



Policing Disobedient Demonstrations

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Abstract

This article sketches a case for the importance of allowing and protecting civil disobedience in a democratic society. There are weighty reasons for non-enforcement of certain laws under certain circumstances, which undermines the legalistic claim that justice requires police to faithfully (try to) enforce all laws at all times. Furthermore, questions about how the police should respond to disobedient demonstrations are not settled by popular theoretical treatments of civil disobedience. Police responses to disobedient demonstrations should be guided by a principle of proportionality. This proportionality requirement is more stringent in cases of self-generated needs for self-defense. Common police tactics like “skirmish lines” predictably escalate interactions and create a need for further defensive force, thereby violating the proportionality requirement.

Keywords Civil disobedience · Policing · Protests · Self-defense · Proportionality · Democracy

On the standard understanding, civil disobedience is an action that intentionally breaks a law the lawbreaker takes to be unjust, to engage, rather than subvert or evade, the political process.¹ The role that civil disobedience plays in the political

¹This is direct civil disobedience. Civil disobedience is often indirect: the disobedient violates another law to protest the one they take to be unjust. As we’ll see, this complicates normative matters. There are other

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process has led many to conclude that the state has strong reasons to protect it, or that there is a right to civil disobedience (Rawls 1999, Brownlee 2012, Smith 2013, Delmas 2018). The implications of the value of civil disobedience have been worked out primarily in the context of prosecution and punishment (Dworkin 1978, 1985). Prosecutors must sometimes decline to bring charges. If they bring charges and secure conviction, judges must sentence leniently. But before we get to that stage, the disobedient must be arrested. And the considerations that count in favor of declining prosecution or assigning a lenient sentence might well be relevant to the decision of whether to make an arrest or a command to disperse in the first place. So, an essential question about the state's response to civil disobedience concerns how the police should respond to civil disobedience. I take up that question here.

I'll restrict my focus to a narrow class of civil disobedience: disobedient demonstrations. These demonstrations take place in public spaces and are disobedient, typically, by making intentionally disorderly use of them. Examples include marching on roadways and remaining for extended periods of time in spaces like public squares (without authorization). This kind of civil disobedience is philosophically interesting for several reasons.

First, it is indirect. Disobedient demonstrations involve instrumental violations rather than reactions to the injustice of laws governing (e.g.) the permissible use of public space. People need some other way to engage in disobedience if directly violating the relevant unjust law is not an option.

Second, the violations are ones that police regularly overlook in other contexts. Police in jurisdictions with loitering laws on the books, for example, often decline to enforce it. They have better things to do.² Though forcing people to obey these laws or punishing them for not obeying does not directly violate their conscience, we don't demand universal enforcement of the relevant laws either.

Third, the police are sometimes able to determine both whether a demonstration is disobedient and whether it is civil. Before police issue an order to disperse, a demonstration might be perfectly legal. And before police forcefully invoke their authority, the demonstration might be perfectly civil. Common tactics, however, predictably raise the temperature of demonstrations, leading to further disobedience and incivility.

Fourth, indirect disobedience cases involve conflicts of legitimate interests. People have a legitimate interest in having their voice heard on policy matters, and disobedient demonstrations sometimes appear to be the only real option. On the other hand, bystanders have a legitimate interest in using public space. These cases are unlike (e.g.) an illegal voting case, where no one has a legitimate interest in denying people the right to vote on demographic grounds.³

requirements for law-breaking to count as civil disobedience, but I'll set them aside for present purposes.

² See Michael K. Brown (1988) and Rosa Brooks (2021) for discussions of how police officers often try to avoid low level misdemeanor incidents.

³ I should note that this is controversial. Some think that those I've termed bystanders are not bystanders at all, but political agents who are complicit in the injustices that generate disobedient demonstrations. Their complicity entails that they are rightful targets of defensive violence. I will not respond to such arguments here for reasons of space, and will instead assume that at least some cases are characterized by conflicts of legitimate interests.

I begin by briefly sketching a case for the importance of allowing and protecting civil disobedience in a democratic society. This establishes that there are weighty reasons for non-enforcement of certain laws under certain circumstances (§ 1). Next, I show that questions about how the police should respond to disobedient demonstrations are not settled by popular theoretical treatments of civil disobedience (§ 2). The rest of the paper develops an argument for a more accommodating police response, grounded in a principle of proportionality. I'll argue that policing, like the rest of the criminal legal system, must satisfy a proportionality requirement (§ 3). The proportionality requirement, as I understand it, is more stringent in provocateur-like cases of *self-generated* needs for defensive force (§ 4). Finally, I argue that common police tactics like “skirmish lines” often predictably provoke the need for defensive force, thereby violating the proportionality requirement (§ 5).

1 Justice Requires Democracy, but Democracy Produces Injustice

The justificatory challenge of civil disobedience arises for those who take democratic procedures to be authoritative (capable of generating obligations in citizens to obey political decisions). How can civil disobedience be permissible if we hold ourselves and our compatriots to be bound by even mistaken political decisions? This section outlines a few plausible answers.

There are compelling reasons for allowing, even institutionalizing, civil disobedience. Even if we take a rather relaxed approach to political authority in principle, it is implausible that existing governments satisfy whatever the requirements for political authority are. In reality, our political decision-making procedures regularly fail to track the truth or justice. They are frequently captured by special interests, and rarely achieve a fair representation of interests. We might then think that while we have some reason to obey the outcomes of political decision-making procedures, our reasons are rather weak and can be outweighed by strong countervailing reasons. It's true that we have reason to defer to political outcomes, the disobedient might say, but it's also true that there are political decisions that issue from captured or otherwise broken procedures.

Continuing this thread, the disobedient might say that their actions respect the political process and their compatriots *while* disobeying it. A defining feature of civil disobedience is its political nature; it is intended to change the law.⁴ While it is illegal, it does not spring from a rejection of political authority; it is supposed to respect the authority of democratically enacted law while attempting to change it. The disobedience is not revolution, or terrorism, or merely a selfish attempt to benefit from the rule-following of others that produces a stable political order while not oneself following the rules.

⁴This definition, from Rawls (1999, 320), is overly simplified. As philosophers now largely agree, civil disobedience is not essentially aimed at changing the law (Delmas 2018). Still, Rawls captures an important element of civil disobedience as a form of law breaking that in some ways respects the law-making institution.

Additionally, when we think about how citizens engage the political process, disobedient demonstrations are a natural fit. Voting is not the only way to engage in politics. People also engage in political writing to shape public opinion, call their representatives, donate to or volunteer for political campaigns, and signal their commitment to various causes through yard signs, bumper stickers, and so on. There is good reason for this: voting happens periodically, and no political campaign can make clear a representative's position on every matter such that one could interpret the representative–represented relationship as one in which the representative is a pure delegate operating on behalf of the represented. Further, a significant amount of governance happens in the executive branch where unelected bureaucrats, often at the direction of the legislature, make politically significant decisions. In other words, both our bureaucracies and our deliberative bodies require more for their authorization than periodic elections. Demonstrations are just another way of making one's voice heard so that they may be represented in political decision-making. And just as a donation or letter to one's representative signals an unusually strong political commitment, disobedient demonstrations where people risk arrest are an especially clear signal (Smith 2013, 112).

Finally, as Candace Delmas has shown, the menu of plausible justifications of political authority might themselves require disobedience (2018). If we have a duty of justice to obey the laws of a just state, then we plausibly also have a duty of justice to disobey the unjust laws of an unjust state to improve it. If a principle of fairness or a Samaritan duty to rescue can ground our obligations to obey the laws of a just state, then likewise, they can plausibly ground an obligation of resistance too.

Few political philosophers and legal theorists now think that civil disobedience is inconsistent with our political obligations. For this reason, enforcing the law to break up a civilly disobedient demonstration is often a sign of an unhealthy democracy.⁵ It is also a sign of an unhealthy police agency. A police agency that rejects this form of political participation cannot rightly be considered a manifestation of self-government and self-policing.

2 Theories of Civil Disobedience Underdetermine just Policing

Having made the case for thinking of civil disobedience as a healthy part of a complete democracy, let's now look at the limitations of this conclusion for understanding how the police should respond to protests. The major limitations come from the philosophically interesting features of disobedient demonstrations noted at the outset.

Suppose, following Delmas, Dworkin, or Rawls, that citizens have a right to engage in civil disobedience. Still, that right is not absolute. In some cases, it will conflict with the rights of others. This is especially so in the cases under consideration, where the disobedience is carried out in ways that crowd out other designed

⁵As Alexandra Natapoff points out, protests without any arrests are common, and this is more desirable than other kinds of underenforcement. Enforcement in these cases is in tension with democracy, rather than an expression of democratic values (2006, 1743).

uses of public space.⁶ And, again, the relevant enforcement in these cases is not, like forcing a pacifist to enlist in the army after being drafted, essentially forcing someone to violate their conscience. These points operate in tandem: the right to this kind of civil disobedience might be weaker, or less decisive, because of one or both features. On the other hand, as we've seen, the police routinely decline to enforce laws to manage the use of public space, and indirect disobedience is often the only possibility.

Alternatively, suppose, following those with authoritarian impulses or those who are especially sanguine about the extent of democratic authorization, that either there is no right to civil disobedience, or that the democratic procedure morally "cleanses" the actions of state agents such that they're permitted to follow unjust orders or enforce unjust laws. Even if this is true, it does not follow that the police have a blank moral check for responding to disobedient demonstrations. Further, just because it is permissible for police to invoke their authority to control disobedient demonstrations, it does not follow that they should all things considered. Certain police tactics exacerbate the situation.

Accordingly, William Smith sets out a case for *negotiated accommodation*, rather than *prevention* or *management* (2013, 112). Operating within a deliberative democracy framework, Smith argues that negotiated accommodation is to be preferred over these alternatives. It is best suited to allow civil disobedience to effectively amplify voices in deliberation, to prevent the escalation of conflicts between police and demonstrators, and to express the police agency's recognition of civil disobedience as a form of political participation. While I think Smith is right that negotiated accommodation is the ideal to which police agencies should aim, the strategy is beset by real problems in practice.

Negotiated accommodation requires that demonstrators negotiate with the police. But when the protest is a response to the criminal justice system, the police are not a neutral third party. When they are not a neutral third party, successful negotiation and mediation would be surprising. This is unlike, e.g., environmentalist protests against energy corporations, where some *might* view the police as neutral.

To be clear, I do not intend this as an objection to Smith's view. Rather, the claim is that even if we accept the ideal of negotiated accommodation, important questions remain. In what follows, I'll argue that the principle of proportionality serves as a parsimonious and effective tool for evaluating and guiding police responses to disobedient demonstrations.

3 Policing must be Proportional

Proportionality requirements are, I think, the most widely endorsed substantive (rather than procedural) constraint on the execution of political decisions. For force to be proportional, roughly speaking, it must be "fitting." Soldiers, even if they're typically permitted to follow unjust orders in war, are prohibited from using disproportionate means to carry out their orders. If blowing up a munitions factory will

⁶The significance of the designed use of public space is that it reflects a prior, presumably democratic, political decision.

result in the death of a non-combatant, it might be all things permissible to carry out the order. But if doing so will result in 1000 non-combatant deaths, the proportionality principle will prohibit carrying out the order.

Similarly, the criminal justice system is widely held to be constrained by a proportionality requirement. A criminal law, to be legitimate, must be worth it, or satisfy legitimate interests of the state without overly burdening citizens. The punishment for conviction, similarly, must “fit” the crime. Five years in prison for shoplifting a pack of gum, quite obviously, does not match or fit the crime.⁷

That proportionality requirements apply widely is unsurprising considering its source in theories of permissible defensive violence.⁸ People are permitted to use force to defend themselves, but it must be fitting. Lethal defensive violence is not permissible when one is defending oneself from an annoying pinch. It is, however, permissible when one is defending oneself from grievous bodily harm, sexual assault, and so on. And the military and the criminal legal system ideally are forms of institutionalizing defensive force. So, we should conclude that policing must also be proportional.

This conclusion, far from being trivial, has far-reaching implications for theories of just policing. The reason is that, while a law may in principle satisfy the proportionality requirement, it does not follow that police strategies for its enforcement will be proportionate. Just laws can be unjustly enforced. The legal regime that allows Terry stops might be in principle proportional, but the “stop, question, and frisk” strategy employed by the NYPD—considering the broken misdemeanor system and the psychological costs associated with repeated Terry stops—is not.⁹ Most important for present purposes, proportionality requires police to de-escalate situations whenever possible. Officers who routinely fail to de-escalate rely on too much force in their policing.¹⁰

Before turning to the application of a proportionality requirement to the policing of disobedient demonstrations, it is critical to first see how the police themselves can influence what counts as proportional force. In certain cases of defensive force, the need for self- or other-defense is generated by the one who will exercise the defensive force. I’ll argue that determinations of proportionality, and so permissibility, are sensitive to the causal history of police uses of force.

⁷Proportionality in punishment involves a host of additional questions. Those who reject retributive theories of punishment might think that proportionality requirements mislead us by surfacing questions of retribution. The proportionality requirement is most compelling as a check, or ceiling. In this way one can retain a proportionality principle without committing oneself to retributivism about punishment. Thanks to Eric Miller for raising this objection.

⁸See Brennan (2019) for an extension of a theory of defensive killing to policing. Brennan argues that if defensive violence is constrained by a proportionality requirement, then it will apply to the police as well.

⁹See Natapoff (2018) for a discussion of problems with the misdemeanor system in the U.S.

¹⁰See Jones (2021) for a discussion of the police obligation to reduce the risk of deadly force. In earlier work I argue that the police have a variety of special moral obligations (2017). Those special moral obligations mean that police officers have different obligations regarding policing demonstrations than, say, a competing mob would. A group of people protecting their property probably do nothing wrong by setting up a skirmish line, but the police often do (I defend this claim in what follows). Thanks to Eric Miller and Stephen Galoob for urging me to address the special nature of professional policing.

4 Police-Generated Defensive Force Lowers the Proportionality “ceiling”

Intuitively, if someone provokes the need for defensive force, they undermine the defensive force’s justification. It is almost as if they were the initial aggressor, rather than a genuine defender. This intuition is codified to various extents in self-defense law. One plausible explanation, offered by Kimberly Ferzan, is that by intentionally causing the threat that generates a need for defensive force, the provocateur forfeits their right to self-defense against the amount of force they anticipated causing.¹¹ One only retains the right to self-defense in cases where one is entitled or non-culpable for acting in a way that causes the need for defensive force (Ferzan 2013). Along these lines, Ben Jones has argued that in a range of cases he calls “police-generated killings,” the police are blameworthy for creating the need to rely on lethal self-defense, and that the legal code must be modified to hold such officers accountable (Jones 2021).

Following Ferzan and Jones, I’ll hold that when people, including the police, cause the need for defensive force, they alter the force’s justification, and that self-generated defensive force constrains the scope of permissible tactics. But one of the difficulties with understanding policing in terms of defensive force is that police force is usually *other*-defense rather than self-defense. In this section, I’ll extend this thought about provocateurs to policing protests.

I’ll argue that we can explain the provocateur intuition by holding that in at least some cases of self-generated defense, the proportionality “ceiling” is lowered.¹² If causing the need for defensive force alters the normative landscape in the way I suggest, then many cases of seemingly legitimate options for responding to disobedient protests are illegitimate because they are not proportional. Further, I’ll argue that the special moral or fiduciary obligations attached to the police role expand the scope of wrongful provocation, making this an especially important point for evaluating police responses to disobedience demonstrations.

To see how causing the need for defensive force affects the justification of police use of force, consider the relationship between necessity and proportionality. Proportionality requires fittingness, not matching or equality. When a person uses lethal defensive force to prevent their sexual assault, the force is fitting, even if losing one’s life is a graver harm than being sexually assaulted. So sometimes defensive force can be fitting even if it is greater than the force being defended against. Likewise, there are elements of a situation that can render some amount of force not fitting, even if it is *lesser* than the force being defended against. This is the case when there is some lesser amount of force that would get the job done. If you are about to stab me, I am

¹¹Ferzan’s (2013) view, summarized: “provocateurs forfeit their defensive rights when they consciously disregard the substantial and unjustifiable risk that their words or conduct will cause another person to attack them. This means that it is only when a provocateur is subjectively aware that he is potentially causing another to attack him that the provocateur forfeits his defensive rights. And, to be clear, the provocateur should only forfeit employing the degree of force that he subjectively appreciates. If he only foresees nondeadly force, then he only forfeits his right to use nondeadly force.”

¹²This is not offered as a competing account: the forfeiture analysis of provocateurs might apply to police-generated killings while other kinds of police force require a different analysis.

usually permitted to stab you in self-defense. But if punching you would eliminate the threat, and that is obvious to me, I am not permitted to stab you. It is not fitting, even though it would be in other circumstances.

Most readers will be skeptical here because this point is typically expressed in terms of necessity, not proportionality. Stabbing is not necessary, even though it is fitting. If stabbing were necessary, then no one would worry that it was not proportional. And the other options render stabbing unnecessary, not disproportionate. This explains why it is impermissible to stab when punching will do. Further, in many cases it seems that necessity is unrelated to proportionality. If I can prevent your stabbing me by running around in a circle while making funny noises, no force is necessary. It is therefore impermissible, even if it is clearly fitting in the abstract. But, in most cases, the issue is one of figuring out *how much* force is justified. In these cases, it seems to me, certain judgements of necessity are ultimately judgements of fittingness, rather than strict necessity.

To see this, consider an example. Suppose that A poses a culpable threat to B. Suppose also that B has two choices of defensive action, *p* and *q*, that are both proportional in the abstract sense. Finally, suppose that *q* involves less force than *p*. In what sense is *p* not necessary? Only in the sense that there are less forceful options available. But when is an option available? Typically, only when, given the full circumstances of the situation, the option does not require the defender to take on too much risk to their own interests. It is not, after all, as if literally only the least forceful form of effective defensive violence is permitted.

In many cases of self-defense, one will not be required to opt for the least forceful option. B does not act impermissibly by punching A in self-defense whenever he could have punched with slightly less force. The actual least forceful option will often require the defender to take on an objectionable amount of risk that the defensive force will fail or be too costly. Outside of stylized cases, the judgement “*p* is necessary to eliminate the threat” is elliptical for “*p* can eliminate the threat while not requiring the defender to take on too much risk to their wellbeing...” and other moral considerations (including, I’ll argue, relevant special moral obligations). So, whether a defensive action satisfies necessity depends on the set of “available” options, and that set is determined partly by acceptable levels of risk.

Now I want to flesh out some of the facts about the defender that influence these fittingness determinations. When the defender provokes the threat, certain forms of defensive force are no longer fitting. Consider the following case.

Suppose that A intentionally provokes B into punching A in the face. To defend himself, A would have to punch B in the face first. If A were not a provocateur, he would be justified in defensively face-punching B. We might think that A forfeits his right to defensively punch B by doing something that is tantamount to being an initial aggressor. Alternatively or additionally, we might think that A’s menu of proportional defensive options is limited.¹³ According to this analysis, while A may not punch B in the face, A may flick B’s ear, causing enough pain to safely retreat. A’s punching

¹³This is an alternative only for those who deny that provocateurs forfeit their rights. One could hold that in addition to forfeiting their rights in some cases, provocateurs may only resort to relatively low-force options in others.

B in the face would not be fitting because A's responsibility for the threat lowers the proportionality ceiling. A's flicking B in the ear is plausibly fitting, however.

Provocateur cases, when we describe them to include low defensive force options, provide some intuitive support for the claim that self-generated defensive force lowers the proportionality ceiling. In non-provocateur cases, the risk one would have to take on by opting for an ear-flick instead of a face-punch would plausibly be too high; the non-provocateur may opt for the face-punch even if it is not the least forceful effective option. The provocateur simply must internalize those risks.

If policing must be proportional, and if proportionality determinations are sensitive to one's status as a provocateur, then whether a given police action is just will also depend on their status as provocateurs. But, the police cases discussed in what follows are usually not paradigmatic provocateur cases, in the sense that they do not involve an *intention* to generate a threat. They are instead cases of predictable, if not intentional, generations of threat. Because they are predictable, and because police officers have professional moral obligations to de-escalate situations whenever possible, police responses to disobedient demonstrations are sometimes *negligent* or *reckless*. Negligently, even if not intentionally, generating a need for defensive force also lowers the proportionality ceiling.

Why? We can appeal to the same considerations that we might in standard provocateur cases. Why is it that we think hurling racist slurs at a funeral *provokes* a violent response, but no morally serious person entertains the idea that a woman who wears revealing clothing provokes their sexual assault? Because people are entitled to wear whatever they'd like, but people are not entitled to shout racial slurs at funeral attendees. The provocateur does something they are not permitted to do with the intention to produce a threat they can then react to (Ferzan 2013). Similarly, the police officer violates their professional moral obligations by negligently or recklessly doing something that causes a threat to which they must react. Indeed, the police obligation to protect and serve generally requires them to intervene to avert threats, and this strengthens the obligation to avoid doing things that generate violence. Police tactics that predictably escalate situations typically violate the professional obligations of law enforcement, making them relevantly like provocateurs.

One final point: in many cases, the police are engaged in other-defense, not self-defense, or at least not only self-defense. When police establish a skirmish line to control a demonstration, they do so not usually to protect themselves, but to protect the interests of third parties. When they resort to force to maintain the integrity of the skirmish line, that defensive force is also other-defense. But other-defense too is constrained by a proportionality requirement. The professional nature of the other-defense (constrained by special, professional obligations to de-escalate) in both contexts just means that the proportionality ceiling can be dropped without police directly intending to provoke or escalate.

Now, please allow me to hedge. I've offered only some considerations in favor of understanding the relationship between provocation and proportional defensive force in this way. A fully formed theory along these lines would surely be contentious. Yet it seems to me that an acceptable theory of self-defense will have to achieve something in this neighborhood. Provocateurs and those who negligently generate threats to themselves don't get the same scope of permissible self-defense as the rest of us

do. The remainder of the paper draws out the implications of this theoretical orientation in the context of policing disobedient demonstrations.

5 Skirmish Lines Provoke Threats

Above I claimed that extant work on the political ethics of civil disobedience leaves important questions about policing disobedient demonstrations unanswered. Earlier work defends a solution that is structurally unlikely to work in the cases I'm interested in. In practice, there will be failures of negotiated accommodation. The proportionality requirement supplemented with considerations of provocation, I argue here, allows us to reach similar conclusions while also illuminating cases of negotiation failures. To see how, we'll consider a common crowd control tactic: the "skirmish line."

A skirmish line—a tactic borrowed and modified from military engagements—is a line of officers with protective gear ("hats and bats") standing shoulder to shoulder. In the standard formation, there will be a commander and "line backers" behind the line giving commands and sharing information with the officers on the line. The skirmish line is formed to prevent protestors from advancing, where they are ordered to disperse once their path is blocked (Hubbs 1997, 9). Looking at an actual skirmish line allows us to get all the relevant considerations on the table.

On June 2nd, 2020, protestors in New Orleans marched onto Interstate 10 to block traffic. The protests were a response to George Floyd's murder by Derek Chauvin. Like many other protests, the ones that took place in New Orleans called for police abolition or defunding, and at times involved marching on roadways without a permit. Officers with the New Orleans Police Department (NOPD) successfully moved the demonstration off the highway. They did so by kneeling in solidarity with protestors. Protestors were voicing their dissatisfaction with American policing, and the NOPD officers acknowledged their concerns. Rather than establishing an adversarial relationship, the disobedient demonstration became a mutual event, joined by the police. The civilly disobedient activity—obstructing a highway is a felony—was given informal approval, and the demonstration proceeded onto residential streets where they were less disruptive than on a federal interstate. Apparently, having been able to demonstrate their point in a way that demanded and received accommodation from the police and others, while also drawing attention to their message, the protestors were satisfied. This shows that negotiated accommodation can be a successful strategy, even just on instrumental terms.

Unfortunately, the next day, the negotiated accommodation broke down. The NOPD fired tear gas canisters and rubber balls at protestors who advanced on a skirmish line formed near the Crescent City Connection, a bridge crossing the Mississippi River (Stein 2020, Sledge 2021). Like the day before, protestors staged a highway-blocking demonstration to engage the political process. Unlike the day before, the protestors were very close to the bridge. The only place for them to go was across the bridge into nearby Jefferson Parish, or back the way they came. Officers formed a skirmish line on the bridge to prevent protestors from crossing and, police superintendent Shaun Ferguson claims, to avoid the danger of hundreds of protestors walk-

ing across the bridge. When the demonstration reached the NOPD, officers invited a few protest leaders behind the first skirmish line to negotiate. Representatives for the demonstration requested that they be escorted across the bridge and back. The NOPD declined and offered instead to again kneel together in solidarity. Representatives declined. A standoff ensued.

Video footage of the event shows one representative inform the police that they would obey police orders to turn around and disperse if police on the skirmish line put down their batons. NOPD declined. The crowd began chanting these demands. The representative told officers that if the crowd pushed forward, it is unlikely the demonstration would remain peaceful. This was, the representative claimed, not intended as a threat. A different representative, speaking to the crowd, said that if the crowd advanced, the NOPD was likely to use force to prevent them.¹⁴ At this point, many in the crowd began preparing for teargas. Men were called to the front of the line, and some in the crowd begin advancing with their hands up, chanting “hands up, don’t shoot”. NOPD officers fired a canister of tear gas and chaos followed. At least one protestor broke through the skirmish line. By the end of the altercation, NOPD fired three canisters of tear gas and several non-lethal projectiles. The crowd retreated the only way it could, the way it came.

How are we to evaluate this situation? Did the police act justly? Those interested in escaping accountability for the outcome might self-servingly interpret the events as one in which demonstrators posed a threat, and the police reacted with permissible defensive force. According to New Orleans’ mayor LaToya Cantrell, “A small group of individuals made the deliberate decision to escalate a physical confrontation with our officers (and) produced an outcome that no one wanted” (Vargas and Stole 2020). The NOPD claimed it was a necessary response to “escalating, physical confrontation with our officers” (@NOPDNews, June 3, 2020). An officer ordered to take a place in the skirmish line, seeing clearly that the crowd has two options, either to advance on the skirmish line or to turn around, and seeing that the representatives are insisting upon crossing the bridge, would reasonably feel threatened. Like Mayor Cantrell or Superintendent Ferguson, one might take this to be a case where the officers made a lawful command, stood their ground, and resorted to defensive force only when threatened. But while I’ll argue that this is in fact a self-serving interpretation that should be rejected, it’s not an absurd interpretation either.

A common mistake, one made by the Supreme Court, in evaluating cases of self-defense, is to zoom in on the split-second before an officer pulls the trigger to determine whether the use of force was reasonable and so justified.¹⁵ Zooming in on the split-second means we overlook the bad decisions that put the officer in a position to need to use force. Likewise, the official interpretation of this altercation makes the same error. The proportionality approach I defended above guards against it.

To see that, we must return to the civilly disobedient nature of the altercation. The event began as a form of civil disobedience. Further, given the impetus for the dem-

¹⁴This point highlights a further difficulty for negotiated accommodation: sometimes, the protestors are not a cohesive group with shared goals or preferences. This can make negotiation difficult or impossible.

¹⁵See Jones (2021) for a discussion of this problem in the Graham decision. *Graham v. Connor*. 1989. 490 US 386.

onstrations, the police lack the kind of legitimacy in the eyes of the protestors that would enable them to effectively negotiate. This means the escalating disobedience is predictable. Consider: advancing on the skirmish lines with hands up *just is* refusing to obey the police order to disperse. The protestors had the options of retreating and obeying, or advancing and disobeying. With these facts in mind, it is entirely unsurprising that the disobedient demonstrators did not suddenly change their minds and obey the NOPD's commands.

Not only is the disobedience predictable, but so is the uncivil escalation. Protestors are likely to engage the police not only by advancing on the skirmish line, but also by throwing rocks, bottles, returning tear gas canisters, etc. Protests are likely to include a small minority of people who are inclined towards violence and setting up a skirmish line puts those people in a position to resort to violence. As one San Diego SWAT veteran noted over 20 years before the Crescent City Connection incident, the shields of the skirmish line can be "missile magnets" (Hubbs 1997, 9–10). When the situation escalates, and the police want to hold the line, they too will have to resort to force: chemical aerosols, rifles with "baton" rounds, shotguns with bean bag rounds, "flashbangs," and even live ammunition.

The predictable nature of the disobedience and its escalation has asymmetric implications for the police and protestors. The protestors will reasonably believe they did not initiate force. They will be inclined to view their return of force as defensive. They simply attempted to exercise their civil rights. In their view, the police initiated force by preventing them from continuing their march or other protest activity. And in turn, since the police officers (as well as the protestors) are now in genuine danger of physical harm, both groups will be inclined to increase their level of force to achieve control of the situation and eliminate any threats to their safety.

But, and this is a crucial part of the case, better policing could have prevented the outcome. Police know that a hardline approach to a demonstration like this is likely to escalate tensions, risking violence. Police have known for decades that the skirmish line generates violence, and in turn, a need for defensive force. Additionally, given where the protestors entered the expressway, once on it, the only way off was an on-ramp that the NOPD was using for their own tactical purposes. This meant that the march would either have to cross the bridge or turn around, both problematic options. The psychology of retreat is important: when protesting the police, obeying and retreating is deferential to those claiming or exercising power. Better to give the protestors an option for continuing that doesn't require deference to the police. By forcing deference to the police, they predictably escalate the confrontation. Had the police maneuvered such that once on the bridge, the protestors could be directed to the next ramp (i.e., their options weren't restricted to obey and retreat, or disobey and cross the line), the situation may not have escalated.

The mayor's response to the situation is therefore not only self-serving and deeply naïve regarding disobedient demonstrations, but also, if taken seriously by the police, likely only to create further confrontations that become violent. By casting this as a dispute between a small group of violent protestors and the police exercising their authority, we overlook the fact that the NOPD's tactics were partly responsible, and we do not hold them accountable for violating their professional moral obligations. In some cases, deliberately disobeying an officer, even non-violently, poses a kind of

threat to their legitimate interests, and plausibly justifies the use of force. If someone enters and refuses to leave a homicide crime scene, officers are presumably within their rights to use force to remove them from the scene. But we've already established that the protestors are attempting to satisfy a weighty and legitimate interest of their own, one the police have powerful reasons to respect.

When we take a step back, then, we can see that the skirmish line will often be part of police-generated defense. The police are not intentional provocateurs, but in view of these predictable dynamics they are negligently or recklessly generating a need for defensive force. Given their professional obligations to protect the interests of the policed, this renders the provocation impermissible, and so renders the defensive force unfitting.

What does this analysis imply about other cases? In light of this predictable dynamic, we must compare the total amount of force used during the interaction to the goal of forming the skirmish line in the first place, *not to the goal of officer self-defense*. If the decision to establish a skirmish line is an arbitrary decision to enforce the law in the context of ongoing civil disobedience, the tactic looks disproportionate (as well as undemocratic). It's not that the interest in dispersing the protest is illegitimate. Rather, the claim is that, like many cases in which the use of force would be disproportionate, the tactic is an unjust manner of protecting a legitimate interest.

I've argued that the NOPD caused the disobedient demonstration to be uncivil. But in a situation where the police have established a blockade (ideally one made of inanimate barriers to reduce the problem of "missile magnet" riot gear) that does not reduce the option set to 'obey' or 'fight', and instead includes the option to continue the civil disobedience elsewhere, the police do not necessarily overly burden the protestors by exercising the authority to control space. Alternatively, by reducing the option set to 'obey' or 'fight,' the police often predictably escalate the situation in violation of their professional obligations. In the Crescent City Connection case, had the demonstration been able to continue, marching right off the highway and back into the city, the temptation to cross the bridge may have never formed. By ensuring that there are options for continuing the disobedient demonstration without directly disobeying a police command, the dynamics—normative and descriptive—of the situation are different.

Suppose that the NOPD did not act negligently, and instead succeeded in blocking the bridge with police vehicles in such a way that the natural path for the march was down the ramp and off the highway. Were the demonstrators to insist upon crossing the bridge, invoking the police authority in that instance would not be tantamount to shutting down political engagement and democratic voice. Civil disobedience could have shut down nearby St. Charles Avenue. This would be a serious inconvenience for motorists, satisfying the demonstrators, while also allowing the police to maintain the primary route in New Orleans across the Mississippi River. Further, the legitimate interest in disobeying the law would not lead predictably to an altercation with the police. Instead, the decision to cross the skirmish line would look much more like an act of aggression than a form of legitimate political participation.

Because the police help to determine the nature of the disobedience, their tactics play a major role in determining whether their force is permissibly defensive. Suc-

successful negotiated accommodation is as good as it gets in protest policing.¹⁶ But when that fails, police will have to make decisions. Sometimes negotiated accommodation will fail *even when the police are acting blamelessly*. The proportionality analysis pushes us towards an accommodating stance even when negotiation fails.

So far, we've looked only at the interests of the demonstrators and the interests of the police. Thinking about these interests helps generalize the analysis. One might be inclined to say that marching along roadways (especially highways) is an illegitimate form of protest because it wrongly prevents bystanders from satisfying their interests in the use of public space. Proponents of this argument usually couch it in terms of the hypothetical emergency vehicle that cannot make it to the hospital because it is stuck in traffic, rather than in terms of their interest in efficiently completing their commute. Still, both kinds of interests are legitimate and must be considered.

In keeping with the general idea that it is crucial to allow everyone a share of public space, a forceful police response can be proportional if it is needed to prevent a group from claiming an unfair use of space. If, rather than marching down the highway for a constrained amount of time, a group of demonstrators attempts to block a highway or other public thoroughfare for an extended period (say, squatting on the Crescent City Connection for hours or days instead of marching across and back), then the proportionality calculus looks different. In a case like this, the demonstrators are claiming too much of the use of public space. It may not be unreasonable to ask people to sit in traffic for a relatively short amount of time to allow a political demonstration to occur, and for it to remain civil. But if a demonstration amounts to claiming public space for one's own purposes in such a way that others no longer have access to it, then the predictable use of force that would result from dispersing it can match the severity of harm caused by such a demonstration.

Why think that bystanders should have to sacrifice their interests when there are forms of civil disobedience that would not require them to do so? One thing to say is that in most cases, the use of public space required by a disobedient demonstration cannot help but thwart the interests others have in competing uses of public space. A rally in Jackson Square crowds out other designed uses of that space. It is in this respect identical with marches on roadways. Another thing to say is that if no one is at all inconvenienced by disobedient demonstrations, it will typically fail to achieve its goal of drawing publicity to the cause, thereby undermining the interests of the disobedient. This is simply one of many ineliminable conflicts of legitimate interests. Not all problems have good solutions.

¹⁶No matter who is doing the negotiating and policing. As Brandon Del Pozo (2022) has pointed out, in some cases protestors will take on that task themselves, stopping and directing traffic and so on. But they still have to do the job of bargaining with e.g. the motorists they police (or otherwise simply brute force their decision).

6 Conclusion

I've argued that policing must satisfy a proportionality requirement, and that the proportionality "ceiling" is lowered in cases of police-generated defensive force. People have a legitimate interest, or even a genuine moral right, to engage in civil disobedience. Police have a professional obligation to de-escalate and minimize their use of force. Thus, when the police take actions that predictably escalate conflicts with disobedient demonstrators by forcing disobedience to be uncivil, the police act in important ways like provocateurs. Their provocateur status drops the ceiling on permissible use of force, often rendering those escalating tactics illegitimate and unjust.

The use of rubber projectiles and teargas in the Crescent City Connection case is unjustified because it exceeds the proportionality ceiling that the ill-placed skirmish line lowered. Instead of firing the teargas, the NOPD commanders should have retreated, breaking down the skirmish line to let the marchers through. More importantly, the argument highlights the need to take a global, rather than local, view of the interaction to appropriately evaluate it: really, the NOPD should have policed the demonstration such that when negotiated accommodation broke down, the protestors could continue satisfying their weighty interest without engaging in uncivil disobedience.

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