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In Defense of Penalizing (but not Punishing) Civil Disobedience[‡]

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Contemporary defenders of a liberal-democratic state's legitimate authority who argue explicitly from within the republican tradition, or whose arguments can be recast in republican terms, maintain that in the circumstances of politics individuals can treat one another justly only by obeying the law (see, e.g., Waldron 1999; Sitlz 2009; Christiano 2010; Dworkin 1986, read in light of Dworkin 2011).[1] Yet these same theorists argue that civil disobedience is sometimes justifiable even when undertaken to advance reforms that would not, in fact, morally improve law or public policy. How can we reconcile these two claims? One strategy is to abandon one or the other; that is, to deny the existence of a general duty to obey the law, or to deny that those who have such a duty have a right to engage in civil disobedience. I have defended an alternative strategy, arguing that the duty correlative to a liberal-democratic states' legitimate right to rule is disjunctive: citizens must either obey the law or engage in suitably constrained acts of civil disobedience (Lefkowitz 2007).[2] Subjects of a legitimate liberal-democratic state, I

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1 The claim in the text need not preclude characterizing the duty to obey the law as *pro tanto* if in acting illegally an agent can simultaneously treat his or her fellow legal subjects unjustly and act in a manner that is morally justifiable all things considered. Illegal conduct that contributes to the extension of the rule of law (and so, for republicans, just relations) to encompass interaction among agents not presently subject to a common juridical order might be an example of such an act. On the other hand, some of the arguments I advance in section III against a conception of rights as general but defeasible likely count equally well against such an understanding of duties.

2 Subjects may also petition for conscientious objector status; see Kassner and Lefkowitz 2012.

maintain, enjoy a moral right to civil disobedience, one that precludes the state from punishing, though not from penalizing, civil disobedients.

In her recent book *Conscience and Conviction: The Case for Civil Disobedience,* Kimberley Brownlee has subjected this analysis of the moral right to civil disobedience to two lines of criticism, both which I aim to rebut in this essay (Brownlee 2012; see also Brownlee 2008). I begin in section I with a brief summary of my original argument for the aforementioned analysis of the moral right to civil disobedience. In section II, I defend the claim that this right derives from a more general right to political participation and not, as Brownlee maintains, from an individual's right to preserve his or her integrity. The success of this argument is vital to the defense of a liberal-democratic state's right to penalize civil disobedience, since the moral rationale for such a practice rests on the place it has in a larger institutionalized system of democratic governance. I then respond in section III to four objections Brownlee raises to the claim that a legitimate state enjoys a right to penalize civil disobedients, including that it rests on a mistaken understanding of the concept of a right of conduct, and that the justifications I offer for the practice of penalizing civil disobedience conflict with respect for the autonomy or reasons responsiveness of those who engage in it responsibly. As my rebuttals to these objections make clear, our differences of opinion over the grounds and scope of the moral right to civil disobedience rest almost entirely on disagreements regarding two foundational issues: first, whether moral rights are best conceived of as defeasible evaluative

principles or conclusive normative principles, and second, whether principles of justice should be theorized on the basis of full or partial compliance.[3]

I

I take civil disobedience to consist paradigmatically in deliberate disobedience to one or more laws of a state for the purpose of advocating a change to that state's laws or policies. 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 it directly harms innocent third parties – no moral significance attaches to the mere fact that it involves disobedience to the law. This is not so in a state with a justifiable claim to political authority, however, for citizens of such a state have a general duty to obey the law that correlates to the state's right to rule them.[4] Civil disobedience at least appears to conflict with this duty, and so is morally

[3] It may be worth noting that the question of whether Brownlee or I offer a better specification of government exercised in accordance with a commitment to the moral equality of persons can only be answered holistically, which involves considering many more implications of our competing views than those I discuss here. My goal in this paper is simply to demonstrate that there is much more to be said in favor of my treatment of the moral right to civil disobedience than Brownlee believes, though of course many of the arguments I detail do imply that her rival account is mistaken.

[4] Space does not permit me to defend this claim against those who argue for alternative understandings of a state's right to rule and its subjects' duty to obey the law. Instead, I simply note that many contemporary defenders (as well as critics) of political authority and obligation continue to rely on the understanding I presuppose in the text. For a response to some objections to the traditional characterization of legitimacy, see Lefkowitz 2016.

problematic in itself, independent of other moral considerations that may bear contingently on any particular act of civil disobedience.

The reconciliation of the practice of civil disobedience with a state's right to rule must therefore begin with a specific defense of legitimate political authority. The one on which I have relied in the past proceeds as follows (Lefkowitz 2007). Suppose that all moral agents, as such, enjoy certain basic rights, including (but not necessarily limited to) a right to be free from deliberately or recklessly 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 need to act collectively, and that modern states consist partly of institutions designed to facilitate this sort of collective action. Laws serve to specify the design of these institutions, spelling out both the state of affairs to be realized by collective action, i.e. the specific content of people's rights, and the form that each actor's 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.[5] 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. I contend that because it accords equal moral authority to settle disputes over what the law ought to be

[5] By 'reasonable disagreement' I mean cognitively reasonable disagreement; i.e. disagreement that is intelligible in light of the burdens of judgment. See Lefkowitz 2005.

to all those with a duty to participate in (or contribute to) the legal order, a minimally democratic and liberal state meets this condition.[6]

A minimally democratic decision procedure is an institutional response to two competing moral demands. On the one hand, there are the claims of those whose proper moral treatment requires collective action, responsiveness to which provides 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 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.[7] 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

[6] A liberal state, as I understand it here, is one that manifests a principled commitment to respect for individuals' basic rights. 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.

[7] I 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. This may not always be the case.

continue to contest the decision reached by such a process after the fact by a variety of means, including suitably constrained civil disobedience.

Why think the morally permissible means for doing so should include civil disobedience, rather than being limited to legal means? One reason is 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 injustices 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.[8] Civil disobedients' willingness to risk the state's imposition of various costs on them and possibly the anger of their fellow citizens can often communicate the strength of their convictions or preferences in ways that legal means for political participation cannot. If the majority feels less strongly about the particular law or policy at issue, they may be willing to reconsider, and perhaps even reverse, their earlier decision.

But 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 who find themselves in the minority with respect to the adoption of a given law or policy when a democratic

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

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 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 and a moral right to civil disobedience, as explicated in this paper, ought to be preferred to an account that includes only the former right.

Certain constraints on the moral right to civil disobedience follow from an understanding of it as derived from a more general right to political participation. For example, only acts of public communication fall within the scope of the moral right to civil disobedience. Individuals who conscientiously disobey the law without having as (one of) their aims communicating to some members of the political community their belief that a given law or policy ought to be reformed do not perform an act that falls within the scope of the moral right to civil disobedience. Furthermore, the moral right to civil disobedience encompasses only non-coercive political acts, since coercing the state into abandoning or adopting certain policies usurps the equal authority of all citizens to determine what the law ought to be. Finally, I maintain that the moral right to civil disobedience only precludes punishing those who engage in such conduct, not penalizing

them. Whereas the former response necessarily expresses moral condemnation of an illegal act, the latter response does not.

Both instrumental and symbolic considerations justify the state's right to penalize those who engage in civil disobedience. Beginning with the former, penalizing civil disobedients can contribute to the stability of the state, and so its ability to facilitate morally necessary collective action. 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. However, 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 only take place when the injustice of existing laws and policies is believed to be significant. In addition, by accepting a penalty such as a fine for engaging in civil disobedience agents can symbolically recognize the costs their illegal conduct impose on others, and perhaps more importantly, symbolically affirm the citizens' collective authority to settle reasonable disagreements over the design of morally necessary collection 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.[9] Moreover, if it is to enjoy a legitimate claim to authority a liberal-democratic state must make a good

[9] This may require calculating fines as a percentage of an individual's annual income or net worth so as to mitigate inequalities in the opportunity to engage in civil disobedience that might otherwise follow from inequalities in income or wealth.

faith effort to ensure that the general public understands its treatment of public disobedients as the imposition of a penalty, rather than as punishment.

With this sketch of a theory of the moral right to civil disobedience in hand, we can now turn to the first set of objections Brownlee levels against it, namely that it provides a mistaken characterization of its grounds.

II

Is the moral right to civil disobedience best understood as a remedy for the shortcomings that even moderately well-functioning democratic institutions suffer in their attempt to realize equal political participation, as I contend? Or is it instead a primary right to act in fidelity to one's conscientious convictions regardless of whether one enjoys effective equal political participation, as Brownlee claims?[10] In what follows I offer rebuttals to the three primary objections Brownlee raises to the derivation of a moral right to civil disobedience from a more general right to political participation, and so by implication in favor of her own position.

Brownlee's first complaint is that a remedial account makes the existence of a moral right to civil disobedience contingent on that practice being "the only way, or undeniably the best way, to redress unjust imbalances in participatory power" (Brownlee 2012, p. 144). One response is to point out that while the remedial account makes the existence of a moral right to civil disobedience contingent on certain facts about how democratic institutions function, these facts are so deep that in any actual political community the optimal specification of each member's general right to political

[10] I owe the framing of this dispute in terms of a conflict between a remedial and a primary right to civil disobedience to Daniel Weinstock; see Weinstock 2015.

participation will include a moral right to civil disobedience (Markovits 2005; Smith 2013). A second, complementary, response is to argue that (per impossible) were a political society to suffer no "unjust imbalances in participatory power," or were the practice of suitably constrained civil disobedience to contribute nothing to reducing them, it is Brownlee who must justify the claim that individuals should nevertheless enjoy a moral right to engage in illegal conduct for the purpose of advancing reforms to the community's law or policy.

A second criticism Brownlee advances against the derivation of a right to civil disobedience from a more general right to political participation is that it is implicitly committed to the false claim that individuals have a moral right to be heard, and not simply a right to express themselves. "The minorities' argument that they should be allowed to step outside the law to participate, because were there more time for debate or were they better resourced their view might have triumphed, implies that they have a claim to compensation or reparation for not being attended to by those shaping the debate" (Brownlee 2012, p. 144). This misconstrues the minority's "bad luck" argument, however. Their complaint is not that their views were not considered, but that the likelihood of their views receiving consideration was shaped by luck; e.g. by differing degrees of access to the media, or the brevity of the time period given to deliberation prior to the enactment of a law or policy. The right to political participation does not include a right to be heard, but insofar as it is a right enjoyed by all members of the community, it does include the claim that all should have an equal opportunity to shape the debate over the content of the community's law and policy. Rather than construing the moral right to civil disobedience as compensation to particular agents, we ought

instead to think of it as compensating for certain shortcomings common and perhaps endemic to the practice of democratic decision-making.

Brownlee's third and primary objection to characterizing the moral right to civil disobedience as a remedial right has two related elements: first, it entails that the state has no duty to accommodate conscientiously motivated disobedience to law that is either not undertaken to change law or policy, or not performed by a member of a "vulnerable minority," and second, it fails to recognize that it is the agent's interest in preserving his or her integrity, not in political participation, that the moral right to civil disobedience protects. Yet an argument like my own that grounds a right to civil disobedience in a more general right to political participation does not entail that the state has a duty to accommodate conscientious disobedience to law only when undertaken for a political aim by disempowered minorities. Indeed, Brownlee recognizes this, as she writes: "…the standard view is that a humanistic principle gives modest protection for private personal disobedience, but not for civil disobedience" (Brownlee 2012, p. 145). Why, then, does she reject the "standard liberal view" that distinguishes two rights to conscientious disobedience to law: a moral right to civil disobedience grounded in a fundamental interest in equal political participation, and a moral right to conscientious objection grounded in a fundamental interest in preserving integrity? One reason may be that she conflates the kind of conduct that falls under a right to conscientious objection with what she labels private disobedience; conscientiously motivated disobedience to law that is either evasive or non-communicative, or both. As I understand the "standard liberal view," however, what distinguishes conscientious disobedience from civil disobedience is not that the former is evasive or non-communicative while the latter is not. Rather, it is

the aim of those who engage in the two types of conduct that distinguishes them, with the civil disobedient aiming to bring about reform to law or policy, and the conscientious objector simply seeking an exemption from some law or policy she believes to be unjust. Both conscientious objection (or, as I put it elsewhere, petitions for conscientious objector status) and civil disobedience are public, communicative, acts, and both differ in those respects from private disobedience. Once we broaden our typology of conscientious disobedience to law to include three types – private disobedience, civil disobedience, and conscientious objection – instead of following Brownlee in employing only the first two of the aforementioned types, then the reasons Brownlee gives for rejecting a characterization of civil disobedience as a facet of the general right to political participation fail to persuade (see also Ceva 2015).

III

Perhaps the most distinctive feature of my analysis of the moral right to civil disobedience is the claim that it only precludes the state from punishing, but not from penalizing, those who engage in such conduct. Though some contemporary theorists of civil disobedience endorse this position, others demur, with Brownlee once again providing the most careful and detailed criticisms. In what follows I offer a response to four of Brownlee's objections to characterizing the moral right to civil disobedience as a claim against punishment but not penalty.[11] Before I do so, however, the precise nature of our disagreement warrants emphasis. Brownlee acknowledges that in some cases considerations of deterrence may provide the state with an all-things-considered

[11] Brownlee's fifth objection (the fourth as she enumerates them) rests on a straightforward misreading of my original argument, and for reasons of space I do not address it here.

justification for imposing certain costs on civil disobedients; for example, a fine for their illegal conduct. However, Brownlee maintains, while I deny, that when it does so the state nevertheless wrongs the civil disobedient, or in terms introduced by Judith Jarvis Thomson, the state infringes but does not violate the civil disobedient's right to engage in conscientious, communicative, disobedience to law. Thus on Brownlee's account the state owes civil disobedients an apology for its "hard treatment" of them, even if that treatment is what morality calls for all things considered. As I will explain, the persuasiveness of our respective analyses of the moral right to civil disobedience depends to a considerable extent on whether one share's Brownlee's intuition that an apology is called for in these circumstances, or instead concurs with my sense that at most we ought to regret the fact that civil disobedients must pay a penalty to act as they do. These conflicting intuitions reflect two deep theoretical disagreements that underlie several of the criticisms Brownlee advances, as well as my rebuttals to them. The first concerns the place of rights in practical deliberation: are they inputs, as Brownlee thinks, or are they outputs, as I maintain. The second disagreement concerns the role that considerations of feasibility ought to play in developing a theory of moral rights. Whereas I maintain that a morality for human beings, including an account of the content of individual's moral rights, ought to assume partial compliance, Brownlee appears to presume the opposite. The positions one finds most compelling in these more general disputes may well determine whether one agrees with Brownlee's specific objections to penalizing civil disobedients, or instead accepts my defense of such a practice.

Objection #1: The claim that civil disobedients have a right not to be punished but no right not to be penalized conflicts with a proper understanding of the concept of a right of conduct.

Rights of conduct, Brownlee asserts, "provide defeasible normative protection of a sphere of autonomy against *all* forms of coercive interference by others" (Brownlee 2012, p. 244). It follows, as a conceptual matter, that the right to civil disobedience cannot exclude punishment but not penalty, since the latter still constitutes a form of coercive interference with the performance of acts of civil disobedience.

This analysis of the concept of a right of conduct stands in need of defense, however, and I contend that we have no compelling reason to think of rights of conduct as providing general but defeasible reasons not to interfere with an agent rather than specific but absolute constraints on such interference, as my characterization of a right to civil disobedience suggests. For example, some criticize the latter understanding of rights because it entails that the full content of any right is unknowable. Yet the conception of rights as general but defeasible faces an analogous criticism, namely that no one can know all of those cases in which a given right defeats or is defeated by other rights (or other moral considerations). More importantly, even those with an incomplete understanding of a concept can successfully use it to navigate many situations; witness many people's ability to use their imperfect knowledge of their legal rights to do so. Another objection to a specificationist account of rights is that they render rights the conclusions of moral arguments, rather than premises in them. But if rights are general but defeasible then the real work of determining what an agent may or must do is done

not by rights but by the values those rights serve to protect, honor, or advance. As George Rainbolt writes, "in non-metaphorical terms, to weigh one right against another is to examine the arguments for the view for and against particular assertions of actual rights" (Rainbolt 2006, p. 161). In light of this observation, the importance of the claim that general but defeasible rights can serve as premises in moral arguments is hardly obvious. Finally, some maintain that we need a notion of rights as general but defeasible to ground claims to compensation or apology, the so-called "moral remainder" created by the infringement of a right. However, the argument for this conclusion often begins with an undefended assumption that in a particular case compensation or apology is in fact appropriate, something specificationists frequently deny. Feinberg's cabin example, in which a person caught in an unexpected blizzard breaks into another person's cabin and burns one of the chairs inside to keep warm, is a case in point (Feinberg 1978). Who should bear the loss that results from conduct for which no one is morally at fault is hardly obvious, and a variety of considerations including equity and efficiency may support principles that assign the loss to the property owner, the perpetrator, or the community at large.

Of the three rationales offered for conceiving of rights of conduct as general but defeasible it is the "moral remainder" argument that figures centrally in Brownlee's critique of the right to civil disobedience as excluding punishment but not penalty. But as I noted in the preceding paragraph, to successfully advance a "moral remainder" argument for a general but defeasible right a theorist must first defend her claim that in performing an act seemingly or normally precluded by the right in question the agent treated the right-holder unjustly. Just as we should not assume that a person who breaks

into another's cabin in order to avoid freezing to death has a duty to compensate and/or to offer an apology to the cabin owner, and so argue on that basis that the property right is general but defeasible, so too we should not assume that the state owes a civil disobedient an apology for penalizing her, and so argue on that basis that the moral right to civil disobedience is general but defeasible. Rather, we need an argument demonstrating that the state wrongs the civil disobedient when it penalizes her in order to establish that an apology is called for.[12] Brownlee attempts to offer such an argument in the next two objections I consider. My aim here is simply to rebut her argument that we have conceptual, as opposed to substantive moral, grounds for rejecting the characterization of a right to civil disobedience as protection against punishment but not penalty.[13]

Substantively, Brownlee objects to penalizing civil disobedients on the grounds that such treatment fails to respect them as autonomous, reasoning agents. She distinguishes two such objections, the first of which focuses on penalty as a means for specific deterrence.

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[12] The same conclusion holds in Feinberg's cabin example: we need a defense of a theory of property rights that entails that the person caught in the blizzard commits a wrong against the cabin owner when she breaks into the cabin and burns the chair. This in turn justifies a claim regarding the need for an apology (which, I argue below, is distinct from an expression of regret).

[13] Brownlee considers *arguendo* and then rejects a specificationist account of the moral right to civil disobedience that draws the boundaries of the right "at the point where disobedients' action would encourage, incite, or inspire others to engage in non-conscientious disobedience" (Brownlee 2012, p. 245). I respond to some of those arguments in my rebuttals to her second and third objections.

Objection #2: In penalizing the civil disobedient, the state fails to address her as an agent capable of responding appropriately to the moral reasons that apply to her.

Instead, it treats her as if she is only owed prudential reasons, or is only capable of responding to prudential reasons, and thereby implies that the civil disobedient has an inferior status rather than recognizing her as a moral equal. Brownlee writes: "when a judge penalizes a disobedient primarily to deter her from engaging in undesired behavior he disregards her status as a reasoning, autonomous agent and treats her as a mere brute responsive to a threatened stick" (Brownlee 2012, p. 245).

The practice of penalizing civil disobedience need not convey this understanding of the disobedient's ability to respond to reasons, however. Rather, the state can and should point to the moral reason she has to endorse a practice whereby the state penalizes but does not punish those who engage in suitably constrained civil disobedience. Such a practice aims to strike the optimal balance between giving all citizens effective opportunities to participate in democratic decision-making and maintaining the state's ability to perform its moral functions, i.e. its capacity to facilitate the citizenry's collective pursuit of a just social order. Indeed, contrary to Brownlee's assertion in the above quotation, by explicitly *not* responding to the civil disobedient's violation of the law as if it were a common crime the state communicates the message that it does not view civil disobedience to be undesirable *per se*, nor does it (morally) disapprove of actors engaging in such conduct.

Yet if a legitimate liberal-democratic state should not view civil disobedience as undesirable *per se*, then why should it enjoy a right to impose a burden on those who

engage in it? Brownlee focuses on one answer to this question, namely the need to deter people from engaging in non-conscientious disobedience to law (and, if it is not the same thing, disobedience that communicates a conscientious conviction in ways that exceed the scope of the moral right to civil disobedience). I argue below that insofar as such disobedience is an ineliminable feature of human society it ought to constrain our account of the content of the moral right to civil disobedience. However, the rationale for penalizing civil disobedience does not rest solely on the need to deter others who would otherwise engage in non-conscientious disobedience to law.

Even conscientiously undertaken civil disobedience will typically require the state to redirect resources it would otherwise use to achieve what a majority of citizens, employing a morally justifiable decision-procedure, have determined to be required by justice. As an empirical matter, the higher the incidence of civil disobedience *of any kind* the greater will be the compromise to the state's ability to perform its moral function. While the moral importance of enhancing citizens' opportunities for effective political participation warrants some tradeoff in this respect, the other values in the balance require that we adopt institutional practices that mitigate citizens' recourse to civil disobedience. Indeed, insofar as civil disobedience is properly defended on the grounds that it contributes to effective political participation, the brake on the frequency of its performance created by a practice of penalizing civil disobedients may serve to enhance its value as a means for communicating the claim that some law or policy stands in need of reform (see also Smith 2013, p. 96). Of course, for Brownlee such an advantage will not count in favor of construing the right to civil disobedience as precluding punishment but not penalty, since whatever benefits the practice of conscientious disobedience to law

generates for legitimate or just democratic rule will be incidental to its proper justification, namely the individual's fidelity to conscience or preservation of her integrity (Brownlee 2012, p. 146). But as I argued in the previous section, Brownlee's rationale for theorizing all conscientiously motivated disobedience to law as grounded in a single right to conscientious action rests on a failure to distinguish conscientious objection from both civil disobedience and personal disobedience.

It may be helpful to think of the amount of civil disobedience a state can tolerate without a morally unjustifiable reduction in its ability to perform its moral function as a common resource. The challenge is to devise a set of norms for the use (consumption) of that resource that will enable a community to generate the maximum value from it. The value in this case consists in the contribution that suitably constrained civil disobedience can make to citizens' effective political participation (and, hopefully, its realization of a substantively just social order). It serves as a means for ameliorating to some degree certain defects in realizing effective political participation for all citizens that are common if not endemic to democratic decision-procedures. The practice of penalizing civil disobedience serves to mitigate the risk of over-consumption of this common resource, and encourages uses of it that generate the greatest value; i.e. that focus the political community's attention on what some of its members take to be among its most unjust laws or policies.

The practice of penalizing civil disobedience also provides a useful corrective to cognitive biases and systematic errors in reasoning to which all human beings are susceptible. For example, in the face of what we believe to be a deeply unjust law or policy we are likely to underestimate the (moral importance of the) impact engaging in

civil disobedience will have on the state's ability to perform its moral function, which is just to say that we are likely to fail to respond appropriately to the moral reasons that apply to us. Modest penalties provide a corrective to this kind of bias, a prudential supplement to our moral deliberation justified on the grounds that *given this fact about human beings* the practice of penalizing civil disobedience will produce a world in which we do better at advancing, promoting, honoring, etc., people's fundamental interests (and perhaps other intrinsically valuable things) than we would in a world in which we did not penalize civil disobedients. The point can be put in terms of hypothetical consent, understood as a heuristic device for identifying what we have reason to do. In order to make it more likely that they will employ civil disobedience only in those cases where the injustice being protested truly merits the disruption to the state's ability to perform its moral function, individuals would agree in advance to a regulatory scheme according to which they would be assessed a penalty for performing acts of civil disobedience.

A critic might respond that the foregoing arguments falsely assume that the state has a fixed amount of resources with which to perform its moral functions. Typically, the state can increase its resources by employing more of those resources currently left to agents to allocate privately. Given the moral importance of effective political participation, and the argument that this should include engaging in suitably constrained civil disobedience, it follows that members of a political community are morally obligated to allocate sufficient resources to their political and legal institutions so that they can perform their morally necessary functions even while accommodating a significant amount of civil disobedience. The right to political participation may simply

turn out to place greater demands on people's private control over resources than some have thought.

I happily concede that in some cases particular political communities ought to increase the resources they allocate to the state so that it can accommodate an increase in the incidence of civil disobedience without significantly reducing its ability to perform its moral function. But I reject the claim that individuals' interest in effective political participation is of such great moral importance that advancing it takes priority over just about every other interest, or the claim that even marginal enhancements in effective political participation warrant major reductions in people's ability to pursue other morally mandatory or prudentially worthy ends. Absent such claims, it remains the case that penalizing civil disobedience is justifiable if it produces (or at least approximates) the optimal level of such conduct, taking into account the other ends members of the political community are morally obligated or permitted to pursue.

To be clear, my claim is not that there is currently too much civil disobedience. To the contrary, I think that in a fair number of polities it might well be a good thing if the incidence of civil disobedience increased, and adopting a practice of penalizing but not punishing civil disobedience might have this effect. Thus I take my account of the morality of civil disobedience to reflect agreement with Rawls' observation that suitably constrained civil disobedience can serve "to inhibit departures from justice and to correct them when they occur" (Rawls 1971, p. 383), and so actually enhance the stability of a political community's social order. My claim is merely (a) that civil disobedience best serves this end if its incidence is limited, and limited in ways that encourage individuals to engage in such conduct only in response to law or policy they believe to be deeply

unjust, and (b) that the practice of penalizing civil disobedience satisfies these desiderata.[14]

The preceding arguments comprise a rebuttal to Brownlee's criticism of the specific deterrence rationale for the practice of penalizing civil disobedience. Not surprisingly the argument that penalizing civil disobedience is justified by considerations of general deterrence fares no better in her eyes.

Objection #3: "when a judge penalizes a civil disobedient primarily to deter other people from engaging in undesired behavior he uses her as a means to achieve some future good. Unless further arguments are offered, such use ignores that she has certain rights as an autonomous agent that proscribe her being treated that way" (Brownlee 2012, p. 246)[15]

While a general deterrence rationale for penalizing civil disobedients clearly treats them as a means, it is not clear that such a practice treats them as a *mere* means, and at least as this Kantian argument is normally understood only the latter constitutes morally

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[14] As should be clear my argument rests on empirical claims regarding the likely effects of competing practices of responding to civil disobedience, a point I return to in the conclusion.

[15] Brownlee also adds that penalizing civil disobedience "misattributes blame for the decline in general deterrence, because copycats are responsible for their own decisions to breach the law…" (Brownlee 2012, p. 246). Blame is an appropriate response only to culpable wrongdoing, however, and since it is not wrong *per se* to perform a suitably constrained act of civil disobedience, the state ought not to respond to it with treatment intended in part to convey or express blame. This is precisely why civil disobedients ought to be penalized, not punished.

problematic conduct. To treat someone as a mere means is to treat him as if he has value only insofar as he is of use to one. This generic description, however, does not tell us what sorts of treatment count as valuing a person solely for their usefulness. Rather, as Brownlee implies, we need to spell out an account of people's rights in order to give content to the notion of being treated as an autonomous agent. Only then can we identify conduct that *fails* to treat a person as an autonomous agent. On the account I offer, respect for persons as autonomous agents requires submission to a common juridical order, one in which individuals enjoy equal authority to determine the content of the law. With respect to civil disobedience, my account reconciles the right to engage in such conduct with each individual's duty to treat others justly by deferring to a common authoritative determination regarding what counts as doing so. If I am right to think that penalizing civil disobedience strikes the optimal balance between agents' interests in exercising equal authority to make law and the protection of their other fundamental interests (including not only welfare interests but status interests), then I am at a loss to see why such a practice treats civil disobedients as a *mere* means. In paying a penalty for her performance of an act of civil disobedience, an agent is not merely being used by the state to deter others from opportunistically or recklessly engaging in the same kind of conduct. Rather, she is doing her part to preserve a system of collective governance that best serves to advance the morally mandatory goals of sustaining a stable state that effectively performs its moral function *and* empowers its citizens to participate effectively in collective governance.

Brownlee might concede that the foregoing arguments (sometimes) justify the state's penalization of civil disobedience all-things-considered, yet maintain that it fails to

demonstrate that in doing so the state does no wrong to those who engage in conscientious, communicative, acts of disobedience to law. All of the rationales I offer to justify penalizing civil disobedience turn on the need to deter people from irresponsible acts of civil disobedience, whether they be frivolous or opportunistic or merely performed without sufficient regard for the impact the practice of civil disobedience has on the state's ability to perform its moral function. But why should the fact that some people will exercise the right to conscientiously violate the law irresponsibly entail that those who will exercise that right responsibly must pay a price in order to do so? The issue is not whether imposing the penalty to deter irresponsible actors is justifiable all-things-considered, but whether the likelihood of others (or my own) irresponsible conduct ought to figure in the very specification of what I am entitled to do; that is, in the characterization of my right. Or as Brownlee puts it, "to let the parameters of our rights of conscientious action be set by others' decision to act rashly is to hold those rights hostage to the heckler and the zealot…" (Brownlee 2012, p. 245).

In response, I maintain that some degree of irresponsible conduct, i.e. conduct performed on the basis of a defeated reason, is endemic to human beings. While its incidence and type can be managed, it cannot be eliminated. As David Schmidtz notes, "the extent of compliance [with a principle of right conduct] is not externally determined but is instead a function of the principles chosen. When we choose a principle and any particular way of putting it into practice we choose a compliance problem at the same time" (Schmidtz 2011, p. 778). A morality for human beings, a set of principles that serve to guide our conduct toward one another (and other intrinsically valuable things), must be responsive to the fact that some degree of failure to respond appropriately to the

reasons that apply to us is unavoidable. Specifically, it must treat this fact as a constraint on the justifiability of candidate norms governing particular types of conduct, such as the one that ought to govern the performance of civil disobedience.

In asserting the necessity of theorizing justice this way I diverge in two respects from Brownlee. First, Brownlee appears to assume that we ought to characterize the content of moral rights on the assumption of full compliance. While that assumption may never be realized, and so rights-transgressing conduct may be justifiable all-things-considered, the assumption of full compliance is nevertheless warranted when we attempt to theorize the kinds of treatment people are owed; i.e. the content of their rights. Second, and relatedly, Brownlee characterizes rights as inputs to moral deliberation, considerations that count in favor but do not conclusively determine what an agent ought morally to do. In contrast, I conceive of rights, moral or legal, as the output of moral deliberation; specifically, they constitute conclusions regarding the priority that advancing or honoring a particular fundamental interest enjoys or does not enjoy vis-à-vis advancing or honoring other fundamental interests. To say that a person has a right if her interest is a sufficient reason for holding some other person to be under a duty is not yet to say anything about the content of the right and correlative duty. To answer the latter question, we need to develop an account of the norms for human beings that, as a whole, best serve to advance or honor our fundamental interests (and other intrinsically valuable things).

Conduct that does not constitute the violation of another's right may nevertheless harm her, and that fact will often provide appropriate grounds for regret, and expressions thereof, on the actor's part. This may well be true in the case of penalizing civil

disobedience. Nothing in my account precludes legal officials from expressing to the civil disobedients they penalize that "'we appreciate the value of what you do, but this is the necessary price of allowing any illegal protest to occur,'" as Brownlee maintains they should (Brownlee 2012, p. 251). But contrary to what Brownlee implies, an expression of regret is not the same thing as the offering of an apology. The latter is appropriate only as a response to one's own wrongdoing, while the former is an appropriate response to any "bad" (e.g. any setback to an agent's interest), regardless of whether it is the result of, or constituted, by a wrong. And for the reasons outlined in the preceding paragraphs, I maintain that a legitimate liberal-democratic state need not do wrong when it penalizes civil disobedients, and therefore it need not owe them an apology for doing so.

Brownlee's final objection targets what I referred to as the symbolic argument for the practice of penalizing civil disobedience.

Objection #4: "If suitably constrained civil disobedience respects the equal authority of all to determine what the law ought to be, as Lefkowitz claims it does, then there could be no real costs of the relevant kind for disobedients symbolically to acknowledge" (Brownlee 2012, p. 247-8).

In one respect I concede this point. Civil disobedience often does impose costs on others, and a *considerate* agent may well wish to convey to others that she recognizes the burden her conduct imposes on them. Nevertheless, if she acts within her right then she has no *duty* to refrain from imposing those costs. The more important component of the symbolic argument for penalizing civil disobedients, however, consists in the claim that a

civil disobedient's acceptance of a penalty for her illegal protest provides her with a means to affirm her fellow citizens' collective authority to determine the content of the law. Since even suitably constrained civil disobedience frequently imposes costs on others, it will often be perceived as, at least in part, an attempt to advance political aims through the exercise of power, rather than as a purely communicative contribution to political dialogue. Moreover, in some cases the reforms that civil disobedients pursue for the sake of justice will overlap with (what others perceive to be) the advancement of their personal interests (i.e. conception of the good life). While not problematic in itself, this may lead to some skepticism regarding their true motives for engaging in acts of illegal protest. This in turn may strengthen the impression that the civil disobedients' actions are nothing more than an attempt to use coercion to impose their own conception of justice on others or to advance their private interests. Acceptance of a penalty for having performed an act of civil disobedience serves to mitigate both of these responses. The practice of imposing and accepting penalties for civil disobedience is one whereby both parties affirm that the conduct, while illegal, does not carry with it the message implicit in the commission of common crimes, namely that the perpetrator enjoys a kind of moral superiority to his or her victim.[16]

[16] Civil disobedients sometimes, and perhaps often, bear costs such as public hostility and violent treatment at the hands of police. Might the willingness to do so suffice as a means for conveying their recognition of their fellow citizens' equal rights to determine what the law ought to be? I see no grounds for ruling out this possibility. However, I contend that an institutionalized practice of penalizing but not punishing civil disobedients provides an especially perspicuous mechanism whereby both the state and civil disobedients can affirm that despite the illegal nature of their

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In sum, the arguments set forth here support two conclusions. First, civil disobedience is best understood as derived from a general right to political participation, not an agent's fundamental interest in preserving her integrity, which grounds a right to conscientious objection. Second, when theorizing the content of the moral right to civil disobedience, we ought to focus on the design of an optimal institutionalized practice for engaging in, and responding to, this distinctive form of political participation. Attaching penalties to civil disobedience, I have argued, is a central component of such a practice. Or rather, this is *probably* the case for any actual liberal-democratic state since, for example, it may be possible that permissible mechanisms for social control other than state imposed penalties better conduce to an optimal level of civil disobedience. My aim here, however, has not been to respond to a challenge along these lines, but only to rebut conceptual and moral criticisms that do not rely essentially on empirical premises.

References

Brownlee, Kimberley. 2012. *Conscience and conviction: The case for civil disobedience*. New York: Oxford University Press: New York.

Brownlee, Kimberley. 2008. Penalizing Public Disobedience, *Ethics* 118(?): 711-716.

Ceva, Emanuela. 2015. Political justification through democratic participation: The case for conscientious objection,' *Social Theory and Practice* 41 (?): 26-50.

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conduct the latter were engaged in a good faith effort to contribute to political dialogue, *not* an effort to use coercion to advance their conceptions of justice or the good life. The ritualistic nature of the practice as I envision it makes it a better means for both parties' public expression of this understanding of the civil disobedients' act than, say, a police officer's use of force to remove a disobedient from a public street and the disobedients' passive resistance to her removal.

Christiano, Thomas. 2010. *The constitution of equality: Democratic authority and its limits*. New York: Oxford University Press.

Dworkin, Ronald. 1986. *Law's empire* . Cambridge, MA: Harvard University Press.

Dworkin, Ronald. 2011. *Justice for hedgehogs*. Cambridge, MA: Harvard University Press.

Feinberg, Joel. 1978. Voluntary euthanasia and the inalienable right to life," *Philosophy and Public Affairs* 7(2): 93-123.

Kassner, Joshua and David Lefkowitz. 2012. Conscientious Objection, in *The encyclopedia of applied ethics, 2nd edition*. Oxford: Elsevier.

Lefkowitz, David. 2016. The Legitimacy of International Law. In *Global political theory*, ed. David Held and Pietro Maffettone. Cambridge: Polity Press.

Lefkowitz, David. 2007. On a Moral Right to Civil Disobedience. *Ethics* 117(2): 202-233.

Lefkowitz, David. 2005. A contractualist defense of political authority. *Ratio Juris* 18(3): 346-64.

Markovits, Daniel. 2005. Democratic disobedience, *Yale Law Journal* 114(?): 1897-1952.

Rainbolt, George. 2006. *The concept of rights.* Dordrecht: Springer.

Rawls, John. 1971. *A theory of justice*. Cambridge, MA: Harvard University Press.

Schmidtz, David. 2011. Nonideal theory: What it is and what it needs to be," *Ethics* 121(4): 772-796.

Smith, William H. 2013. *Civil disobedience and deliberative democracy*. New York: Routledge.

Stilz, Anna. 2009. *Liberal loyalty*. Princeton, NJ: Princeton University Press.

Waldron, Jeremy. 1999. *Law and disagreement*. New York: Oxford University Press.

Weinstock, Daniel. 2016. How democratic is civil disobedience?' *Criminal Law and Philosophy* 10(4): 707-720.