

1-2007

On a Moral Right to Civil Disobedience

David Lefkowitz

University of Richmond, dlefkowi@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/philosophy-faculty-publications>



Part of the [Ethics and Political Philosophy Commons](#)

Recommended Citation

Lefkowitz, David. "On a Moral Right to Civil Disobedience." *Ethics* 117, no. 2 (January 2007): 202-33

This Article is brought to you for free and open access by the Philosophy at UR Scholarship Repository. It has been accepted for inclusion in Philosophy Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

On a Moral Right to Civil Disobedience*

David Lefkowitz

In this essay I argue that citizens of a liberal-democratic state, one that I argue has a morally justified claim to political authority, enjoy a moral right to engage in acts of suitably constrained civil disobedience, or what I will call a moral right to public disobedience. Such a claim may well appear inconsistent with the duty usually thought to correlate to a legitimate state's right to rule, namely, a moral duty to obey the law.¹ If successful, however, the arguments that follow entail that the duty correlative to a liberal-democratic state's justified claim to political authority is in fact a disjunctive one: either citizens of such a state must obey the law or they must publicly disobey it.²

In Section I, I clarify the position to be defended in this article by distinguishing it from two kinds of cases where the moral justifiability

* I presented an earlier version of this article at the NEH Summer Seminar on Political Obligation, Democratic Legitimacy, and Human Rights, and I extend my gratitude to Andy Altman and Kit Wellman for inviting me to participate in it, to the NEH for funding such a wonderful seminar, and to the other participants for their many helpful comments. Any views, findings, conclusions, or recommendations expressed in this publication do not necessarily reflect those of the National Endowment for the Humanities. For their many insightful criticisms I also wish to thank Simon May, Terry McConnell, Colleen Murphy, Chris Naticchia, Steven Wall, and several reviewers and editors for this journal; I regret that I was not able to address all of their remarks here. A portion of this article was presented at the XXII World Congress of Philosophy of Law and Social Philosophy; I thank the philosophy department and the International Programs Center at the University of North Carolina, Greensboro, for helping to fund my attendance at that meeting. A Summer Excellence Grant from the University of North Carolina, Greensboro, was also instrumental to the completion of this article.

1. Throughout this article I understand a legitimate state to be one with a justified claim to political authority, historically thought to correlate to a duty to obey the law, and not merely a justified claim to enforce the law. See A. John Simmons, *Moral Principles and Political Obligation* (Princeton, NJ: Princeton University Press, 1979), and *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001). This contrasts with Allen Buchanan's definition of legitimacy in "Political Legitimacy and Democracy," *Ethics* 112 (2002): 689–719.

2. Citizens of such a state may also appeal for status as conscientious objectors, but I set this possibility aside here.

Ethics 117 (January 2007): 202–233

© 2007 by The University of Chicago. All rights reserved. 0014-1704/2007/11702-0003\$10.00

of civil disobedience does not require that those who commit such acts have a right to do so. The first kind of case involves civil disobedience in a state without a justified claim to political authority, while the second kind involves cases of civil disobedience where other moral considerations defeat or outweigh the duty to obey the law. In both these kind of cases, agents act rightly when they disobey the law, or at least they do not act wrongly merely in virtue of having disobeyed it. In contrast, if citizens of a state with a justified claim to political authority enjoy a moral right to public disobedience, they may engage in such acts even when in doing so they fail to act rightly.³

In Section II, I provide a summary argument justifying a liberal-democratic state's claim to political authority. My aim is not to defend this argument at any length. Rather, I seek only to provide enough detail for the reader to determine whether a moral right to public disobedience is consistent with the existence of a duty to obey the law justified by the proposed account.

In Sections III and IV, I develop a defense of the moral right to public disobedience by way of a response to Joseph Raz's argument for the contrary position. This defense has three parts. First, I provide a justification for the right in question that situates it within the justification for the state's claim to political authority outlined in Section II. Specifically, I argue that in circumstances characterized by (a) the moral necessity of collective action and (b) reasonable disagreement over the specific form collective action ought to take, the moral right to political participation cannot be adequately recognized in law but instead entails a suitably constrained moral right to civil disobedience. Second, I contend that acts of civil disobedience in a state with a justified claim to political authority of the sort I work with here must meet certain conditions in order to be morally justified; only those that meet these conditions fall within the scope of a moral right to public disobedience. Third, I argue that the moral right to public disobedience does not entail a duty on the state to refrain from coercively interfering (in certain ways) with its citizens' attempts to exercise this right. Rather, drawing on Joel Feinberg's arguments concerning the expressive element of punishment, I argue that while the state may *penalize* publicly disobedient actors for their conduct, the moral right to public disobedience entails a duty on the state to refrain from *punishing* them.

While Sections III and IV provide a justification for, and characterization of, the moral right to public disobedience, Section V focuses on the claim that the moral right to public disobedience constitutes a right to do wrong. I begin by explicating the notion of a right to do wrong, distinguishing between a claim right against others that they not

3. I discuss in detail the exact nature of this "permission" in Sec. V of this article.

interfere (in certain ways) with one's ϕ ing, even when ϕ ing is wrong, and a liberty right (or permission) to ϕ , where, in a sense to be explained, one morally ought not to ϕ . I then sketch two justifications for the existence of a claim right against the state that it not punish an agent for her publicly disobedient act, even when the agent aims by that act to advocate for a change in law or policy that, though she believes it to be morally superior, would in fact be less just or moral than existing law or policy. Both justifications appeal to the noninstrumental value of an agent's exercise of autonomous choice or authorship over her life, including that part of it in which she acts with others to see to it that all are treated as morality requires. The two justifications differ, however, in that the first treats the noninstrumental value of autonomous choice as unconditional—that is, as having its value independent of the value (or disvalue) of the choices the agent makes—while the second treats the noninstrumental value of autonomous choice as conditional on the agent's choices being valuable or good ones. Within limits (e.g., those set by basic moral rights), the noninstrumental value of (valuable or good) autonomous choice or authorship justifies promoting opportunities for agents to engage in such activities, even when they misuse those opportunities by making erroneous decisions about what to do, including what laws or policies to support.

I conclude this essay by presenting an initial argument for the admittedly strange proposition that, in addition to the aforementioned claim right, agents enjoy a liberty right to advocate for laws or policies that are in fact less just than existing ones, but where (a) it is reasonable for those who advocate for these changes to believe that they would in fact improve the match between law and justice, and (b) they sincerely believe that such changes will have this result. On the assumption that 'ought' implies 'can', I contend that we can demand only that others act on reasonable and sincerely held beliefs regarding what morality requires. It follows that they are at liberty to do so—we have no claim against them that they refrain from acting on such beliefs—even when we think, correctly, that though they are reasonable, those beliefs are mistaken. That is, in such a case the agents in question enjoy a liberty right to do what is, strictly speaking, wrong.

I

Civil disobedience, as I will understand it here, consists 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.⁴ Though quite capacious, this

4. This definition is not meant to be historically accurate, in the sense that it correctly applies to all (or almost all) of those who have either identified themselves as civil disobedients or had that label applied to them. For example, using the definitions set out

definition of civil disobedience excludes nonpolitical disobedience (i.e., common crimes), as well as several categories of politically motivated disobedience. For instance, it distinguishes civil disobedience from revolution, which aims to replace the existing state with a new one and not merely to modify some of the existing state's laws or policies. It also distinguishes civil disobedience from conscientious objection, which does not include as an essential element the advocacy of change to some law or policy, but only the claim (or perhaps better, the plea) that the agent should be exempt from having to obey a certain law or comply with a particular policy. Moreover, this definition is morally neutral; whether and when agents are morally permitted (or even required) to engage in civil disobedience remains an open question.⁵

In a state without a justifiable claim to political authority, civil disobedience in itself presents no moral difficulty. While certain consequences of such an act may make that act morally problematic—for instance, if the act in question directly harms innocent third parties—no moral significance attaches to the mere fact that it involves disobedience to the law. This is not so, however, in a state with a justifiable claim to political authority, for citizens of such a state have a duty to obey the law that correlates to the state's right to rule them. Civil disobedience at least appears to conflict with this duty and so is morally problematic in itself and independent of other moral considerations that may bear contingently on any particular act of civil disobedience.

Of course, even in a state where citizens have a duty to obey the law, the conflict between such a duty and the commission of an illegal act, including civil disobedience, may be only apparent. The duty to obey the law may be a *pro tanto* or prima facie moral reason that in some cases is defeated by other moral considerations that favor (or even require) acting illegally, such that citizens act rightly (i.e., do not act contrary to duty) when they adopt the latter course of action. Alter-

in the text, Thoreau counts as a conscientious objector, while Gandhi qualifies as a revolutionary (albeit a nonviolent one). Perhaps, then, civil disobedience as defined here should be understood as but one form of principled disobedience to law (or political authority), a category of actions to be contrasted with common crimes or disobedience for mere personal gain. Note, too, that on this definition an agent will count as engaging in civil disobedience even if he does not believe that he has much chance of bringing about a change in the law or policy he protests.

5. This analysis of civil disobedience follows closely the account provided in Joseph Raz, *The Authority of Law* (Oxford: Clarendon, 1979), 263. It differs only in excluding from the domain of civil disobedience attempts to merely dissociate oneself from some law or public policy. I believe that acts of this latter type are better analyzed as instances of conscientious objection. For an excellent summary of the many vexing problems that arise for any attempt to provide a morally neutral analysis of civil disobedience, see Paul Harris's introductory essay in *Civil Disobedience*, ed. Paul Harris (Lanham, MD: University Press of America, 1989), 1–56.

natively, the duty to obey the law can be conceived of as a preemptive reason for action, that is, a reason that excludes certain other reasons from an agent's deliberation and replaces them with a new reason for action (i.e., one that would not exist in the absence of the preemptive reason), namely, the law's requiring some conduct C.⁶ However, even when conceived of as a preemptive reason, the duty to obey the law may not always entail the moral impermissibility of illegal conduct. The duty to obey the law may not exclude all of the reasons that apply to an agent in a given case, and a nonexcluded reason for violating the law may in turn defeat the reason for action provided by the law's requiring some conduct.⁷ In such a case, citizens will not act wrongly simply in virtue of disobeying the law.

Whichever one of these two accounts of the nature of the reason provided by a duty to obey the law we choose, both show such a duty to be compatible in principle with civil disobedience, at least under certain conditions. That is, each account shows that citizens can act rightly when they commit an act of civil disobedience, in the sense that they act on an undefeated moral reason. In what follows, however, I argue for a stronger claim, namely, that citizens of a state with a justified claim to political authority have a moral right to commit civil disobedience (or, more precisely, a moral right to a suitably constrained form of civil disobedience which I label public disobedience). If correct, this claim entails that citizens act within their moral rights when they commit an act of public disobedience, even when in doing so they fail to act rightly. To use a common but contentious phrase, a moral right to public disobedience consists in a right to do wrong.

In Section V, I examine in greater detail the idea of a right to do wrong and defend the claim that a moral right to public disobedience involves such a right. First, however, I must provide a justification for the contention that citizens of a legitimate liberal-democratic state have a moral right to public disobedience. I begin in the next section by outlining an argument in support of the claim that liberal-democratic states enjoy a justified claim to political authority. I then proceed in Section III to demonstrate that a state's recognition of the moral right to public disobedience is not only compatible with this defense of political authority but also necessary for it.

6. See Joseph Raz, *Practical Reason and Norms*, 2nd ed. (Princeton, NJ: Princeton University Press, 1990), and *The Morality of Freedom* (Oxford: Oxford University Press, 1986) for elaboration of this conception of practical reason.

7. Raz, *Practical Reason and Norms*, 40; see also Leslie Green, *The Authority of the State* (Oxford: Clarendon, 1988), 39.

II

My defense of a liberal-democratic state's political legitimacy has its basis in a contractualist account of what is involved in treating others as autonomous agents. As elaborated by T. M. Scanlon, morality consists in the set of principles for the general regulation of behavior that suitably motivated agents could not reasonably reject.⁸ Suitably motivated agents are conceived of as having two fundamental commitments: (1) a commitment to leading a way of life they find valuable and meaningful and (2) a commitment to limiting the pursuit of that way of life where necessary to accommodate other agents who have these same two commitments. Hence morality consists in those principles agents would choose to govern their own conduct (i.e., "rule themselves"), insofar as they are what Rawls terms rational and reasonable.⁹ To act only on principles that others could not reasonably reject, to constrain in this manner the pursuit of those valuable activities that make one's life a good one, is simply to respect other agents' autonomy, to treat them as creatures whose conduct can be justifiably limited only in ways that they themselves would limit it to express their respect of others' autonomy (if they were suitably motivated).

The method of reasonable rejection can be used to establish the specific duties that all moral agents owe to all other moral agents or, what is the same, to characterize in greater detail the kinds of treatment that suitably motivated agents would reject as unreasonable. Though Scanlon does not say so, I contend that a moral agent's natural duties to refrain from treating others in various ways that they could reasonably reject correlate with the rights of those others not to be treated in those ways.¹⁰ Talk of both duties and rights is merely a shorthand way of

8. T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Belknap Press of Harvard University Press, 1998). As I argue elsewhere, Scanlon appears to employ two distinct notions of 'reasonableness'. The first, which I label moral reasonableness, refers to a particular kind of motivation on the part of an agent, which I describe in the text as the second of a suitably motivated agent's two fundamental commitments. The second, which I label cognitive reasonableness, describes those judgments made in circumstances characterized by the burdens of judgment. See David Lefkowitz, "A Contractualist Defense of Democratic Authority," *Ratio Juris* 18 (2005): 346–64.

9. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 52.

10. By "natural" duties I mean only those duties that agents have simply in virtue of the fact that they are moral agents—i.e., creatures capable of acting for moral reasons. Natural duties, in this sense, are to be contrasted with acquired obligations: obligations an agent has only as a result of the exercise of her will. To avoid any potential confusion, I will talk of basic rights, rather than natural ones, as correlative to these duties. Of course, it does not follow necessarily from X having a duty to treat Y in a particular way that Y has a (claim) right against X that he be treated in this way. Rather, the right may be held by a third party; thus Z may have a (claim) right against X that he treat Y in a particular way. Though I cannot argue for it here, I deny that there are any natural (i.e., nonacquired)

referring to moral principles for the general regulation of behavior that no one could reasonably reject, not a reference to foundational values that are incorporated, already morally laden, into the process of determining what principles cannot be reasonably rejected.

For reasons of space, I will not argue here for a particular list of rights that all moral agents, as such, possess. Instead, I will simply stipulate that they include those rights often said to be basic or human rights, such as (but not necessarily limited to) a right to be free from deliberately or negligently inflicted bodily harm, a right to freedom of religious belief and practice, a right to freedom of speech, a right to adequate nutrition, and a right to basic health care. Correlative to these rights are duties on all other moral agents to see to it that they are not violated. I suggest that, in order to do so, individual agents will often need to act collectively and that modern states consist partly of institutions designed to facilitate this sort of collective action.¹¹ Laws serve to specify the design of these institutions, spelling out both the state of affairs to be realized by collective action and the form that each individual's contribution to (or participation in) the collective enterprise ought to take. Yet reasonable disagreement will inevitably arise with respect to these matters, that is, with respect to what the law ought to be.¹² In such circumstances—those characterized by (a) the moral necessity of collective action and (b) reasonable disagreement over the form collective action ought to take—the recognition of each person's equal status as an autonomous agent requires a decision procedure that suitably motivated agents could not reasonably reject.¹³ Elsewhere I argue that because it accords equal moral authority to settle disputes over what the law ought to be to all those with a duty to participate in (or contribute to) the legal order, a minimally democratic and liberal state meets this condition. Such a polity is one in which any authoritative settlement of a reasonable moral disagreement reached by the state, including disputes over the design of the state's decision-making institutions, is provisional in the sense that there is a process for changing it that both is democratic and respects individuals' basic rights.¹⁴ The

duties of this type (as there might be if God had a claim right to people treating one another in certain ways).

11. I understand collective action to include both cooperation and coordination.

12. By "reasonable disagreement" I mean cognitively reasonable disagreement—disagreement that is intelligible in light of the burdens of judgment.

13. Recall that for the contractualist, to treat others in ways that they cannot reject, insofar as they are suitably motivated in the sense defined above, constitutes respect for their status as autonomous agents.

14. Note that the position sketched here does not reconcile democratic authority with individual autonomy by claiming either that casting a vote in a democratic decision procedure qualifies as consent or quasi consent to comply with the outcome of the procedure or that, since an agent has voted in the decision procedure, she is in some sense

object of this article is to demonstrate that respect for persons as autonomous agents (in the sense defined above) also requires that the state acknowledge a moral right to public disobedience on the part of its citizens. Together, these arguments flesh out (at least in part) the content of a right to political participation that agents must enjoy in order for the state to have a justified claim to political authority over them.

As I noted in the previous paragraph, that a state is democratic does not suffice to justify its claim to political legitimacy. In addition, the state must be a liberal one, by which I mean that it must manifest a principled commitment to respect for individuals' basic rights.¹⁵ Individual rights designate the limits of the compromises it is reasonable for any agent, including the state, to demand of people regarding their freedom to pursue what they believe to be the good life. Therefore, suitably motivated agents could reasonably reject the authority of any state that did not, as a liberal state does, eschew on principle the deliberate or negligent violation of individual rights.¹⁶ Thus being liberal and democratic are jointly sufficient as a justification for a state's claim to political authority over its citizens and a correlative duty on their part to obey the law.¹⁷

ruling herself. Rather, democratic authority is alleged to be compatible with a specifically contractualist account of autonomy—it is the fact that one could not reasonably reject the authority of a democratic decision procedure in circumstances characterized by the moral necessity of collective action and reasonable disagreement over the form collective action ought to take that renders democratic authority consistent with respect for persons as autonomous agents.

15. Liberal states manifest a commitment to basic rights in the kind of reasons (usually) appealed to by legal officials in carrying out the duties of their offices, as well as in the very design of the legal order itself, as, e.g., in the construction of various checks and balances on the authority of different officeholders. Such a commitment is consistent with occasional rights violations that occur as a result of mistakes or unintended but nonnegligent consequences, but not with the intentional violation of or negligent disregard for basic rights.

16. Thus if a democratic majority enacts sufficiently unjust laws—namely, laws that conflict with a principled commitment to respect for basic rights—civil disobedience raises no general moral problem, because the state lacks legitimacy. (Recall the discussion of this point in Sec. I). Yet laws may be unjust or unwise without conflicting with this principled commitment (and not only because laws are often underinclusive, overinclusive, or both), and it is in these cases, I argue, that citizens of a liberal-democratic state have a duty to obey the law (or to engage in public disobedience). For anyone committed to a defense of democratic authority on noninstrumental grounds, in order for the duty to respect democratic authority to have any independent weight, it must be the case that there are some instances in which that duty defeats other moral duties.

17. While the fact that a state is both liberal and democratic suffices to justify its claim to legitimacy, it may be that states can justify their authority over particular individuals on other grounds, such as those individuals' voluntary acquisition of a duty to obey the state or the fact that agents are more likely to act as reason requires by obeying the law than by trying to determine this for themselves. However, the former justification for a duty to

When confronted with the demand that she contribute to (or participate in) the collective-action scheme that is the domestic legal order, an agent can pose two challenges: (1) on what basis do I have a moral duty to contribute to this scheme? and (2) why must my contribution take the form set out in the law? On the account of political obligation sketched here, the answer to the first question is that the agent has a natural duty to others to see to it that they do not suffer violations of their basic rights, and fulfilling this duty requires collective action. The answer to the second question is that a culpable failure to obey the law of a liberal-democratic state, at least on the part of an agent with a right to participate in its governance, constitutes a failure to respect the autonomy of the others with whom the agent must act collectively in order to fulfill her natural duty. Assigning less or no weight to others' judgment regarding the design of a *collective-action* scheme constituted by democratically enacted law treats those others in a denigrating or degrading way; in short, it amounts to a denial of their status as autonomous agents and their claim to moral equality as such.

Thus my defense of a liberal-democratic state's legitimacy includes both an instrumental and a noninstrumental component. It may be, though, that the noninstrumental component—namely, the fact that respect for others' autonomy requires acknowledging the authority of a decision procedure that grants an equal say to all—will more often figure in the response to a challenge to the duty to obey a particular law in a particular case. For example, it will account for why an agent is not permitted to disobey the law simply on the grounds that he believes (possibly correctly) that enough others will obey it so that his disobedience will have only a morally insignificant impact on the effectiveness of the scheme. All of the other participants in the scheme may justifiably ask why this agent should decide who will receive the benefits made possible by the fact that there are a surplus of contributors (or contributions) to the collective scheme. The question of how to distribute the opportunities or benefits made possible by the fact that there is a surplus of contributors to the scheme is one that each of the contributors has an equal moral claim to settle. Thus, while it is true that an agent who defects from a scheme with a surplus of contributors will not wrong

obey the law likely holds for very few subjects of modern states, while the latter justification does not entail a duty to obey the law in general, but only in specific cases. I believe that the account of political obligation sketched in the text (or one similar to it) is the theory most likely to demonstrate that all citizens of existing liberal-democratic states have a general duty to obey the law, and so it is on the reconciliation of a moral right to civil disobedience with this account of a duty to obey the law that I focus here. (I set aside any complications for the exercise of a moral right to public disobedience that may arise from an agent having a duty to obey the law on grounds in addition to the fact that the state of which he is a citizen is a liberal-democratic one.)

those who have a claim to the good provided by the scheme, she will wrong those who have a claim equal to hers to determine how the surplus of contributors (or contributions) is to be distributed. Decisions regarding how such opportunities are to be distributed ought to be made democratically, that is, by a procedure that (at least at the most basic level) grants equal authority to determine the design of the scheme to all those with a duty to participate in it.¹⁸

No doubt much more needs to be said to support the account of a liberal-democratic state's legitimacy sketched above.¹⁹ Recall, however, that here I aim only to provide enough detail for the reader to determine whether the arguments that follow successfully reconcile a moral right to (suitably constrained) civil disobedience with this defense of a liberal-democratic state's claim to political authority. Accordingly, I proceed in the next section to provide a justification for a moral right to public disobedience in a liberal-democratic state, a project I begin by examining Joseph Raz's argument for the opposite conclusion.

III

Raz offers a quite concise argument against a right to civil disobedience in a liberal state.²⁰ He begins with a stipulative definition of such a state as one in which the moral right of every person to political participation is adequately recognized and protected in law. It follows straightfor-

18. It might be objected that in some cases no efficient mechanism exists, or could be created, for determining how a surplus of contributors (or contributions) ought to be distributed. That is, any attempt to do so would "use up" all of the surplus or result in a worse state of affairs than that in which some of those with a duty to contribute unilaterally determine that their contribution is unnecessary. I contend that this line of argument assigns insufficient noninstrumental value to the respect for others' autonomy realized by democratic decision making. Even if it is the case that the promotion of well-being would be greater if a particular individual (or small number of individuals) disobeyed a given law enacted by a liberal-democratic state, the duty or permission to pursue this end is defeated by the duty to recognize other agents' claim to equal authority to determine the form that collective action should take (including the possibility that certain agents should have no duty to contribute at all). However, there may be a duty to advocate for democratically enacted changes to the law aimed at reducing surplus contributions or improving the match between law and morality (above the baseline match that is necessary for the state's legitimacy).

19. For a more detailed defense, see Lefkowitz, "Contractualist Defense." For justifications of a democratic state's claim to political authority that have important affinities to the one outlined in the text, see Thomas Christiano, "The Authority of Democracy," *Journal of Political Philosophy* 11 (2003): 245–70; Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon, 1999); Scott Shapiro, "Authority," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (New York: Oxford University Press, 2002), 382–439; and Christopher Heath Wellman's contribution in Christopher Heath Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* (New York: Cambridge University Press, 2005), 3–89.

20. Raz, *Authority of Law*, 271–74.

wardly from this definition that in a liberal state there can be no right to civil disobedience (at least as Raz and I understand that concept). At a minimum, civil disobedience involves disobeying the law for the purpose of political participation, for example, expressing one's disapproval of a government policy or calling attention to a legally permissible injustice as part of an effort to remedy it. But the right to political participation is already adequately recognized and protected by law in a liberal state—that is what makes the state a liberal one. Therefore the subject of such a state cannot appeal to her moral right to political participation in order to justify her disobedience to law.²¹ Thus Raz concludes that while in certain circumstances a citizen of a liberal state may act rightly when she commits an act of civil disobedience, say, if doing so will improve the justice of the legal system, it is never the case that she has a right to do so.

Raz asserts that “every claim that one’s right to political participation entitles one to take a certain action in support of one’s political aims (be they what they may), even though it is against the law, is *ipso facto* a criticism of the law for outlawing this action.”²² This claim is mistaken. As I will now argue, it does not necessarily follow from the assertion that one has a moral right to take a certain action in support of one’s political aims—specifically, disobeying certain laws—that one is criticizing the law for outlawing this action. Or at least it does not necessarily follow that one is criticizing the state for interfering (or threatening to interfere) with one’s committing (or attempting to commit) such actions where interference takes various forms for which the state would be criticized were it to interfere in these ways with citizens’ attempts to exercise their moral rights to political participation by legal means. Of course, at least in a state with political authority, the outlawing of an action does not mean simply that the state retains a liberty right to interfere with one’s commission of that act. It means as well that the state’s ordering one not to do the action in question provides one with

21. Raz does not explicitly state the basis of the moral obligation to confine one’s political participation to legal means when those means constitute adequate recognition of the moral right to political participation. But drawing on the theory of political obligation he develops elsewhere, we can construct the following argument. Subjects of a state have a duty to obey its laws when by doing so they are more likely to act as the balance of reasons dictates than if they try to determine this for themselves. One type of case in which this normal justification for obedience to practical authority applies is when acting on the balance of reasons requires coordination. Presumably there are a number of incompatible but at least adequate ways in which agents might coordinate with one another in order to successfully exercise their rights to political participation for the purposes of reaching collective decisions. When any one of these incompatible but adequate ways is realized in law, the normal justification for practical authority entails that all those subject to the law ought to confine their political participation to legal means.

22. Raz, *Authority of Law*, 273.

a reason not to do it, simply because the state said so and independent of the state's threat to interfere with one's commission of the act. But if the arguments that follow are correct, then the duty correlative to the state's right to rule ought to be understood disjunctively: obey the law or commit an act of public disobedience.²³

As I argued in the previous section, a legal order constitutes a collective-action scheme through which individuals can coordinate and/or cooperate in order to fulfill their natural duties to see to it that all enjoy their basic moral rights. Yet reasonable disagreement over the form collective action ought to take—that is, over what the law ought to be—is practically inevitable. Only a minimally democratic decision procedure provides a mechanism for settling these disputes that cannot be reasonably rejected or, what is the same, treats each person with a duty to participate in the scheme with the respect due to him or her as an autonomous agent.

A minimally democratic decision procedure is an institutional response to two competing moral demands. On the one hand, there are the justifiable claims of those whose proper moral treatment requires collective action, which make up (one of) the ends of a justified modern state. On the other hand, there are the reasonable claims of various individuals regarding the specification of those ends and the morally best or most efficient means to their realization. Responding to the former in a timely manner may require that official deliberation come to a close, say, with the taking of a vote, so that some collective action can take place.²⁴ Yet oftentimes those who find themselves in the minority when such a vote occurs may justifiably complain that, had there been further time for debate and deliberation, or had they enjoyed greater resources for the dissemination of their arguments, their own (reasonable) views might have won majority support. In recognition of this fact, the moral right to political participation should be understood to give rise to two more specific moral rights—one a right to participate in the decision process itself, say by casting a vote in a majority rule procedure, and one a right to continue to contest the decision reached by such a process after the fact by a variety of means, including suitably constrained civil disobedience.

Yet even if the moral right to political participation entails (or

23. Note that Raz's focus here is on a specific injustice the law allegedly perpetrates, namely, its prohibiting a certain type of action for the purposes of political participation. Raz presumably recognizes that in cases of indirect civil disobedience, an agent can violate one law for the purposes of advocating a change to some other law that she is not (presently) violating without implying that the law she violates is unjust.

24. I will assume here that whatever design for collective action is settled upon, its implementation is a morally better outcome than would occur were no collective action to take place. Of course, this may not always be the case.

includes) a right to continue contesting the laws specifying the design of a morally necessary collective-action scheme, why think the morally permissible means for doing so should include civil disobedience, rather than being limited to legal means? Several familiar explanations may be given. For instance, agents who commit acts of civil disobedience may rightly believe that the legal means for contesting inadequate or unjust laws or policies will 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 harms may take place. By engaging in acts 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.²⁵ Civil disobedients' willingness to risk the state's imposition of various costs on them (e.g., fines, detention, etc.), 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.²⁶

Still, even if there are certain advantages to employing civil disobedience rather than relying on only legal means of political participation to advocate for one's own conception of what the law ought to be, why think that these advantages provide a justification for a moral right to civil disobedience? Why is it not just tough luck for the agents

25. Frequently the majority view will be expressed by legal means (e.g., through a vote), and it seems safe to assume that so long as an agent's view is reflected in law or policy, that agent will not be concerned with whether others recognize the intensity with which she holds those views. However, 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 to the minority.

26. The argument here is not the familiar utilitarian one that strength as well as number of preferences must be taken into account when we aim to maximize the good, understood as preference satisfaction. Rather, it rests on a claim regarding the nature of collective deliberation and decision making, namely, that in conditions of uncertainty and reasonable disagreement, people are sometimes willing to defer to others with whom they disagree when those others have much stronger convictions regarding the point at issue. For discussion of both points presented in this paragraph, see Harris, *Civil Disobedience*; Peter Singer, *Democracy and Disobedience* (New York: Oxford University Press, 1973), 72ff. The novelty of the arguments presented herein does not consist primarily in the substantive account of public disobedience I offer (though it differs in detail from both Harris's and Singer's accounts) but, rather, in the explicit defense of it as a moral right, in the characterization of that right, and in its reconciliation with a defense of a liberal-democratic state's political legitimacy.

who find themselves in the minority with respect to the adoption of a given law or policy when a democratic decision procedure concludes? The answer is that the best understanding of the moral right to political participation is one that reduces as much as possible the degree to which it is a matter of luck whether one attracts majority support for one's reasonable views regarding what justice requires, consistent with the ability of the state to achieve those ends that provide a moral justification for its existence and authority. That is, respect for agents' moral right to political participation requires that potential barriers to their effective exercise of this right be diminished as much as possible, given the aforementioned constraint. In light of this understanding of what respect for agents' moral right to political participation involves, an account of that right as including both a moral right to legal means of participation, such as voting, and a moral right to civil disobedience, as explicated in this article, ought to be preferred to an account that includes only the former right.

Note, however, that the moral permissibility of continuing to contest a democratically enacted law or policy by legal means or by suitably constrained civil disobedience is not equivalent to, nor does it imply, that agents who would dispute the law are not morally bound by it. A citizen of a liberal-democratic state, one that is assumed here to enjoy a morally justified claim to political authority, does not enjoy a prerogative to disregard a law or policy if she thinks it ought not to have been endorsed by a democratic majority. She must either obey it or engage in suitably constrained civil disobedience; she may not act on her own assessment of what morality requires or from self-interest or inclination where acting from those motives would involve acting contrary to law. Thus on the view defended here, a citizen of a liberal-democratic state is morally bound by its laws, though the obligation is not the traditional "duty to obey the law" but rather the disjunctive "duty to obey the law or engage in civil disobedience."

Not all forms of civil disobedience are morally permissible, however. Rather, certain constraints on morally justifiable civil disobedience follow from the justification for an effective liberal-democratic state's authority over its citizens, together with an understanding of civil disobedience as essentially an act of political communication or participation. Acts that fall within these constraints constitute what I label public disobedience, and it is a moral right to engage in acts of this type that I aim to defend here.

Most important, morally justifiable acts of civil disobedience must be acts of public communication.²⁷ That is, it must be reasonable for

27. Note that this is not the claim that all illegal acts must be acts of public communication in order to be morally justifiable.

those who commit such acts to believe that by doing so they will be able to communicate to (some of) their political leaders and fellow citizens their beliefs regarding the moral acceptability of the state's current exercise of authority.²⁸ Therefore, morally justifiable civil disobedience must be done intentionally for the purpose of advocating a change to existing law or policy (though perhaps not solely for that purpose). Note, however, that a reasonable belief in public communication is probably consistent with Raz's claim that a civilly disobedient protester need not make her identity known. For example, one might rig a device to burn an American flag and broadcast an antiwar message in a public park, in order to protest what one believes to be an unjust war, without thereby divulging one's identity. Still, while anonymity is not strictly inconsistent with public disobedience, many observers may feel some tension between such conduct and the importance to the disobedient agent of demonstrating to her fellow citizens that she respects their equal moral claim to settle the form that morally necessary collective action ought to take.

The requirement of public communication should not be confused with the requirement of public deliberation (if there is such a requirement). Though civil disobedients sometimes intend their actions themselves to be a contribution to public deliberation on the justice of a given law or policy, in other cases their aim is to influence the agenda that is (or will be) the subject of deliberation by the political community or its representatives. For example, protesters may intend by their illegal actions simply to call attention to an existing law they believe to be unjust. Having done so, they may press their case for changing that law by legal means rather than by further acts of civil disobedience.

Public disobedience must also be noncoercive. Those who engage in such acts must display their commitment to the equal authority of all citizens to determine what the law ought to be and so must refrain from usurping this authority by coercing the state into abandoning or adopting certain policies. It may be, though, that public disobedience can be violent without being coercive, as in the case of destruction of certain types of public property, such as statues, for symbolic purposes.²⁹

Publicly disobedient agents must also willingly accept the state's

28. Indeed, given the definition of civil disobedience set out in Sec. I, it may be that any act that does not meet this requirement fails to count as civil disobedience, regardless of its moral permissibility. Whether this is so depends on whether advocacy of a change to the state's laws or policies necessarily entails publicity.

29. Cases of disobedience intended to frustrate the operation of a law or the implementation of a policy are more difficult to evaluate. Temporary acts of this type may in some cases be noncoercive, though this is unlikely to be true of more persistent interference in the operation of a law or policy. For a brief discussion of this issue, see Singer, *Democracy and Disobedience*, 82.

enforcement of the law against them, but not because they have a duty to do so. Rather, as I shall argue in the next section of this article, the only claim constitutive of the right to public disobedience is a claim not to be punished for engaging in such an act. But publicly disobedient agents have no claim against the state that it refrain from interfering with their attempts to exercise the right to public disobedience. That is, the state remains at liberty to enforce against them those laws public disobedients violate and to penalize them for doing so. Still, a protester who somehow slips away from the police has no moral duty to turn himself in at a later time, though he may have strategic reasons for doing so.

In sum, I contend that adequate recognition of the moral right to political participation encompasses a moral right to public disobedience. While the moral necessity of collective action requires that at some point an action-guiding settlement be reached regarding the form collective action ought to take, such settlements almost inevitably impose an arbitrary end to debate and deliberation on this matter. The acknowledgment of each agent's claim to a voice in settling disputes over the design of morally necessary collective-action schemes requires that debate be permitted to continue, though the state is also morally justified in acting on the basis of the decision reached when the initial deliberation is brought to a close. The inclusion of public disobedience among the morally permissible methods for continuing debate rests on instrumental considerations regarding the best set of norms for regulating collective decision-making mechanisms, including norms designed to reflect the depth of an agent's conviction on a particular issue and to enhance the rapid dissemination of various views by those (including most citizens) who have little control over the media.

It should now be clear why the claim that one has a moral right to public disobedience need not count as a criticism of the state for outlawing the action in question. Agents should recognize that given the moral necessity of collective action, some settlement must be reached. Further, they should recognize that this entails the necessity of some limits on the form that political debate and deliberation may normally take. So though they disobey the law, citizens of a legitimate state can consistently believe that the existing legal system is the morally best compromise between the need to act and the need to accommodate continued debate among citizens over the form collective action ought to take. Indeed, given the advantages of public disobedience with respect to the publicizing of one's views and the strength of one's conviction, it seems plausible to think that suitably motivated agents concerned to identify the morally best norms for regulating reasonable disagreements over how to act collectively could not reasonably reject a set that encompasses a moral right to public disobedience.

IV

Raz writes that in a liberal state there could be “no claim that the general public or public authorities shall not take action to prevent [civil] disobedience or to punish its commission (provided such action is proportionate to the offense, etc.).”³⁰ As noted above, I agree with Raz that citizens of a state that enjoys a justified claim to political authority have no claim that it not take action to prevent their commission of public disobedience. Moreover, I contend that the state may justifiably impose certain types of costs or *penalties*, including fines and perhaps even temporary incarceration, on those who engage in such acts. Unlike Raz, however, I contend that citizens of a legitimate state who engage in public disobedience do have a claim against it, namely, that the state refrain from *punishing* publicly disobedient actors merely because they have engaged in an act of this type. This claim constitutes the core of the moral right to public disobedience.

Both punishment and penalty involve an authority’s imposition of some cost or loss on an agent, in virtue of that agent’s failure to adhere to some standard or command. But as Joel Feinberg pointed out, punishment has essentially an expressive element absent from penalty, one that serves to distinguish between them. As he puts it, “punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval, and reprobation, either on the part of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”³¹ Penalties, in contrast, lack this symbolic significance.³²

If there is a moral right to public disobedience, then the state’s

30. Raz, *Authority of Law*, 274. Raz’s remarks here refer to a right to toleration, but, given his earlier rejection of the claim that the moral right to political participation gives rise to a moral right to civil disobedience, presumably the same conclusions apply in the case of the latter right.

31. Joel Feinberg, *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970), 96.

32. Though Feinberg’s distinction is clearly informed by the use of the terms ‘punishment’ and ‘penalty’ in U.S. law, his overriding concern is to capture what he views as an important analytic distinction, not to reflect the use of these terms in any actual legal system. (He does point out, however, that in light of the U.S. Constitution’s prohibition on cruel and unusual punishment [but not penalty], whether the treatment of a person is viewed as punishment or penalty can have important legal and moral consequences.) Note, too, that while the term ‘penalty’ is often associated with violations of regulatory law, while ‘punishment’ is often associated with violations of criminal law, the connection is not analytic. For example, U.S. law sometimes uses the term ‘penalty’ to describe certain types of “hard treatment” for violations of criminal law (typically where the hard treatment involves a monetary fine or forfeiture of property). In any case, I use the terms ‘punishment’ and ‘penalty’ to mark the morally important analytic distinction described in the text, regardless of how those terms are employed in any particular legal system.

enforcement of the law against those who exercise this right ought not to express any resentment or indignation toward their mere commission of public disobedience or convey a disapproving or reprobative judgment of their having done so. State officials, and individual citizens, may of course criticize the content of the views expressed via an act of public disobedience, as well as the decision to exercise that right in light of the purposes to which it is being put to use. But they ought not to condemn an agent who publicly disobeys the law merely because she does so, as this amounts to a denial of that agent's standing as a person with a moral claim to settle disputes over the form that morally necessary collective action ought to take. Nor may they criticize her for not limiting her exercise of the right to political participation to legal means, for the reasons enumerated earlier. In short, to punish a person for engaging in public disobedience is equivalent to punishing a person for exercising the right to vote or the right to free speech.

No denial of standing is implied by those who criticize the content of the views expressed via an act of public disobedience rather than the fact of public disobedience itself. To the contrary, by engaging in rational criticism of those views with the person who advocates them, citizens implicitly acknowledge the publicly disobedient actor as capable of acting autonomously, that is, of acting on the basis of the two fundamental commitments described earlier. By trying to persuade publicly disobedient actors that the views they advocate are mistaken, rather than dismissing them for having adopted the means they did to advance those views, state officials and other citizens will acknowledge the protesters as agents with a moral right to play a part in determining law and state policy.

But if a legitimate state has no right to punish its publicly disobedient citizens, then why think it acts in a morally justifiable manner when it interferes with their activities, say, by erecting barriers to prevent a protest march or sit-in or, even worse, by fining and incarcerating them for having committed publicly disobedient acts? In other words, why think the claim constitutive of the moral right to public disobedience extends only to the state's not punishing those who exercise it, rather than, say, to the state's not interfering at all with such conduct?

Both instrumental and symbolic considerations provide a moral justification for the institutionalization of norms permitting the state to interfere (in certain ways) with its citizens' attempts to engage in public disobedience and to impose certain costs on those who successfully do so. Beginning with the former, granting the state a right to interfere with and penalize publicly disobedient actors contributes to the stability of the state and so to its ability to facilitate morally necessary collective action. Imposing some costs on those who engage in public disobedience makes it more likely that actions with the potential to reduce the

state's ability to successfully and efficiently apply laws and policies will take place only when the injustice of existing laws and policies is believed to be significant. Of course, citizens of a legitimate state have a moral right to publicly disobey the law to contest any law or policy they believe to be unjust, no matter how small the injustice.³³ The state's liberty to impose penalties on them simply serves as an institutionalized incentive to such agents to consider the potential cost to justice of their engaging in such acts. In particular, the more resources the state devotes to dealing with public disobedience, the less it has to use for achieving what a majority of citizens, employing a morally justifiable decision procedure, have determined to be required by justice.

Equally important as a justification for the state's liberty to penalize those who engage in public disobedience is the symbolic value that acceptance of such penalties can have. Fines for public disobedience provide those who adopt this method of political participation with an opportunity to symbolically recognize the costs they impose on others by doing so and, perhaps more important, to symbolically affirm the citizens' collective authority to settle reasonable disagreements over the design of morally necessary collective-action schemes. To carry this symbolic value, fines must be set high enough to impose a genuine sacrifice for those who carry out acts of public disobedience. At the same time, they should not be set so high that they discourage almost any protest at all.³⁴

Fines imposed on those who engage in public disobedience should not be seen as akin to tort judgments, providing compensation to those who suffer losses as a result of the protest. The exercise of a right to free speech may also impose costs on third parties, but we do not think that they are entitled to compensation for their losses. Why not? The reason, I think, has to do with a moral account of what kinds of costs people ought to be expected to bear and what kinds they should not have to tolerate and so should be compensated for when they do bear

33. Compare this to Rawls, who limits the right to civil disobedience to instances of "substantial and clear injustice," which gives rise to a "presumption in favor of restricting civil disobedience to . . . the principle of equal liberty, and . . . the principle of fair equality of opportunity" (John Rawls, *A Theory of Justice* [Cambridge, MA: Belknap Press of Harvard University Press, 1971], 372).

34. A further, intriguing, justification for fines assessed against publicly disobedient protesters is that they serve as an ex post facto licensing fee for staging a particular kind of protest, with the just-mentioned instrumental considerations justifying higher fees for such "licenses" than for permits for legal protests; see Feinberg, *Doing and Deserving*, 95–96. It is reasonable to expect that even in a legitimate state the process for distributing permits for public gatherings, parades, etc., will not be completely unbiased. In recognition of this fact, ideal moral agents selecting the political institutions via which nonideal agents ought to govern themselves might not constrain a right to political participation to legal means.

them. I suggest that people should have to bear the costs involved in others' exercise of their moral right to political participation, and insofar as a moral right to public disobedience is derived from the right to political participation, people should have to bear the costs of others engaging in acts of public disobedience. It may be that in many states the distinction between activities that impose costs for which compensation is owed and those for which it is not often mirrors the distinction between legal and illegal activities. But if the arguments of this article are correct, then the overlap between these two ways of categorizing actions is neither necessary nor complete.

The instrumental and symbolic justification of fines for public disobedience applies as well in the case of the state's imprisoning publicly disobedient actors. As the case of a certain population being quarantined for the purposes of public health demonstrates, there is no necessary connection between confinement by the state and the state's expression of disapproval or resentment toward those who are confined.³⁵ Thus temporary incarceration of those who engage in public disobedience need not convey any judgment by the state regarding the moral propriety of their committing acts of that type. However, the severe limitation on liberty involved in incarceration, even if temporary, will likely dissuade many people who might otherwise publicly disobey from doing so, except when they judge the injustice of a law or policy to be great.³⁶ In doing so, the state's liberty to temporarily incarcerate public disobedients will facilitate its pursuit of what a majority, employing a morally justified decision procedure, believe to be required by justice.³⁷ Moreover, by willingly accepting temporary in-

35. The reader may question the aptness of the comparison between quarantine for disease and confinement for public disobedience, perhaps on the grounds that in the latter case, the state responds to something for which the agent bears responsibility, while this is often not true in the former case. But I see no reason to think that any time the state imposes a loss on an agent in response to conduct for which he is responsible the state must necessarily express disapproval of that conduct. More important, so far as I am aware there is no reason to think that any conduct or object must carry a particular symbolic message. Whether incarceration and the expression of disapproval are so tightly associated in contemporary liberal-democratic states that as a matter of fact confinement will be understood as punishment, not penalty, is a matter I briefly address below.

36. We should not assume, however, that agents considering engaging in public disobedience will always view temporary incarceration as a greater loss than that involved in the payment of a fine, particularly if the former treatment is viewed as carrying a greater strategic payoff than does the latter treatment.

37. The fact that being arrested while conducting an act of public disobedience often serves to garner the disobedient agent and her views more attention from the media than she would otherwise enjoy may provide a further instrumental justification for the state's enjoying a liberty to temporarily incarcerate publicly disobedient actors. From the standpoint of agents designing norms for regulating debate over how to design morally necessary collective-action schemes, short periods of imprisonment as a response to public disobe-

carceration, publicly disobedient agents can symbolically affirm their fellow citizens' claims to a voice in determining the law, as exercised through the morally justifiable decision procedures partly constitutive of the state. That is, by accepting temporary confinement by the state, publicly disobedient actors make clear that they are not trying to usurp authority but instead are acting (just) within the boundaries of political debate.³⁸ As with fines, imprisonment for public disobedience serves a symbolic purpose, and the specific form it takes ought to reflect that symbolic role (in ways consistent with the instrumental justification for such treatment).³⁹

If the arguments of this section are correct, then the state ought to make a good faith effort to ensure that the general public understands its treatment of public disobedients as the imposition of a penalty rather than of a punishment. It may be that the use of fines and temporary incarceration conflict with such a requirement, though whether this is so is ultimately an empirical matter. I suggest, however, that the state could employ various mechanisms to distinguish fines and/or incarceration handed down as penalties from those handed down as punishments. Such mechanisms might include public pronouncements by officials (e.g., judges and spokespersons for law-enforcement agencies), official recognition in public records that the illegal act for which an agent was convicted was one of public disobedience (important given the requirement to list one's criminal record on many applications for jobs, admission to universities, admission to various professions, etc.), and perhaps even separate courts and detention centers.

The essential difference between a legitimate state's response to

dience may well be attractive to anyone who can conceive protesting particular policies, even when those have been reached by a morally justifiable decision procedure. The argument here is not merely strategic; rather, it involves a moral evaluation of rival political institutions in terms of the partly instrumental role they play in facilitating agents' moral treatment of one another.

38. As Rawls puts it, civil disobedience "expresses disobedience to law within the limits of fidelity to law, although it is as the outer edge thereof" (*Theory of Justice*, 366). The point might be put more clearly by saying that public disobedience is disobedience to a law within the limits of respect for the rule of law.

39. The willing acceptance of fines and/or imprisonment is only a particularly salient opportunity to acknowledge the state's authority (or better, the collective authority of the citizenry as exercised via the mechanisms of the state). It is not, however, the only way to make such an acknowledgment; one could, for instance, make such an acknowledgment explicitly in an anonymous note. There is, therefore, no duty to accept the state's attempt to fine or imprison one for an act of public disobedience (though neither is one at liberty to actively resist the state's attempt to do so, since one has no claim against the state that it not interfere in one's exercise of the right to public disobedience). This point is crucial if public disobedience is to be consistent with anonymity, a possibility I noted in the previous section.

public disobedience and its response to nonpolitical and/or nonpublic disobedience to law consists in the expressive element of that response. Oftentimes, but not always, this difference in the expressive element will be conveyed by a difference in the amount of the fine or length of incarceration imposed on the disobedient actor.⁴⁰ So, for example, when committed as an act of public disobedience, a certain illegal act may be met with two days of incarceration, while when not committed as an act of public disobedience, the same illegal act may be met with two weeks incarceration. The difference in the length of incarceration reflects the different moral quality of the two acts (a point which should not be taken to imply any commitment to the view that the moral quality of an act is always the only factor relevant to determining the length of incarceration or when such treatment ought to be handed out). Crucially, however, a lighter fine or briefer imprisonment for public disobedience should not be understood to reflect the assessment that the act in question was a lesser failure to act within one's moral rights than in the case of nonpublic disobedience. Rather, the publicly disobedient agent acts within her moral rights, and by penalizing rather than punishing her, the state recognizes this fact.⁴¹

40. The reader may think it odd that a public disobedient could receive the same "hard treatment" as that received by a common criminal and wonder what exactly distinguishes a liability to penalty from a liability to punishment. To the person incarcerated for a week's time, the reader may suppose, it will make no difference whether or not that treatment expresses resentment and disapproval toward the agent for having engaged in an act of a particular type. While this may be true for some agents, it does not strike me as necessarily true for all agents. Some agents will care a great deal that their fellow citizens not view them as mere lawbreakers, implicitly (or explicitly) denying either their moral equality as subjects of democratically enacted law or their moral equality as creators of the law. To these agents it will be of great importance that the state recognize them as contributors to the process of lawmaking—demonstrating respect for the rule of (liberal-democratic) law even while violating a particular legal norm—rather than as mere common criminals. These public disobedients will be concerned with more than simply the amount of the fine they pay or the length of their incarceration; they will also be concerned with the message expressed by the state in its treatment of them. In other words, it will matter a great deal to these agents whether the state punishes them for their conduct or simply penalizes them, even if the length of their incarceration is the same regardless of which of these two responses the state adopts.

41. Thus retribution does not provide a justification for the state's imposing "hard treatment" on a public disobedient, as there is no wrong to be made right. Rather, as indicated above, the justification for a fine or limitation on liberty rests primarily on considerations of deterrence, i.e., on an instrumental calculation of the effect that penalizing, or not penalizing, a public disobedient will have on the stability and effectiveness of the legal order. For an argument that U.S. courts ought to rely solely on such instrumental considerations when sentencing civil disobedients challenging the constitutionality of a particular law, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 215–16.

V

At the beginning of this article I suggested that a moral right to public disobedience involves a right to do wrong. Specifically, I contend that even when an agent engages in public disobedience in order to advocate for a change in law or policy that, though she believes it would be an improvement, would in fact be worse from the standpoint of justice or morality than existing law or policy, still she acts within her moral rights.⁴² Yet presumably she also acts wrongly, at least on the plausible assumption that, at a minimum, agents have a moral duty to others not to (attempt to) increase the immorality or injustice of those laws and policies that affect them.⁴³

The statement that ‘if X has a right to ϕ , then she has a right to do wrong’ involves an important ambiguity, because it fails to distinguish between X having a claim that others not interfere (in certain ways) with her ϕ ing and X’s enjoying a liberty to ϕ . A person has a claim against one or more agents if the latter have a duty not to interfere (in certain ways) with her ϕ ing and that duty is grounded in some feature of the right holder. A person enjoys a liberty to ϕ when no other agents have a claim against her that she not ϕ , that is, when she has no duty to other agents not to ϕ .⁴⁴ Of course, liberty rights may be narrower in scope than this, as in the case where Jane enjoys a liberty to ϕ with respect to Max, but no such liberty with respect to Sue. An analogous point holds for claims as well.

Both William Galston and Robert George argue that an agent may have a claim against others that they not interfere with her ϕ ing even

42. Though I focus in this article on the moral right to public disobedience, the following arguments apply equally to the right to vote—a legal action by which an agent may increase the injustice or immorality of the state’s laws and/or policies.

43. Whether this assumption seems plausible may depend on the reader’s views regarding the role that an agent’s beliefs play in justifying her act. If an agent’s beliefs regarding the moral correctness of her act have no effect on whether her act is in fact morally correct, then the assumption in the text is plausible. Her act will not be justified, though it may be excused, say, if she acts from sincere and what I label subjectively reasonable beliefs. However, if an agent’s belief regarding the moral correctness of her act does affect whether the act is in fact morally correct (justified), then this assumption may not seem plausible.

44. As the last phrase of this sentence indicates, I am inclined to treat the domain of duties correlative to claims as exhaustive of the domain of duties. Note, however, that the agent with a claim need not be the agent that makes or expresses the claim; thus animals and unconscious human beings can still enjoy claims against others that give rise to duties on those others. Note as well that this restriction on the domain of duties is compatible with the possibility of noninstrumental values that provide reasons for action, albeit not duties.

in cases where the agent enjoys no liberty to ϕ .⁴⁵ If so, then in one sense an agent's right to ϕ may entail a right to do wrong, in that others have a duty not to interfere with her ϕ ing, even when her ϕ ing is morally or legally wrong. In a second sense, however, this agent has no right to do wrong, since she has no legal or moral liberty to ϕ when doing so would be legally or morally wrong. Indeed, it appears to be impossible for an agent to enjoy a liberty right to ϕ when ϕ ing would be wrong, since what makes the act wrong is that it involves a failure to do one's duty, while what it is to have a liberty is for an agent to have no duty to refrain from the act in question.⁴⁶

One justification for according an agent a claim right to noninterference even in cases where she acts wrongly—that is, in ways she is not at liberty to act—is that interference may generate “obnoxious externalities” that make all worse off in the long run than they would be were interference forgone.⁴⁷ But, as Galston notes, this justification for noninterference in the conduct of an agent who acts immorally does not entail that agent's enjoyment of a genuine right: “Interference is ruled out, but not because individuals are rights-bearers. Just the reverse. Individuals are said to have rights because interference is deemed inappropriate for exogenous reasons.”⁴⁸ While others may have duties not to interfere in an agent's conduct, these duties are not grounded in any claim the agent has against them. Moreover, it is not clear whether the consideration Galston describes justifies the existence of a genuine moral duty not to interfere, since it provides only a contingent reason for noninterference. Of course, the likelihood of obnoxious externalities may be a good reason to create legal rights that forbid interference with certain types of immoral conduct. Such a justification, together

45. William A. Galston, “On the Alleged Right to Do Wrong: A Response to Waldron,” *Ethics* 93 (1983): 320–24; Robert P. George, *Making Men Moral* (Oxford: Clarendon, 1995), chap. 4. Though some of his initial remarks on the topic are somewhat ambiguous, Jeremy Waldron also appears to endorse this view; see Waldron, “A Right to Do Wrong,” *Ethics* 92 (1981): 21–39, and “Galston on Rights,” *Ethics* 93 (1983): 325–27.

46. When speaking colloquially, we sometimes describe vicious behavior as wrong or immoral. Given such an understanding of these terms we can identify cases where a person acts selfishly, meanly, etc., as ones where an agent acts wrongly, though she has a right to do so. For example, we might describe as wrong the unwillingness of a sister with more chocolate than she can eat to share her surplus with her younger brother, though given her property right to the chocolate, not sharing is something she has a right to do. In this article, however, I limit the terms ‘wrong’ and ‘immoral’ to violations of moral duty.

47. Galston, “On the Alleged Right to Do Wrong,” 323; see also George, *Making Men Moral*, 117.

48. Galston, “On the Alleged Right to Do Wrong,” 323. Similarly, George argues that a justification of the sort described in the text gives rise only to a “weak right—a mere shadow of a governmental duty which grounds the right,” but not “a strong right, that is, a reason for the duty.” See George, *Making Men Moral*, 122.

with a justification for adhering to the law even in cases where it is overinclusive, can establish a legal right to noninterference with immoral conduct even in cases where the underlying instrumental justification for having such a legal right does not hold. But I wish to defend the existence of a moral right to public disobedience, not least because clearly there can be no legal right to engage in such acts, and it seems that instrumental arguments of the sort Galston identifies cannot be used to establish moral rights.⁴⁹

Earlier I asserted that genuine rights must be grounded in some feature of the right bearer; it is the failure to offer such a basis that accounts for why the above argument does not provide a justification for a genuine right. However, the noninstrumental value of an agent's exercise of autonomous choice, or authorship, over the form and direction her life takes does provide such a grounding for the moral right to political participation and so the derivative right to public disobedience.⁵⁰ In fact, it provides the basis for two different justifications for a claim against the state that it not punish publicly disobedient actors. Both justifications assume that the noninstrumental value of being the author (to some degree) of one's own life extends to the domain of politics as well, or at least to that part of politics concerned with determining how agents are to act together, as they must, in order to treat people morally. The first justification goes on to assert that the exercise of autonomous choice, or authorship, in both the personal and political realms is not only noninstrumentally valuable but also unconditionally so. That is, an agent's exercise of choice or will has noninstrumental value independent of what she chooses or the consequences of her choice. If correct, this view would entail that, in some cases at least, it

49. Galston identifies two other bases for a right to do wrong by reflecting on the justifications given in the seventeenth century for a right to religious toleration, understood as a right to do wrong. One basis is that coercive interference for the purpose of seeing to it that the person interfered with adopts the one true path to God is self-defeating. As Locke noted, religious faith must be sincere, but sincerity cannot be coerced. It is not clear that the mere fact that such treatment would be self-defeating entails that an agent has a right not to be so treated. But in any case, I do not see how an argument of this type might be applied to the right to political participation or to the derivative right to public disobedience. A second basis Galston identifies for a right to toleration is the fact that compelling standards of rightness do not exist, or at least have not been identified, for a given domain of conduct. His brief discussion of this point is somewhat ambiguous and underdeveloped, but it may be compatible with the argument for a liberty right to do wrong set out below.

50. The nebulous term 'authorship' may carry less of a commitment to a demanding notion of autonomy and so what counts as an autonomous choice, and therefore I shall use both terms. Obviously a great deal of work has to be done to specify what autonomous choice, or authorship, consists in and to justify the assertion that its exercise is noninstrumentally valuable. I cannot do so here, but I trust that the reader will be familiar at least in outline with various attempts to address these issues.

is wrong to interfere (in certain ways) with an agent's exercise of autonomous choice, regardless of whether she exercises it poorly, as she does if she advocates a change in law that would make the law less just than at present.

That political participation, as a component of an autonomous life, has unconditional, noninstrumental value does not entail that whenever the right to political participation comes into conflict with other rights, it always defeats them. It does not necessarily follow from something being unconditionally and noninstrumentally valuable that its promotion or realization always takes priority over other values or ends. Still, it is true that the justification of a right to political participation presented here commits its defenders to the view that in some cases it is more important that a law or policy be the result of collective choice than that it be morally correct. However, at least on the theory of political obligation sketched earlier, the constraints on the state's morally justified claim to authority imposed by the requirement of respect for basic moral rights limit the domain in which choice or authorship, rather than moral correctness, wins out.

The second justification for a claim right against others, including the state, that they not interfere in certain ways (i.e., punish) with acts of public disobedience, also appeals to the noninstrumental value of autonomous choice, or authorship, but treats that value as conditional upon the choice of good or valuable ends.⁵¹ Though the act of choice or authorship is valuable in itself, and not merely as a means to the realization of some good or valuable end, its value depends on the goodness of the selected end. When an agent autonomously chooses a bad or valueless end, her doing so has no value, or perhaps even negative value (i.e., the act is worse for having been autonomously chosen). Put a bit simply, choice is good only when the object of choice is good. How, then, can autonomy (or the living of an autonomous life) provide a justification for a claim against others that they not interfere with her choices, even when they reasonably, and perhaps correctly, believe that her choices are poor ones? The answer is that it does so only as a necessary consequence, or side effect, of providing agents with opportunities to autonomously choose good or valuable ends. It is choices of the latter sort, or a life that is shaped by them, that we ought to promote. The only way to do so, however, involves creating space within which agents may choose their ends, projects, and so on. Claim rights are part of the normative framework employed to create this space. Unfortunately, when we create conditions in which agents can live autonomous

51. On this conception of the value of autonomy (or perhaps better, an autonomous life), see Raz, *Morality of Freedom*.

lives, we necessarily enable them to choose bad or valueless ends as well as good or valuable ones.

So, for instance, an agent's participation in a political process that determines the form morally necessary collective action ought to take is noninstrumentally valuable when that agent's political choices contribute to the adoption of the morally best collective-action scheme. In contrast, the attempt to advance a less just (or to some degree unjust) collective-action scheme, in the mistaken belief that it is the morally best one, has no noninstrumental value even if it constitutes the agent's autonomous choice, or act of authorship. However, the only way to promote actions of the first type involves granting agents a right to political participation that protects actions of the second type as well. To do otherwise, to allow agents to participate in political decision making or to implement their decisions only when they make (what we believe to be) morally correct choices, would be to deny those agents autonomous lives—ones in which they exercise a significant degree of control over the shape and direction their lives take.⁵² As with the first justification for a claim right to engage in public disobedience described above, so too on the justification sketched here the noninstrumental value of autonomy will not always defeat other values (or rights) when they come into conflict. However, in at least some cases, the noninstrumental value of political participation, as a component of an autonomous life, will defeat or outweigh the values affected by the enactment of a particular law or the adoption of a certain policy.

While either of the two arguments just described appear to provide a justification for a claim right against others that they not interfere (in certain ways) with the commission of public disobedience, only the first appears to provide a basis for a liberty right to engage in such acts. Yet the second argument seems to me to provide the more compelling account of the value of autonomous choice. For this reason, as well as for reasons of space, I focus in the remainder of this article only on presenting an argument for a liberty right to do wrong grounded in an understanding of autonomy as noninstrumentally, but conditionally, valuable.

The precise content of our moral claims on others depends in part on facts about the kind of creatures we are and the circumstances we inhabit. That is, what we ought to do depends in various ways on what we can do. Yet sometimes philosophers and nonphilosophers alike ignore the ways in which human nature and the circumstances we inhabit

52. To be sure, there are also good instrumental justifications for not pursuing this policy. But as I noted earlier, such arguments do not provide an account of agents' moral rights to political participation, but only at best a rule-based duty on the state (and perhaps nonstate actors) not to pursue such a policy.

can shape the content of our justifiable moral claims against one another and the duties to which such claims correlate. For instance, it seems quite natural to assert that I have a claim against others that they refrain from advocating the adoption of unjust laws or policies, whether by legal means or through civil disobedience. Yet such an assertion ignores the fact of reasonable disagreement as to the content of justice. This kind of disagreement results from what Rawls labels the burdens of judgment, a reference to various facts about our ability to reason and the circumstances in which we do so.⁵³ If we accept that 'ought' implies 'can' and that the most that creatures like us can do, in circumstances characterized by the burdens of judgment, is to make reasonable judgments as to what justice, or morality, requires, then this fact ought to be reflected in the content of our claims against one another. Thus with respect to the advocacy of laws and policies, whether by legal means (e.g., voting) or illegal means (e.g., public disobedience), all I can claim from others is that they restrict their advocacy to laws and policies they sincerely and reasonably believe to be just.

Of course, I may disagree with others' assessment of the laws and policies they advocate; that is, while I may recognize that their beliefs are reasonable, I may nonetheless think that they are erroneous. But I have no claim against them that they refrain from advocating such views. Herein lies the key to understanding the moral right to political participation, including the moral right to public disobedience, as a liberty right to do wrong. If I have no claim against others that they refrain from advocating reasonable views regarding the requirements of justice, and this is true for all other agents as well, then those others enjoy a liberty to advocate such views. For to have a liberty to ϕ is simply for it to be the case that no one has a claim against one that one not ϕ . Yet while I ought to recognize that others enjoy a liberty to advocate reasonable views regarding the requirements of justice, I may believe those views mistaken and be reasonable in doing so. Moreover, in some cases my belief may be not only reasonable but also correct. In such cases, I will view those others as acting within their rights and yet as acting wrongly, that is, as acting in ways that will make the realization of justice less likely than under current conditions, or than under the conditions I believe ought to obtain.

An opponent of the argument just sketched might respond that while the burdens of judgment provide an (at least partial) excuse for someone who advocates for the realization in law or policy of a reasonable, but mistaken, view of justice, they do not provide a justification for her having a liberty right to do so. Even if we accept this claim, the

53. Rawls, *Political Liberalism*, 54ff. See also Thomas Nagel, "Moral Conflict and Political Legitimacy," *Philosophy & Public Affairs* 16 (1987): 317–18.

argument just stated still provides a basis for my earlier contention that the state ought not to punish those who engage in public disobedience.⁵⁴ Valid excuses make the expression of blame, reprobation, and moral superiority inappropriate, but it is just the inclusion of these expressive elements that, according to Feinberg, distinguish punishment from penalties. In any case, I suggest that to treat the burdens of judgment, and the reasonable disagreement to which they give rise, as merely an excuse runs counter to the idea that 'ought' implies 'can'.

It is important to distinguish between two claims we might make when we say of a person that her belief is reasonable but wrong. First, we might mean that, relative to the evidence and arguments available to her and/or her abilities to evaluate that evidence and those arguments, she acts reasonably in reaching the conclusion she does. However, relative to the evidence and arguments available to us (or to the relevant experts) and/or to our abilities to evaluate that evidence and those arguments, her belief is not reasonable. Were the agent to become aware of additional evidence to which we have access, and which she currently does not, it would no longer be reasonable for her to maintain her present belief(s). The reasonableness of a person's belief in this subjective sense does often provide an excuse for an agent who acts immorally on the basis of an erroneous belief. But the argument advanced here does not invoke this subjective sense of reasonable belief, but instead the understanding of reasonableness invoked by Rawls, Nagel, and others when describing reasonable disagreement. Here the problem is not a difference in the evidence or arguments available to various agents or in their abilities to evaluate that evidence or those arguments. Rather, despite the fact that all of the agents in question are similarly situated with respect to these properties, they remain unable to agree on what conclusion to draw. As Rawls puts it, "Many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion."⁵⁵

Crucially, and unlike the case of a person who forms a subjectively reasonable but nevertheless erroneous belief, none of the agents in question suffers from a particular failing from which the others are exempt; indeed, it is not clear that the agents suffer from any moral failing whatsoever. We can, of course, imagine creatures like us but with

54. Such a conclusion may not follow if the excuse is only partial, since this is usually thought to entail only a reduction in the amount of punishment (or the application of a lesser form of punishment), not the inappropriateness of punishment altogether. Since I contend that we ought not to treat the burdens of judgment as giving rise to an excuse, I will not examine this complication any further.

55. Rawls, *Political Liberalism*, 58.

superior reasoning abilities (and whatever else might go into forming moral judgments), just as we can imagine creatures like us with superior vision. And while by comparison to the standards appropriate for creatures with these imagined abilities the exercise of our own might lead to many failures, this seems irrelevant with respect to determining what can be expected of us. Similar remarks apply as well to the circumstances we inhabit; even if we can imagine a world in which various environmental factors enable creatures with the same visual abilities as we have to see much better than we do (clearer, farther, etc.), this has no bearing on what can be expected of us in the world we actually inhabit. Likewise with respect to the circumstances in which we form moral judgments: even if our judgment would more often track the moral truth in a different environment, what is relevant to forming the expectations against which human conduct should be evaluated is what we can expect of creatures like us in the environment we actually inhabit.⁵⁶ If all we can expect of creatures like us is that in circumstances characterized by the burdens of judgment, we form reasonable, even if sometimes erroneous, beliefs, then it seems that when we do so we do not display any kind of failing relevant to moral assessment. Excuses, however, apply in those cases where an agent does manifest a failing relevant to moral assessment but in which for certain reasons negative assessment (blame, punishment, etc.) is deemed inappropriate. It seems, therefore, that the formation (and advocacy) of reasonable but mistaken beliefs regarding what morality requires should not itself count as a moral failing and so does not stand in need of an excuse.⁵⁷

The close association in the criminal law of excuse and justification defenses may suggest the following inference: if the burdens of judgment do not provide an excuse for advocating reasonable but mistaken views regarding what justice requires, then they must provide a justification for doing so. In one sense this is correct, but in another it is not.

56. My claim here is not about the beliefs people might form in a totalitarian state with a well-run propaganda machine; such an example raises the issue of subjectively reasonable beliefs. Rather, I mean to refer to the environment in which we reason when human causes of mistaken beliefs, such as propaganda, are absent. Reasonable disagreement will arise even in this environment, or so I suggest.

57. Raz claims that “those who act wrongly because of a reasonable mistake should be excused” (Joseph Raz, “Liberalism, Skepticism, and Democracy,” *Iowa Law Review* 74 [1989]: 761–86, 768), a view contrary to the one I defend in the text. Yet he also writes that one should not “desist from acting on beliefs with which others reasonably disagree. That seems to indicate that reasonable disagreement provides a limited basis for toleration. One should not criminalize actions undertaken because of a reasonable belief that they are right.” In contrast to the first claim, this one appears to be consistent with the argument of this article. To further confuse the issue, Raz then suggests that “the very fact that an act is prohibited by law may affect the reasonableness of a belief that it is an innocent act,” though he offers no explanation for why this should be so.

Justification defenses in the law are usually understood to apply to cases where an agent acts rightly by doing an act of a type that it is normally wrong to do. I have argued that the burdens of judgment provide a justification for attributing to agents a right to advocate for the adoption in law or policy of reasonable views they sincerely believe to be true, even when they are not. However, this is not to say that such agents act rightly when they do so; as I argued earlier, they do not.⁵⁸

One potential source of resistance to the recognition of a liberty right to advocate reasonable but false views regarding the requirements of justice stems from the concern that such a right will downgrade the importance of moral truth in politics or even expunge it altogether. It may seem that as long as agents advocate a reasonable conception of justice, they need not be concerned with whether their beliefs are true. But a liberty right to advocate for reasonable views of justice does not entail this conclusion. All agents have a duty to determine as best they can what morality requires of them, both individually and collectively. It follows from this, first, that agents must sincerely believe that the reasonable conception of justice they advocate is true. Agents do not enjoy a liberty to advocate a reasonable conception of justice they believe is false but more advantageous to them personally than a different reasonable conception of justice they believe is true. Second, an agent's liberty right to advocate a reasonable conception of justice she sincerely, though mistakenly, believes to be true does not free her from the demand that she seek to reduce the burdens of judgment whenever possible or that she continue to engage in discussion with others in an attempt to pierce the epistemic fog imposed by the burdens of judgment.⁵⁹ That is, the agent must manifest a commitment to the pursuit of truth, not to mere reasonableness, even if oftentimes the latter may be the best creatures like us can do and therefore the most we may expect of her.

In sum, moral truth—treating others as morality truly requires—provides the standard agents ought to seek to uphold; when they fail to do so, they act wrongly. But a person's failure to correctly identify

58. It is difficult to capture the distinction I aim to defend here using the traditional deontological concepts. If an agent enjoys a moral liberty to ϕ , how can she act wrongly when she does so? The key idea is that the standard of right conduct people should seek to follow is not the standard that establishes what they are morally entitled to claim from others. People ought to seek to act as morality truly requires, but all they are morally entitled to demand of others is that they act on reasonable moral beliefs. Thus to claim that an agent enjoys a moral liberty to ϕ is not to say that she acts rightly when she does so but, rather, to say that she acts reasonably (i.e., on the basis of beliefs regarding what morality requires that are reasonable in light of the burdens of judgment).

59. This claim does not imply a commitment to the view that all moral truths can eventually be identified beyond reasonable disagreement.

that standard, when reasonable and sincere, does not entail that she has acted in a morally impermissible manner, at least in the following sense: the person in question acts within her rights (or as she has a right to act), though given the way she exercises that right—to advocate for what is in fact an unjust, or less just, law—she acts wrongly. If successful, this line of argument, together with those advanced earlier in this section, demonstrate that the moral right to public disobedience (and indeed, the more general moral right to political participation) consists in both a claim right and, in a special sense, a liberty right to do wrong.

Copyright of Ethics is the property of University of Chicago Press and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.