of many laws, and ultimately, in anarchy. This argument, however, mistakenly attributes destructive causal agency to an act of civil disobedience, when in fact it is primarily a symptom of a possible wrong in the legal system. It simply does not follow from the fact that people of principle and conscience selectively object to a law they consider invalid or immoral, that the less reflective, habitually obedient remainder of the citizenry will repudiate the rule of law, bringing about a general collapse of the legal system. That a viable legal system not only does, but should respond to civil disobedience with a sensitivity to the import of conflicting principles, and not blindly appeal to the integrity of the letter of law and order is now apparent, and we need to turn to those principles.

Fuller’s theory of law maintains that law is the enterprise of subjecting human conduct to the governance of rules. Law, for Fuller, is an *enterprise*, tied to a morality of aspiration rather than a static model, such as Hart describes. Fuller’s theory of law places its emphasis on legislators, and demands of them that they follow the morality of aspiration when attempting to make law. The legislators, in an attempt to achieve the best possible law, must follow Fuller’s eight criteria of the “morality aspiration” of law: generality, clarity, noncontradiction, promulgation, constancy, susceptibility to obedience, nonretrospectivity, and congruency of rules and their administration. Fuller has created a procedural natural law theory that correlates the degree of a law’s correspondence to these criteria directly with the degree to which that law is qualified as good. Fuller portrays law as necessarily involving morality in the procedure of its creation, and not necessarily in the substantive outcome. As we would expect, Fuller’s theory will handle the conflicting principles that civil disobedience presents to a legal system, in a manner vastly different from the treatment Hart accords such principles.

Fuller is concerned with the status of law with respect to justice, fairness, and the role the legislature plays in forming such laws. He does not emphasize adjudication or the judiciary. That Smithson is sincere in his beliefs and has been confronted with a law that is impossible for him
to obey, presents an immediate anomaly in Fuller’s concept of law. Together they violate one of his eight criteria for the inner morality of law, i.e., that it be possible to obey it. Here, the flexibility of his eight criteria enables him to some extent, to balance the various concerns raised by Smithson’s case. Even though it is morally impossible for Smithson to obey, the law remains valid for the vast majority of the people. If the draft law is rewritten to accommodate Smithson, the law cannot help but violate the criteria of generality and clarity. As a result of this conflict, Fuller would elect to accept the violation of the criterion of susceptibility to obedience in Smithson’s case, to satisfy the criteria of generality and clarity for the majority.

One can understand that Fuller’s system would, in the general interest of justice and with respect for the fact that this law is impossible for Smithson to obey, dismiss the extreme prosecution response. It is clear that the criterion of susceptibility to obedience is essential for Fuller, as he writes: “To command what cannot be done is not to make law, for a command that cannot be obeyed serves no end but confusion, fear and chaos” (Fuller 37). If it is physically and morally possible to obey the law, then Fuller’s theory can accommodate prosecutorial responses to conscientious violation which are not extreme severity, yet allow the spirit of the rule of law to persist while preserving some measure of justice for the violator. To accommodate Smithson, who finds it physically possible, but morally impossible to obey the law, Fuller would allow compromise in one or more of his eight criteria. Since the vast majority of citizens will obey the law, Fuller would prefer that it remain in its original form. Ultimately, Fuller would allow the prosecution of Smithson for violating a morally impossible law, but in the interest of fairness and justice that his system intends, he would prefer acquittal or a light sentence.

We have seen that as the complexity of the concept of law increases and the issues of legality and morality are jointly addressed under one legal system, we have more options available, and achieve a representation of law closer to the manner in which it actually functions. However, is it possible that the partial justice Fuller’s theory offers, is a compromise of justice tantamount to a denial of justice? I will now argue for the position that Dworkin’s theory of law as interpretive concept, with its emphasis on interpretational legal adjudication and administration, offers us the best framework within which to articulate issues of civil disobedience, and arrive at an appropriate response.

For Dworkin, the best working constitution of his theory of law as an interpretive concept is law as integrity. This means that judges need to search for and apply fundamental principles in deciding cases. This process is divided into the preinterpretive, interpretive, and postinterpretive stages, with decisions based on a community’s coherent ideals of justice and fairness. The judge, in his discretion, abides by a creative, interpretive process that reflects history, legislative intent, political theory and morality as embodied in law. These principled decisions must respect individual rights, not just consensus opinion or majority interest. Immediately we recognize a
framework that takes into account the fact that interpretation is the act which judges actually perform in the disposition of cases, and that law is tempered by political morality.

That Dworkin has created a model of law that reflects community concerns is clear. What remains is to understand how this model would handle the case of John Smithson. The key point of departure is the interpretive concept; this does not only apply to judges, but to prosecutors as well. Dworkin explains that prosecutors use interpretive skills to discern which cases should be prosecuted with great prejudice, as opposed to those which should be prosecuted less than fully or not at all. If the prosecutor interprets correctly in cases of civil disobedience, he will notice a difference in kind that distinguishes the civilly disobedient act from other transgressions. Civilly disobedient persons do not act out of personal greed or a desire to subvert the government; rather, they act because they believe the law is invalid, and compliance would violate their sincere convictions. The law, Dworkin argues, not only should recognize this salient fact, but does so every day. Prosecutors employ the very same faculty of discrimination when they decide which cases to bring to trial, and judges make all manner of discernments concerning a defendant’s state of mind. In 1882 Judge Bowen quipped: “…the state of a man’s mind is as much a fact as the state of his digestion.” Here Dworkin maintains that it is incumbent upon and desirable for the state to distinguish in this manner between the typical law-breaker and the law-breaker motivated by conscience. The interpretive concept allows us to establish that Smithson’s transgression was not motivated by greed or intended to subvert the government. Additionally, the interpretive concept allows us to recognize that Smithson does not feel the draft law is a valid law. For Smithson, this law is invalid because it forces him to act against his conscience. This point raises constitutional issues on two accounts: (1) A law that forces Smithson into an unconscionable act may violate his right to freedom of religion because it restricts his freedom to practice his constitutional equivalent of a religion. (2) In the United States, the constitution allows that validity is, in degree, subject to conventional political morality. If that morality is in conflict with a statute, then constitutional questions and doubts must be raised proportionate to the magnitude of the conflict.

The question now becomes, whether all manner of sincere or religious convictions condition the legitimacy of an illegal act? Does Dworkin intend to secure the right of a Nazi sympathizer to refuse to join the prosecution of a war against Hitler, along with the right of Smithson to avoid participation in a war he deems unjust? Clearly not. The flexibility of the interpretive theory allows for Smithson to abide his conscience without simultaneously securing the precedent for a Nazi sympathizer to do likewise. When a judge employs the interpretive concept, he is ever aware that his search for applicable principles should reflect a coherent conception of the community’s political morality. There is no allowance in a nation constituted of democratic principles for the sanctioning of a conscientious objector classification based on sympathy for a system representing the antithesis of that nation’s political morality. Just as the judge uses the interpretive concept
to discern the difference between criminal violations and conscientious violations of law, so too
s/he uses the same concept to understand the differences between those sincere convictions
which have a legitimate grounding in the nation's political morality and those which do not.

Does Dworkin intend to secure the right of the segregationist to indulge in overtly racist acts,
along with the right of Dr. Martin Luther King, Jr. to disobey segregationist laws? An appeal to
political morality based on democratic principle may seem to imply this result. However, the
interpretive concept demands more than a numerical majority as the condition of legitimacy of the
political morality. It is, or should be, well known even to casual observers of democracy that the
will of the majority is hardly a principle of the good, though the two may be found to coincide.

When Dworkin interprets law in the light of democratic principles, he refers to those presumed
objective standards which imbue democracy with the spirit of human dignity: to human rights.
Neither the greatest scientist nor the cleverest logician could construct a rational, moral
justification of racist laws, and legitimately claim to ground such an argument on general
humanistic principles. Smithson's defense, on the other hand, can claim precisely such a general
grounding, and it is in this crucial respect that the two examples are diametrically opposed. The
process allows the judge to rule that securing Dr. King's right to protest segregationist laws does
not sanction the right of the segregationist to indulge in overtly racist acts. The question now is
a matter of how these issues are weighed in light of the distinction between the opposition to all
wars and opposition to almost all wars, as in Smithson's case. Dworkin has provided us with the
interpretive framework which allows the judges and prosecutors to give consideration not only
to Smithson's convictions, but also to these important constitutional issues, when deciding on a
course of action.

What is immediately apparent in Dworkin's theory is that there is a variety of options available
in the system for dealing with cases of civil disobedience. By contrast, Hart's and Fuller's models
allowed for only one procedure — prosecution and punishment. According to Dworkin's
interpretive concept, prosecution of Smithson is not present as a reasonable option. Dworkin
believes in the responsiveness of the interpretive concept to democratic principles and does not
subscribe to the positivist contention that law and morality are two distinct entities. His
interpretive framework strives to reflect the very political morality that Hart's model rejects. That
the foundation of the law is not subverted by Smithson's non-prosecution is a sufficient condition
for Dworkin to establish that the process of appeal and legislative redress is a costly and less
certain means by which justice could be administered.

The law clearly works for the majority of the eligible draftees. That a law can or need be
written to accommodate all possible scenarios of conscientious objection to war is not clear. That
there can be a law that can reasonably be interpreted as valid and invalid by different groups at
the same time is clear, and while the law's overall validity might be dubious, acts of disobedience
such as Smithson's help illuminate this fact about the legal system. Dworkin maintains that the
government has a special responsibility to those who act on a reasonable judgement that a law is
invalid. Governments should make accommodations for them as far as possible, when those
accommodations are consistent with constitutionally well grounded policies. As a result of these
constitutional concerns and democratic principles of individual rights, no decision to prosecute
Smithson can be appropriate, whatever the outcome, and therefore a balancing of principles
involved will encourage the law to "look the other way." In deciding for a no prosecution response
I urge that within the interpretive framework, the principle that should carry the day in the
Smithson case is the respect for an individual's need to obey a sincere, morally principled
conviction above the obligations one has to the state. Society needs to respect citizens of principle
and reflection to ensure that majority policy does not rule over individual right. The appropriate
social expression of this respect, if it is to be significant, must take the form of legal accommoda-
tion.

There are several arguments against this position that need to be addressed before it can be
considered legitimate. The Draconian assumption that all violators must be prosecuted in order
to maintain the integrity of the rule of law is often used as an argument against the decision not
to prosecute. While that argument, which comes under the principle of a citizen's duty to the state,
was effectively dismissed when we addressed Hart's theory, its specific argument against not
prosecuting draft resisters needs to be rebutted here.

The issue becomes whether the failure to prosecute would lead to wholesale refusal to serve.
Dworkin states that "... it may not — there were social pressures including the threat of career
disadvantages, that would have forced many young Americans to serve if drafted, even if they
knew they would not go to jail if they refused. If the number would not have much increased, then
the State should have left the dissenters alone, and I see no great harm in delaying any prosecution
until the effect of that policy became clear. If the number of those who refused induction turned
out to be large, this would argue for prosecution. But it would also make the problem academic,
because if there had been sufficient dissent to bring us to that pass, it would have been most
difficult to pursue the war in any event, except under a near totalitarian regime" (Dworkin 219).
The statement demonstrates once more the flexibility of Dworkin's theory. He contends that if
large numbers of conscientious objectors materialize as a result of this principled decision, then
a decision to prosecute could be employed. However, what seems to be a policy-over-principle
decision becomes a moot point, because the same political morality that rendered Smithson's
status unique, has now changed such that the majority of the new political morality will function
to make the draft unconstitutional. The legal authority of government to conscript the service of
the people for war vanishes along with the consensus that the nation requires their services for
its defense. Dworkin touches on two key ideas here. The combined facts that wholesale draft-
dodging is unlikely, and that impressive credentials must be brought to the draft board in order to qualify for an exemption, militate against the possibility of wholesale abuse—witness the implication of Judge Bowen’s quote that a court can regularly determine a person’s sincerity. If it appears unlikely that mass resistance or even fraudulent pretense will result from Smithson’s exemption, then there is only one clear objection left: the objection that, by accommodating a conscientious objector such as Smithson who is opposed to almost all wars, we somehow place an unfair burden on those who submit to the draft. The argument rests upon the tacit premise that the law is either valid for all, or valid for none. However, it is the validity of the law itself which is in doubt. It is no more the case that Smithson is deliberately violating a valid law, than it is that those who submit to conscription are deliberately adhering to an invalid law.

Dworkin’s theory ultimately accords recognition to the fact that there can indeed be well-founded arguments in support of opposite ethical propositions. Neither the conscientious objector nor the conscientious supporter can be said to act in bad faith. Rather, it can be said that the moral priority of their principles does not correspond precisely, or that it holds true to different principles. In the former case, it is the degree of reasonable support the law lends to the individual’s moral priorities, which determines the degree of the law’s validity for that individual. In the latter case, it is the degree of correspondence between individual principle and political morality which objectifies the rightness of the one proposition and the wrongness of its opposite. Smithson’s case is sincere and reasonable, and furthermore, it is in keeping with his nation’s political morality. Thus the law is both subjectively and objectively invalid.

Conscientious supporters, on the other hand, do not accept Smithson’s argument. For them, the law applies, and though they support an objectively invalid law, the fact alone that they do support it renders it subjectively valid. That is why the conscientious supporter of conscription cannot be accused of deliberately adhering to an invalid law. The error the supporter makes is in failing to recognize the legitimacy of the objector’s argument, which, like all meaningful arguments, is one of degree. This cognitive failure stems from an interpretation of all meaningful law as general (Smithson cannot be right because he claims exemption), and all good law as stable (Smithson cannot be right, or the law will collapse). Generality is thought to be a necessary and sufficient condition of stability, but Dworkin has pointed out that neither is this always the case, nor is unlimited stability an intrinsically valuable aspect of a legal system.

Curiously, this puts Dworkin in the position of supporting objectively invalid laws. Let us recall, however, that Dworkin’s is a theory which proposes not absolutely valid laws, but rather, a system of law which is the best it can be. The conscription statutes, taken in conjunction with appropriate interpretive legal administration, will yield law that is the best it can be. If Smithson’s acquittal should lead to an avalanche of draft resistance, then the objective invalidity of those statutes will be manifest, and the appropriate reform measures enacted. If Smithson’s acquittal
should not precipitate any mass movement, then the law has fulfilled its purpose in rendering justice to Smithson, while allowing the nation to pursue its policy objectives constitutionally. The law is always valid (subjectively) for those who respect it. There is, however, neither need nor reason to assume that the law is or ought to be perfectly general, as such cases as Smithson's attest to.

Although the burden of service is redistributed, it does not follow that this redistribution is therefore inequitable to those who submit to the draft. The draft lottery presupposed no fixed rights, and by tolerating draft resisters we make only small shifts in the law's calculation of utility and fairness, Dworkin explains. He continues that it may cause small disadvantages in the lottery, but that is an entirely different issue from contradicting the moral rights of individual citizens (Dworkin 219). The position we have defended here is that the obligation to be civilly disobedient takes precedence over acquiescence to an individual's duty to the state. In doing so we have shown that the principle of a person's obligation to his conscience and individual rights reign supreme over the principles of a citizen's obligation to the state. In divining those principles we saw that Dworkin's interactive conception of law as integrity provided the best context in which to examine the conflicting principles in the Smithson case.

The only issue that remains is to demonstrate that Dworkin's theory is the most ideally suited among the three to handle cases of civil disobedience in a democracy. Our method will be to evaluate each theory on the basis of independent criteria.

Due to its emphasis on judicial interpretation and administrative justice, Dworkin's complex theory has the structured flexibility to accommodate varied responses to cases of civil disobedience. In addition, its ideological commitment to a legal system that reflects a community's coherent conception of justice and fairness and acts in a principled manner towards all its members, renders Dworkin's law disposed towards accepting the legitimacy of civil disobedience.

The theories of Hart and Fuller, owing to their rigidity and lack of complexity, were limited in their responses to cases of civil disobedience. Fuller's theory, while ideologically concerned with fairness and justice, mainly addressed the legislative process. When these concepts of law are judged on the basis of a correspondence criterion to determine which best represents law the way it actually exists in the United States, Dworkin's interpretive concept again prevails. It is apparent that judges do interpret and not simply apply the law, and administration of justice by prosecutors likewise involves discernment and interpretation. It is to the positivists' discredit that Hart's theory cannot reflect this, and to the detriment of Fuller's theory that, while he acknowledges such a role, he does not emphasize it.

When the three competing theories are compared on the basis of pragmatic value, Dworkin's theory again has a clear advantage over the others. The cost and the length of time involved in
disposing of cases according to Dworkin, is greatly reduced relative to the others. Although in Hart's system, civil disobedience cases are prosecuted with swiftness and certainty, the lack of judicial costs is balanced by the legislative costs of dealing with civil disobedience issues. The cost of implementing Fuller's theory would be relatively higher in both its administrative and legislative aspects. There are two causes from which this result emanates: First, Fuller places a high degree of emphasis on reforming the law through legislative procedures, a process that is costly in both money and time. Second and most important, Fuller's conception of the law as an aspiration of excellence guided by his eight criteria creates a dichotomous situation for him when disposing of civil disobedience cases. While the general concern for fairness is present in the construction of the law, it cannot be equally reflected in its application. Fuller has to prosecute because the attempt to rewrite the law would, as a matter of course, result in a lack of clarity and generality. His congruency criterion also demands some form of prosecution to avoid a divergence between the law as written and the law as administered. Ultimately Fuller's criteria force him to make compromises to arrive at an acceptable status for the law, a status that results in less than full justice for Smithson.

By contrast, Dworkin’s theory accords a greater discretionary latitude to the administrators of the law, thereby circumventing the inordinately high costs associated with frequent and protracted litigation. For Dworkin, the law consists not only of statutes, but also of their interpretive administration. Dworkin provides for the discretionary exercise of the interpretive skills of legal administrators because such judgements are required in a legal system that recognizes that the validity of statutes may reasonably be considered dubious. The discretion of judges and prosecuting attorneys is the key instrument in incorporating statutes and interpretive administration into a principled, coherent, and pragmatic system of law.

With regard to the complexity of the law, Hart and Fuller’s theories provide society with much more readily understood systems. In particular, Hart’s system leaves little doubt as to which way the law must proceed in cases of civil disobedience. However, it is the very simplicity of these systems which renders them limited in their capacity to do justice to the varied and conflicting principles involved in cases of civil disobedience. It is to the credit of Dworkin’s system that it is able to process complex cases, while at the same time distribute justice according to principles essentially moral and/or pragmatic. His system recognizes that there is no ultimate principle of justice, or consistent set of such principles, that allows the legal process to flourish in all cases despite these encumbrances. This is not to say that Dworkin believes there is not a best principle to apply in each case, as for Dworkin clearly there is, but rather he realizes that in tough cases opposing sides can sometimes make a legitimate appeal to the same principle. It is when this conflict between principles occurs that Dworkin allows the judge to use the creative interpretive process. The predictability of Hart’s system, which is an extension of its simplicity, is a potentially
important desideratum of a legal system. However, the value of the predictive capacity is called into question if the system's capacity to dispense justice is proportionally diminished. Dworkin's theory strikes the balance between these two largely exclusive desiderata in the favor of justice.

Ultimately, the dispensation of justice is the most important function of a legal system. For Hart, the greatest amount of justice is achieved by the ordering of society through the rule of law. Yet the application of Hart's concept of law to Smithson's case clearly results in a denial of justice to the defendant. While it is possible that the principles raised by Smithson's case might receive appropriate treatment in the legislature, these facts remain: (1) Smithson would be prosecuted, (2) Smithson would be convicted, and (3) Smithson would be punished. The lack of justice stems from the fact that Smithson suffers the compulsion of the state for violating law of dubious validity in performing an act of reasonable, morally principled civil disobedience. Hart's system denies Smithson the complete acquittal that justice demands.

Fuller's system comes closer to providing for the satisfaction of our concept of justice in the sense that the compulsion to which Smithson could be subjected is significantly mitigated. However, justice compromised is, to some degree, justice denied. Fuller's theory does allow a greater measure of justice than Hart's theory for the conscientious violator. Fuller interprets justice as the aspiration of human excellence in the creation of law which is intended to result in statute that is the best it can be. Fuller acknowledges the existence of laws that fail to measure up to the goals of these aspirations. His theory emphasizes the legislative process as the appropriate device for implementing the reform of such defective laws. Though Fuller's theory is more merciful and understanding of the motive and rationale of the conscientious violator, it is still unjust in that, to the degree that, it brands the conscientious violator an outlaw by attaching the inevitable stigma associated with prosecution.

Dworkin's theory accords legal status to the rational, principled moral grounds on which the conscientious violator stakes his claim. This grant is possible because Dworkin's theory accounts quite sensibly for the fact that legitimate ethical disputes can arise where the validity of the law is dubious. Therefore it is possible, under Dworkin's theory, to rule in such a way that the conscientious violator can receive justice without society suffering a proportional defect in the integrity of the rule of the law. The reason the rule of law is not harmed by such apparently adverse rulings is that Dworkin's theory appears to achieve justice at the expense of the generality and clarity of the law. However, a more sophisticated examination reveals that this is not the case. The defect in generality and clarity is correctly interpreted by Dworkin to be inherent not in the law, but rather in the statute (as it applies to Smithson), which constitutes but one aspect of the law.

Based on criteria of correspondence, utility, simplicity, and justice, it is clear that an interpretive concept of law has much more to offer a society than competing concepts. It has been shown that the most problematic aspect of these competing theories was their failure to
accommodate the just cause of the conscientious violator, on account of their unsophisticated concepts of the absolute essence of law's validity, and their failure to recognize the composition of law as interpretive administration in addition to statutes, rather than merely the latter. Because of these theoretical deficiencies, these theories can do no more than dispense partial justice (Fuller), or no justice at all (Hart), to the rationally and morally motivated conscientious violator. It is especially ironic that Hart's theory should deal with such an important case in this manner, while simultaneously regarding the absolute essence of the validity of statutes as key to the preservation of an ordered society through the rule of law. As John F. Kennedy said on March 12, 1962 in an address before Latin American diplomats in the White House, "Those systems which make peaceful revolution impossible make violent revolution inevitable."

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