

Rights, Civil Disobedience, and Punishment*

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1. Introduction

In “On the Moral Right to Civil Disobedience,”¹ David Lefkowitz seeks, amongst other things, to challenge Joseph Raz’s claim that people have no moral right to civil disobedience in liberal regimes.² Lefkowitz argues that members of liberal democracies enjoy a moral right to engage in suitably constrained forms of civil disobedience which he calls ‘public disobedience’. An example of public disobedience might be antiwar protesters holding a sit-in in a federal building to communicate their objections to a military action.³ Lefkowitz conceives of the right to engage in such disobedience as constituting both a claim-right against punishment, grounded upon the non-instrumental value of individual autonomy, and a (special) liberty-right to do wrong. The latter is understood as a liberty to act sincerely and reasonably on a mistaken conception of what justice requires. The former does not include a claim-right against other forms of interference by the state such as forcible prevention or penalisation. Drawing upon Joel Feinberg’s arguments for the expressive element of punishment, Lefkowitz argues that, although the state may not punish public disobedients, it is at liberty to penalise them for their conduct through heavy fines and even temporary incarceration.⁴ Penalisation of public disobedients is

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¹ David Lefkowitz, “On the Moral Right to Civil Disobedience,” *Ethics* 117 (2007): 202-233.

² Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 273.

³ C.f. Lynne Williams, “Restraining Dissent is Harmful” *Bangor Daily News*. 10 September 2004.

⁴ Joel Feinberg distinguishes penalisation from punishment on the grounds that, although both are authoritative deprivations for failures, punishment alone involves the communication of condemnation through hard treatment. Joel Feinberg, “The Expressive Function of Punishment,” *A Reader on Punishment*. Antony Duff and David Garland (eds.) (Oxford: Oxford University Press, 1994), 73-4.

permissible, he says, on both instrumental grounds and symbolic grounds because, unlike punishment, it does not aim to communicate condemnation to disobedients for their breach of law.

In the first part of this discussion, I outline my reasons for supporting Lefkowitz's efforts to defend a moral right to public disobedience in liberal regimes. In the second part, I explain why I am not persuaded that the right to public disobedience is either a claim-right against punishment (and not penalisation) or a special liberty-right to do wrong.⁵ On the standard liberal conception, rights of conduct provide defeasible normative protection of a sphere of autonomy against *all* forms of coercive interference by others, not just against particular forms of interference such as punishment. The fact that such rights protect the conduct whether or not it is reasonable shows that there can be no liberty-right to public disobedience. And, the fact that such rights of conduct do not provide defeasible normative protection against negative judgments of that conduct shows that public condemnation of some public disobedience can be consistent with respect for the right to public disobedience.

2. Public Disobedience

Lefkowitz defends a contractualist account of legal obligation, beginning with the idea that persons, as autonomous agents, have certain basic moral rights respect for which often requires collective action. Lefkowitz suggests that modern states consist partly of institutions designed to facilitate the collective action schemes

⁵ It is a mistake to suppose that punishment is inevitably worse, and thereby less justifiable, than penalisation. The *reasons* for which some action is taken and the particular mode of action used determine whether it is justifiable.

necessary to protect those basic rights.⁶ According to Lefkowitz, where there is reasonable disagreement over the form that collective action should take, it would be unreasonable to reject a democratic procedure for resolving such disputes since such a procedure recognises the equal authority of all citizens to determine what the collective action scheme (the law) ought to be. A state, he says, has a justified claim to political authority when it is both minimally democratic in this sense and liberal in the sense of manifesting a principled commitment to individual rights. When a state has such legitimacy, citizens have a duty to follow the law. But, in contrast with traditional accounts of legal obligation, Lefkowitz maintains that this duty to the law is disjunctive. Citizens either must follow the law or they must engage in suitably constrained civil disobedience. If they oppose a policy, they may not choose, for example, simply to disregard it; they either must follow it (using legal means of protest if they wish) or use suitably constrained civil disobedience against it.⁷ Lefkowitz's explanation for why legal obligation is disjunctive is that both adherence to the law and suitably constrained civil disobedience, and only these two options, demonstrate respect for other citizens as persons who have equal authority to determine what the law ought to be.

Lefkowitz's purpose in sketching out his contractualist account of legal obligation is to show that it is compatible with a moral right to suitably constrained

⁶ See David Lefkowitz, "A Contractualist Defense of Democratic Authority," *Ratio Juris* 18 (2005): 346-364.

⁷ Although this disjunctive duty could be interpreted exclusively (so that the duty of the majority is to follow the law and the duty of the minority is publicly to disobey it), I assume that Lefkowitz intends the disjunction to be inclusive such that there are two ways for a person to satisfy the demands of legal obligation: either through adherence to the law or through public disobedience. On this inclusive reading, however, legal obligation is disjunctive only for those citizens who regard a certain law or policy as unjust. Citizens who do not sincerely believe that a certain policy is unjust could not satisfy the demands of legal obligation through public disobedience (even when they disobey out of sympathy for the minority) because their disobedience would lack the sincere conviction which, on Lefkowitz's view, we legitimately may demand from each other: their disobedience would not be suitably constrained in the appropriate ways. Thus, there can be only one way for such citizens to honour their legal obligation on Lefkowitz's view, which is to follow the law.

civil disobedience. Lefkowitz goes so far as to say that recognition of such a right is necessary for a state to have political legitimacy. To defend his position, Lefkowitz begins by critiquing Raz's view that there can be no right to civil disobedience in liberal regimes because members' rights to political participation are, by hypothesis, adequately protected by law and so cannot justify breaking it. Raz says:

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. For if one has a right to perform it its performance should not be civil disobedience but a lawful political act. Since by hypothesis no such criticism can be directed against the liberal state there can be no right to civil disobedience in it.⁸

Lefkowitz argues, correctly I believe, that when one appeals to political participation rights to defend one's disobedience one does not necessarily criticise the law for outlawing one's action. Members of minorities can appreciate that democratic discussions often must be cut short so that decisions may be taken. As such, persons who engage in political disobedience may view current policy as the best compromise between the need to act and the need to accommodate continued debate. Nonetheless, they can observe that, with greater resources or further time for debate, their view might have held sway. Given this possibility, the right to political participation must include a right to continue to contest the result after the votes are counted or the decisions taken. And this right should include public disobedience because the best conception of political participation rights is one that reduces as much as possible the impact that luck has upon the popularity of a view.

As Bertrand Russell observes, often it is difficult to make the most salient facts in a dispute known through conventional channels of participation, partly because the controllers of mainstream media tend to grant defenders of unpopular

⁸ Raz, *Authority of Law*, 273.

views limited space to advance their causes.⁹ Given, however, the sensational news value of illegal protest, engaging in civil disobedience can often lead to wide dissemination of a position where legal protest could not do. Civil disobedience, as Lefkowitz points out, also allows dissenters to demonstrate the strength of their convictions about issues which may be for the majority matters of indifference (214). Including suitably constrained civil disobedience under political participation rights thus helps to make those rights real.

In addition to reducing the impact of luck, time, and limited resources on the effectiveness of persons' political participation, a state that respects individual rights has some responsibility, I believe, to reduce certain barriers to the conscientious communication of deeply held commitments. To require a person either to respect a law that she finds objectionable or to engage only in private disobedience against that law (where possible) is to deny her appropriate space to act in keeping with her conscientiously held beliefs. Borrowing from Antony Duff's discussion of punishment, when a person believes that certain decisions are wrong, this commits her not only to avoiding such decisions herself and to judging the conduct of people who pursue such decisions as being wrong, but also to communicating this judgment in some situations. To remain silent, to let the action pass without objection, could cast doubt on the sincerity of her conviction.¹⁰ And although legal protest, like civil disobedience, offers a vehicle through which to communicate conviction, it lacks the conscientious and frequently performative forms of dissociation that distinguish civil

⁹ Bertrand Russell, *Autobiography* (London, Routledge, 1998), 635.

¹⁰ Antony Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001), 28.

disobedience from ordinary offences.¹¹ Thus, to make political participation rights real and meaningful, some space must be made for communicative dissociation from laws and policies.

The space made for disobedience under political participation rights necessarily is constrained in certain ways. For Lefkowitz, the constraints in question are communicativeness, non-coerciveness, and a willingness by disobedients to accept the legal consequences of their conduct, namely, penalisation (215). I discuss in Section 4 my doubts about the third constraint, and for now will note that I endorse Lefkowitz's communicativeness and non-coerciveness constraints provided that the latter is not intended to restrict protected disobedience to that which defends morally reasonable causes. Lefkowitz states that,

Those who engage in [public disobedience] 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 (216).¹²

This could be interpreted as ruling out any public disobedience taken in support of causes that do not affirm a commitment to the equal authority of all to determine what the law should be.¹³ If it did, then Lefkowitz would have in mind a different notion of a right of conduct from the liberal conception endorsed by his primary opponent Raz, who argues that the nature and purpose of rights of conduct is to protect a sphere of autonomy for the agent even when the agent is somehow morally unjustified in her

¹¹ C.f. Brownlee, Kimberley, "Protest and Punishment" in *Law and Philosophy*. Ross Harrison and Michael Freeman (eds.), (Oxford: Oxford University Press, 2007a), 430-458; and, Brownlee, Kimberley (2007b), "The Communicative Aspects of Civil Disobedience and Lawful Punishment" *Criminal Law and Philosophy* 1:2 (2007b), 179-192.

¹² Italics added.

¹³ Lefkowitz has said in conversation that he intends the non-coerciveness constraint to apply primarily to disobedients' modes of action. However, he has said that he would not be troubled if an implication of his view were that the right to public disobedience does not protect citizens who deny the equal authority of all to determine what the law should be.

conduct.¹⁴ To assert a right to civil disobedience, Raz argues, is to grant the legitimacy of resorting to this mode of political action to one's opponents; it means that the legitimacy of this mode of protest does not depend upon the legitimacy of one's cause. Although Lefkowitz's notion of a right of conduct seems to differ from Raz's in that Lefkowitz regards rights of conduct as providing normative protection only against certain forms of interference, nevertheless he presumably has Raz's notion of a right to civil disobedience in mind when he says that he aims to show Raz is mistaken to deny there is a right to civil disobedience in liberal regimes (203ff.). Therefore, we may take it that Lefkowitz's non-coerciveness condition pertains to disobedients' modes of action and not to their chosen commitments. Understanding that the right to public disobedience, as a right of conduct, has the character just described is important for my purpose in the next section which is to show that there is no liberty-right to public disobedience.

A good conception of non-coerciveness begins, I believe, with the communicativeness constraint. Communication is an other-directed activity characterised by engagement at a rational level by the 'speaker' with the 'hearer', and by comprehension by the hearer of what is conveyed to her. Civil disobedience, like lawful punishment by the state, is associated with a backward-looking aim to communicate condemnation of certain conduct and a forward-looking aim to bring about through moral dialogue a lasting change in that conduct.¹⁵ Having the aim to lead policymakers and society to internalise the reasons behind a protest so as to bring about a lasting change in policy, places certain constraints upon how disobedients may legitimately pursue that aim. A genuine desire to communicate effectively

¹⁴ Raz, *Authority of Law*, 266ff. Raz states that we do not need a right to act rightly. 'When our conduct is right that gives us all the entitlement we need. But, we do need a right to act in ways we ought not to act.'

¹⁵ C.f. Brownlee, "Protest and Punishment", and Brownlee, "The Communicative Aspects of Civil Disobedience and Lawful Punishment".

requires an awareness that certain modes of communication, such as systematic coercion, are at odds with long-term persuasive aims. Too radical a protest may obscure the moral force of the objection. More importantly, to try to coerce hearers rather than to persuade them of a view would be to treat them as less than fully autonomous beings with whom disobedients could engage rationally. For disobedients to claim plausibly that they endeavour to engage in moral dialogue with policymakers and various members of society, they must use modes of communication consistent with respect for the autonomy of their hearers as rational beings capable of responding to the reasons disobedients believe they have to challenge current policy. Finally, disobedients who both respect their hearers and aim to be persuasive have reason to avoid protesting in ways and places that unduly provoke or incite harmful conduct by supporters or opponents.

3. Liberty-Rights

As noted above, Lefkowitz conceives of the right to public disobedience not merely as a claim-right against certain kinds of interference which I consider below, but also as a Hohfeldian liberty-right or moral permission to engage in public disobedience.¹⁶ Lefkowitz endorses the Hohfeldian idea that a person enjoys a liberty-right to act when others have no claim upon her not to act. However, Lefkowitz revises the traditional conception of what it means to have a claim upon someone's action. He argues that there are limits to what we plausibly may demand of each other as persons making decisions in light of the 'burdens of judgment.'¹⁷ Lefkowitz says that,

¹⁶ For a brief defence of the coherence of the notion of a liberty-right to do wrong, see Peter Jones, *Rights* (New York: Palgrave, 1994), 204-207.

¹⁷ Following Scanlon and Rawls, Lefkowitz identifies two senses of 'reasonable'. A person is *morally reasonable* if, and only if, she is committed to limiting her pursuit of the good life appropriately to

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 (229).

Although people ought to act as morality truly requires, the most that people may demand of each other is that they act reasonably, Lefkowitz argues. To say someone has a liberty to act is not to say that she acts rightly, it is to say that she acts reasonably (232). The right to public disobedience may be construed as a liberty-right in this sense, Lefkowitz argues, because when a person champions through public disobedience a reasonable but erroneous conception of justice, she satisfies all claims that others plausibly can make of her, but nonetheless, in some sense, acts 'wrongly' since the policy she defends is less just or moral than existing policy.

I have three criticisms of this view. First, the difficulties, which Lefkowitz notes, in applying traditional deontological terminology to this account might be alleviated if Lefkowitz relinquishes the idea that the realm of duty is exhausted by the realm of rights-claims (224). His suggestion that these two realms are co-extensive is problematic for him because he also says that, for the purposes of his article, he limits the terms 'wrong' and 'immoral' to violations of moral duty (225). If wrong actions are actions that breach moral duty, and if duties are exhausted by rights-claims, then it cannot follow that a person acts wrongly when she acts sincerely and reasonably in defence of an unjust cause where no one has a claim upon her that she act otherwise. But, if people can have duties to act in certain ways even when others have no claim-right against them, and thus act wrongly when they breach those duties, then the person who reasonably endorses an unjust policy can be said to act wrongly (even

accommodate others who are also rational and reasonable. A person's belief or action is *cognitively reasonable* when it is 'a judgment made under conditions of less than full information, and/or awareness of the full range of reasons that apply to someone in that situation, and/or with less than perfect reasoning.' Cognitively reasonable judgments are ones made in circumstances characterized by what Rawls calls the burdens of judgment. C.f. Lefkowitz, "A Contractualist Defense".

though no one may demand that she act otherwise) since she breaches a duty, and thus fails to act as morality truly requires. Adopting this view of duty would prevent Lefkowitz from having to assert that the conduct of the reasonable person involves some special and rather obscure sort of wrongness.

Second, related to this, we should consider whether the claim that ought implies can actually supports Lefkowitz's position. Suppose I have to give a lecture this morning, but my train to the university is delayed so that I am unable to give the lecture this morning. In some sense, I still ought to give the lecture, but the fact that I am unable to is a constraint upon this. According to John Gardner, what I ought to do (have reason to do) is not limited to what I am able to do. I have reason to give my lecture even though I cannot do so and it is because I have reason to give the lecture that I feel distressed at being unable to do so. But, since I cannot give the lecture, I have no reason *to try* to give the lecture. I have reason to try to ϕ only if I can succeed in ϕ -ing.¹⁸ This characterisation of the relation between ought and can (i.e. that ought to try implies can succeed, but ought does not necessarily imply can) is more compatible with Lefkowitz's position than the standard account since Lefkowitz seeks to highlight that what we ought to do according to morality lies beyond what we may demand of each other given the burdens of judgement; therefore, what we ought to try to do is to act reasonably.

Third, let us consider the parameters of the claim-right to public disobedience in relation to the parameters of Lefkowitz's liberty-right. I assume that Lefkowitz intends the liberty-right to public disobedience to map onto the same set of actions as the claim-right to public disobedience. But, if the correct way to conceive of the claim-right to public disobedience is, as I have suggested, as a right of conduct that

¹⁸ John Gardner, "The Wrongdoing that Gets Results," *Philosophical Perspectives* 18 (2004): 53-88.

protects a certain sphere of action irrespective of the legitimacy of the disobedient's cause, then necessarily there will be acts of disobedience, namely those advocating highly objectionable or unreasonable causes such as Neo-Nazism, that are protected by the claim-right to public disobedience but not by the liberty-right. The implication is that there is no liberty-right to public disobedience *per se* because only the public disobedience that is just or reasonable could fall within the parameters of a liberty-right. Therefore, we may reject the idea of a liberty-right to public disobedience and turn to the claim-right to public disobedience.

4. Penalisation

According to Lefkowitz, the claim constitutive of the right to public disobedience is a claim against punishment: the right to public disobedience grounds a duty for the state not to punish disobedients merely because they have engaged in this form of protest. On Lefkowitz's view, this claim against interference does not extend to a claim against penalisation. The distinction between punishment and penalisation, highlighted by Feinberg, turns on the observation that penalties such as parking tickets, offside penalties, and disqualifications have a miscellaneous character, but largely lack the symbolic condemnatory significance of punishment.¹⁹ Trading on this distinction, Lefkowitz argues that it is the non-instrumental value of individual autonomy that makes it impermissible for the state to condemn (that is to say to punish) public disobedience, but permissible to penalise it.²⁰

Lefkowitz offers both instrumental grounds and symbolic grounds for his claim that severe penalisation does not infringe the moral right to public disobedience.

¹⁹ The distinction between punishment and penalisation is less clear-cut than Feinberg and Lefkowitz suppose, but I shall accept the distinction for the purposes of this discussion because my challenge to Lefkowitz focuses on the reasons for which he says penalisation may be imposed.

²⁰ The arguments in this section are presented in Brownlee, "Penalizing Public Disobedience".

He argues that granting the state the liberty to penalise public disobedience contributes to the stability of the state by both better enabling the state to facilitate morally necessary collective action and reducing the likelihood that people will undertake public disobedience unless they believe a law and policy is significantly unjust (219). In brief,

...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 (223n).²¹

Concerning symbolism, he argues that the state should be at liberty to penalise public disobedients because their acceptance of harsh penalties allows them symbolically to affirm citizens' collective authority to settle reasonable disagreements about morally necessary collective action schemes (220). Paying heavy fines allows public disobedients symbolically to recognise the costs they impose on others when they adopt this mode of political participation. And, accepting temporary incarceration allows public disobedients to show that they do not intend to usurp the authority of the state, but rather act (just) within the boundaries of political debate (222).

Let us test the suggestion that the right to public disobedience includes no claim against penalisation. Our test is to consider whether the liberal-democratic state that penalises someone for public disobedience properly owes her some apology for this treatment (on the grounds that the treatment infringes her rights). There are several rights-related reasons to think that such an apology by the state would be appropriate even when the imposition of penalisation is at some level defensible.

²¹ Detering all but the most serious dissenters might not contribute to the stability of the state. First, the most serious dissenters are not necessarily the most justified in their commitments. Second, as John Rawls suggests, (justified) civil disobedience can serve to inhibit departures from justice and to correct departures when they occur; thus it can act as a stabilising force in society. John Rawls, *A Theory of Justice*. (Cambridge: Harvard University Press, 1971), 383.

First, Lefkowitz's claim that public disobedients have no right against penalisation conflicts with his contractualist account of what is required to respect persons as autonomous rational agents, an account upon which he bases his defence of both the liberal-democratic state's political legitimacy and the right to public disobedience. In brief, Lefkowitz argues that it is the non-instrumental value of individual autonomy and the protection of persons' good and bad choices that that value demands, that make it impermissible for the state to condemn (to punish) public disobedience. But, he fails to explain why, on his view, the non-instrumental value of individual autonomy does not also make it impermissible, other things being equal, for the state to seek to prevent public disobedience and to penalise its practitioners.

One reason that such interference is impermissible on autonomy-related grounds is that it disregards both the conscientious nature of public disobedients' conduct and public disobedients' status as equal members of the community. When, for example, a judge orders a long-time anti-fur-trade activist, who blocked a department store entrance, to stay away from animal rights protests so that she and others won't 'be back doing the same things again,' he gives no weight to the conscientiousness of her convictions or the merits of her position or the constrained, non-coercive nature of her chosen conduct. He simply issues an order to deter undesired behaviour.²² And, when a judge penalises a public disobedient primarily to deter either her or other people from engaging in undesired behaviour he treats her merely as a means to achieve some future good. Unless further arguments are offered, such treatment ignores that a person has certain rights as an autonomous agent that

²² Will Potter, "The New Backlash: From the Streets to the Courthouse, the New Activists Find Themselves under Attack" *Texas Observer*. 14 September 2001. Retrieved 10 October 2005 from <http://www.texasobserver.org/showArticle.asp?ArticleID=420>.

proscribe her being treated that way.²³ Of course, those rights are not absolute, and they may be overridden if the benefits of penalisation are sufficiently great. But, such rights nonetheless identify persisting normative protection against interference that must be addressed to defend penalisation as a deterrent.

This autonomy-related objection also applies to some of the particular penalties that Lefkowitz endorses such as temporary incarceration, which is by its nature at odds with respect for individual autonomy. Lefkowitz compares the penalisation of public disobedients through incarceration with the quarantining of potential disease carriers to demonstrate that there is no necessary connection between confinement by the state and the state's communication of disapproval or resentment to those confined. However, the issue Lefkowitz overlooks is whether the unpleasantness of the burden imposed is an essential and intended feature of what is done to the detained person and whether the reasons for imposing the unpleasantness are at odds with a respect for individual rights. Incarceration as penalisation cannot be compared to quarantine because, whereas the deprivation imposed in quarantine is an unintended and regrettable side-effect of isolating persons as potential disease carriers, the deprivation imposed on public disobedients as penalisation is an essential and intended part of what is done to them. The incarceration is meant to be burdensome on public disobedients so that it deters either them or others from engaging in excessive or frivolous disobedience. And this disregards their rights as full members of the community to contribute to the resolution of collective disputes through legitimate means such as public disobedience.

Second, related to the autonomy objection is an objection concerning the conditions for effective exercise of the right to political participation. Lefkowitz's

²³ C.f. J. G. Murphy, "Marxism and Retribution," *A Reader on Punishment*. Antony Duff and David Garland (eds.) (Oxford: Oxford University Press, 1994), 44.

willingness to have the state penalise public disobedients through means that are sufficient to impose a *genuine sacrifice* upon them (220) conflicts with his claim that it is important *ceteris paribus* to reduce as much as possible the barriers to effective political participation. Since penalisation, and in particular penalisation sufficient to impose a genuine sacrifice, is likely to dissuade many people from undertaking public disobedience (including many who are serious about their convictions), the use of penalisation is a barrier to citizens' effective exercise of their right to political participation including the right to public disobedience.

Third, Lefkowitz's defence of the state's liberty to prevent people from publicly disobeying and to penalise them for publicly disobeying would be more understandable if public disobedience were, on his view, a deviant form of political engagement beyond what can be tolerated in a liberal democracy. But, for Lefkowitz, public disobedience is not beyond what can be tolerated. Rather, it offers one of two ways to satisfy the demands of legal obligation because it respects other citizens as persons who have equal authority to determine what the law ought to be. And, this status of public disobedience as a legitimate form of political engagement considerably weakens the symbolic grounds for penalisation. Since suitably constrained civil disobedience respects the equal authority of all to determine what the law ought to be, there can be, on Lefkowitz's view, no real costs of the relevant kind for disobedients symbolically to acknowledge.

One might respond on Lefkowitz's behalf that, since public disobedience can encourage frivolous or opportunistic disobedience in the absence of penalisation, public disobedients should accept certain significant penalties as a means of restoring the level of deterrence that their own actions have undermined. Since they are responsible for a decline in the deterrence of frivolous disobedience, it might seem

fair to impose the burden of repair on them.²⁴ This response fails because burdening conscientious actors on such grounds uses them merely to deter other types of conduct, which, unlike their own conduct, do not respect the authority of all citizens to contribute to collective decision-making. Penalising public disobedients in order to restore deterrence levels may be a necessary evil that the state must impose in order to avoid having to prohibit and to punish all civil disobedience, but we should not suppose, as Lefkowitz does, that it is anything other than a necessary evil that fails to respect public disobedients as autonomous persons who contribute to collective decision-making in legitimate ways.

Unless there are more compelling arguments for penalising public disobedients, we may conclude that disobedients have a rights-claim against both forcible prevention and penalisation by the state. Now, do public disobedients have similar claims against public condemnation? I shall argue in the next section that they do not. Briefly, if deterrence were said to provide an independent justification for punishment, then disobedients would have autonomy-related claims against being punished. But, on a plausible conception of punishment as the communication of disapprobation for a wrongdoing (which Lefkowitz seems to endorse), deterrence plays only a secondary role in its justification.²⁵ The central purposes and justifying aims of punishment, on the communicative account that I adopt, are to demonstrate condemnation of and disapprobation for certain conduct or aspects of conduct and to engage the offender in moral dialogue so as to persuade her to repent aspects of her

²⁴ I thank Jeff McMahan for outlining this response.

²⁵ C.f. Duff, *Punishment, Communication and Community* and John Tasioulas, "Punishment and Repentance," *Philosophy* 81 (2006): 279-322. Note that not all consequential reasoning is ruled out of the justification of punishment on a communicative account. When deciding on the appropriate punishment, the state must consider how the punishment will be received, that is, what form of punishment will most effectively communicate the state's condemnation. And when choosing between two punishments that are equally defensible on a retributive basis, the state must consider their respective benefits, including deterrence, to determine which is preferable.

conduct, to recompense those whom she has harmed, and to reform her conduct as appropriate. In certain circumstances, these aims can be consistent with respect for the right to public disobedience.

5. Punishment

There is an important distinction between protecting autonomous choices and assessing or guiding those choices.²⁶ Although a right to public disobedience both defeasibly protects a person from coercive interference (including penalisation) and provides that person with certain claims to positive assistance,²⁷ this right does not protect that person from others' judgments of her chosen exercise of this right. Essentially, it does not immunise her from the condemnation of either other citizens or the state. Lefkowitz accepts as much when he says that state officials and individual citizens may, of course, criticize both the content of views communicated through public disobedience and the decision to exercise that right in light of the purposes to which it is being used:

...[In fact] 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...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 (219).

²⁶ C.f. Jones, *Rights*, chapter 9.

²⁷ Persons' political participation rights, including their right to public disobedience, require an effective system of provision and protection within the society's accepted morality and (in certain senses) its legal system in order to reduce the impact that luck has upon effective participation. Effective recognition of the moral right to public disobedience requires, for example, that the state, where possible, allow the disobedience to occur, and neither sabotage the disobedience nor respond with excessive force. Additionally, it requires that the state take public disobedients seriously as a distinct category of offender, and thus, exercise discretion when deciding whether to arrest, charge, go to trial, convict, or sentence. Although the strength of these duties depends partly upon the strategies that public disobedients employ and their immediate effects, these duties will be in play for any suitably constrained, rights-protected disobedience. At all stages in the legal process, authorities have opportunities to show their tolerance of a little disobedience.

What state officials and citizens ought not to do, Lefkowitz argues, is condemn a person who publicly disobeys the law merely because she does so or criticize her for not limiting her exercise of the right to political participation to legal means. Agreeing with Lefkowitz on this last point does not commit us to his conclusion that the state is not at liberty to condemn (i.e. to punish) any of the conduct of its public disobedients. Even were it the case (and I think it is the case) that the state ought not to punish persons for mere breach of law, often politically communicative breaches of law will have negative aspects that make them appropriately subject to the state's disapproval. Since it is impossible to divorce an exercise of a right from either the purpose for which it is exercised or the effects of its exercise, there will be occasions where society's communication of condemnation to a public disobedient is legitimate as an effort to engage that person in moral dialogue about her conduct.

One such occasion is when disobedients advocate through highly visible methods deeply offensive policies that are at odds with the fundamental principles of a liberal democracy. (Deeply offensive conduct, such as leading a banned Neo-Nazi march through a Jewish neighbourhood, nonetheless can satisfy the formal constraints of communicativeness and non-coerciveness as outlined above.) A second occasion is when disobedients' conduct, irrespective of its objectives, causes significant harm or unreasonable risk of harm to others. (Much harmful or risky conduct, such as vandalism, road-blocks, some symbolic theft, some trespass, property damage, self-mutilation, disturbance of business, and so on, nonetheless can satisfy the formal constraints of communicativeness and non-coerciveness.) Although disobedients' defence of genuine values does not warrant censure, the mode of communication they employ does warrant censure to the extent that it wrongfully causes significant negative effects and/or risks of harm to others. These disobedients deserve

condemnation to the extent that they intentionally, knowingly, or recklessly brought about harmful consequences through their chosen action.²⁸ (The amount of condemnation that actually is justified sometimes may be less than that which these disobedients deserve given relevant factors that recommend being compassionate toward them as individuals who find adherence to laws they oppose deeply onerous. I discuss this briefly below.)

One might question whether, in either of the above contexts, the communication of disapprobation by the state could or should take the form of punishment. The abolitionist characterisation of illegal actions as conflicts to be resolved may be appropriate in the context of public disobedience since disobedients who breach the law in suitably constrained, conscientiously communicative ways enter into a conflict with authority at the level of deeply held conviction. In that context, it may be a more fitting objective for the state to promote a reconciliation of antagonistic perspectives than to seek to punish public disobedients. Even so, not all conflicts between disobedients and the state merit a reconciliation of perspectives (as opposed to a revision in perspective on the part of disobedients). And, when a reconciliation of perspectives is appropriate, modest punitive censure understood as an attempt to engage the offender in moral dialogue can play an important role in that process of reconciliation.²⁹ Punishment, on this view, not only communicates both disapprobation of aspects of the offender's action and a desire for reformation on her part, but also gives her an opportunity to communicate her acceptance of that

²⁸ How much weight these considerations should be given will depend on the case. Lefkowitz says: '...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.' (221) This is true when those costs are minimal. But, when public disobedience causes significant harm, unreasonable risk of harm, or unreasonable offence, then, even when their protest greatly contributes to public debate, there are *prima facie* grounds for requiring those who protest to make reparation to those they negatively affect.

²⁹ Antony Duff, "Punishment" *The Oxford Handbook of Practical Ethics*, Hugh LaFollette (ed.) (Oxford: Oxford University Press, 2003), 348.

judgement, to apologise to those whom she has negatively affected, and to make reparation where appropriate. Even when a person's wrongdoing is fully justified, these normative consequences come into play; healthcare employees who strike illegally to secure an equitable contract, for example, may be fully justified in their disobedience and yet may be called upon to make reparation to the community harmed by their action. Any legal system presupposes that even fully justified wrongdoing has at least one normative consequence. As John Gardner observes, it makes it the offender's job to offer what justification she can as a responsible agent who answers for her conduct.³⁰ Lefkowitz's comments quoted above, that citizens and the state may criticise those who exercise the right to public disobedience poorly, is consistent with, and indeed supportive of, this conception of punishment as a contribution to moral dialogue.

It does not follow from the fact that punishment can play an important role in this moral dialogue that public disobedients are susceptible to severe burdens such as incarceration. A key tenet of the communicative theory of punishment is that modes of punishment must be consistent with a respect for offenders as rational persons. Too harsh a response not only drowns out the moral appeal, as Andrew von Hirsch would say, but also denies offenders standing as persons capable of responding to reasons. Acceptable modes of punishment thus, for example, would not reduce disobedients' valuable options below an adequate range.³¹ This feature of the communicative theory neutralises Lefkowitz's worry that the punishment of public disobedience must constitute a violation of disobedients' autonomy. Lefkowitz might reply that punishment which does not reduce disobedients' valuable options below an adequate

³⁰ John Gardner, "In Defence of Defences" *Flores Juris et Legum: Festschrift till Nils Jareborg*, (Uppsala: Iustus Forlag, 2002).

³¹ C.f. John Stanton-Ife, "Limits of Law," *Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.). (Spring 2006 Edition) <http://plato.stanford.edu/archives/spr2006/entries/law-limits/>.

range nonetheless constitutes an attack upon autonomy since it is to varying degrees coercive, and to be coerced is to be disrespected as an autonomous person; moreover, given the stigmatising aspects of punishment, *any* form of punishment violates or disrespects the autonomy of public disobedients. But, if this were so, which is debatable, then the argument would seem to prove too much since it would entail not only that the state has a duty not to punish any offender no matter what the crime since to punish would be to disrespect that offender as an autonomous agent, but also that the state may not criticise public disobedients for any improper use of their right since to do so would be stigmatising.

Note that public disobedients need not have a claim-right against punitive censure for the state to have a duty not to punish (assuming that the realm of duties is not exhausted by the realm of rights-claims). When, for example, disobedients are sincere and serious in their conviction and conscientious in their conduct in ways that relevantly distinguish them from both ordinary offenders and radical protesters, then the state has reason to appreciate the onerousness for them of not disobeying or effectively challenging laws or policies they find objectionable. Concern for their wellbeing as conscientiously motivated offenders gives the state some reason to be charitable or merciful toward them whether or not their cause is well-founded.³² I agree with Lefkowitz that public disobedients differ from ordinary offenders and from other protesters and that recognition of this must be reflected in the state's responses to their conduct. Being charitable toward public disobedients in virtue of their conscientious conviction is one way for the state to acknowledge this difference.

In summary, appropriately modest censure allows a state to make known its disapprobation not only of certain modes of action that harm or risk harm to others,

³² For a discussion of mercy, see Tasioulas, "Punishment and Repentance".

but also of certain views, particularly when those views are advocated through modes of conduct that lie at the periphery of what is permissible within a liberal democratic state. If the arguments offered here concerning the legitimate role of punishment in the moral dialogue between disobedients and the state are correct, then the claim constitutive of the right to public disobedience is a claim against penalisation, not against appropriately modest punishment.

6. Concluding Remark

Although I both have challenged the idea of a liberty-right to civil disobedience and have argued that the claim constitutive of the claim-right to public disobedience is a claim against penalisation not punishment, nevertheless I believe that Lefkowitz provides a plausible defence of this right in liberal regimes as an important manifestation of persons' political participation rights. The arguments that Lefkowitz puts forward concerning the effective exercise of rights and the need to reduce the impact that luck has upon one's political participation are compelling and well worth developing.