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Civil Disobedience and the Duty to Obey the Law: A Critical Assessment of Lefkowitz's View

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CIVIL DISOBEDIENCE AND THE DUTY TO OBEY THE LAW:
A CRITICAL ASSESSMENT OF LEFKOWITZ'S VIEW

by

JOHN LUKE PIZZATO

Under the Direction of Professor Andrew Altman, PhD

ABSTRACT

In this paper I critically assess David Lefkowitz's view that the right to political participation encompasses a right to suitably constrained civil disobedience. I claim that his argument is not successful because it has an explanatory gap. I then examine two strategies for repairing his argument. The first attempts to show that acts of civil disobedience fulfill the duty to obey the law. The second attempts to establish that the moral value of civil disobedience outweighs the moral value of obeying the law. I argue that both strategies may be successful—to a certain extent—but only the latter can establish a right to civil disobedience.

INDEX WORDS: Civil disobedience, Political obligation, Political authority, Democracy, Contractualism, Rawls

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DEDICATION

For my brother, my mother and my father.

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1 INTRODUCTION

Civil disobedience has been a subject of philosophical analysis since, at least, the era of the Civil Rights Movements and the Vietnam War (Rawls 1969, Rawls 1971/1999, Dworkin 1977, Raz 1979). In more recent philosophical work, accounts of the justification of civil disobedience have aimed to show that it may be justified in a reasonably-just society, even when the political aims of civil disobedience are not in fact just (Brownlee 2012, Smith 2013, Lefkowitz 2007; Lefkowitz 2017). One argumentative strategy deployed in this type of justification emphasizes the instrumental value of civil disobedience as a means for surmounting barriers to effective political participation (e.g. Smith 2013; Lefkowitz 2007).

In his article “On a Moral Right to Civil Disobedience,” David Lefkowitz employs this sort of argument (Lefkowitz 2007). He defends the view that a suitably-constrained form of civil disobedience—which he calls “public disobedience”—is among the “morally permissible methods for continuing debate” within an effective liberal democracy (2007: 217). Lefkowitz defines public disobedience as a type of civil disobedience that advocates “reasonable” changes to law (2007: 202; 230). With the term, “reasonable,” Lefkowitz invokes a Rawlsian conception of “reasonableness.” On that conception, a reasonable political end is one that represents a person’s best judgment and that respects all moral agents’ individual rights (2007: 209)¹ Accordingly, although “agents must sincerely believe that the reasonable conception of justice they advocate is true,” a reasonable political end may not be part of the best account of what justice requires (2007: 232).

¹ Asserting the latter point, Lefkowitz says that “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” (2007: 209).

On Lefkowitz's view, "the inclusion of public disobedience among the morally permissible methods for continuing debate rests on instrumental considerations regarding the best set of norms for regulating collective decision-making mechanisms" (2007: 217). The "instrumental considerations" to which he refers, are particular features of public disobedience that make such action instrumentally valuable for diminishing barriers to citizens' fully effective political participation (2007: 215). On the grounds that public disobedience allows citizens to participate more effectively in political debate, Lefkowitz argues "a moral right to public disobedience" is among the "morally best norms" for political debate in an effective liberal democracy (2007: 217).

Notably, Lefkowitz also argues that an effective liberal democracy "has a morally justified claim to political authority" (2007: 202). Accordingly, he acknowledges that a moral right to public disobedience within such a state "may well appear inconsistent with the duty usually thought to correlate to a legitimate state's right to rule, namely a moral duty to obey the law" (2007: 202). But Lefkowitz claims that this inconsistency is illusory. To defend this claim, he develops accounts of political authority and political obligation (i.e. the duty to obey the law) in order to explain how citizens could be "morally bound" by the law while they enjoy a moral right to commit acts of public disobedience (2007: 215).

Lefkowitz's account of a moral right to suitably constrained civil disobedience is a valuable contribution to the contemporary literature on civil disobedience. Lefkowitz's argument for his view is systematic and nuanced, and I have learned a great deal from studying it. I worry, however, that the success of the argument is forestalled by an important explanatory gap. I accept Lefkowitz's account of the political authority of an effective liberal democracy; I also accept his defense of the claim that public disobedience is instrumentally valuable for

diminishing barriers to effective political participation. But I think his argument becomes unclear when he begins to argue that the instrumental value of public disobedience supports the further claim that “adequate recognition of the moral right to political participation encompasses a moral right to public disobedience” (2007: 217).

My primary concern with Lefkowitz’s argument is that I do not think it explains why the duty to obey the law does not provide a reason to reject the right to public disobedience, no matter the instrumental value of that right. Because the argument does not explain this, I claim that the argument does not show that the apparent inconsistency between political obligation and public disobedience is illusory. If this inconsistency is not resolved or addressed, the success of Lefkowitz’s account of the right to civil disobedience is seriously jeopardized.

In what follows, I explain Lefkowitz’s view (Sections 2 and 3), and I then develop my concerns about the explanatory gap in his argument (Sections 4 and 5). I then suggest that his argument might fill in this explanatory gap by employing one of two plausible strategies (Section 6). The first strategy attempts to explicitly establish that public disobedience satisfies political obligation. This would resolve the apparent inconsistency between Lefkowitz’s account of political obligation and public disobedience. I argue that this line of argument can establish that public disobedience may *sometimes* satisfy political obligation, but I note that this is not sufficient to establish a moral right to public disobedience.

I then suggest that Lefkowitz could accept that political obligation is sometimes inconsistent with public disobedience while, nevertheless, defending his account of a right to public disobedience. This might be done via the second strategy I discuss, namely, by defending a particular moral principle. That principle would assert that the value of public disobedience always outweighs the value of obeying the law. I do not develop a defense of this principle, but I

argue that such a defense would have to show that the principle is superior to two alternative principles.

2 LEFKOWITZ ON POLITICAL AUTHORITY AND OBLIGATION

As noted above, Lefkowitz's argues that the "morally best norms" for political debate in a liberal democracy ought to include "a set that encompasses a moral right to public disobedience" (2007: 217). Lefkowitz's argument for the inclusion of a right to public disobedience among such moral norms is grounded in contractualist moral theory. On that moral theory, moral agents are morally obligated to act only on action-guiding norms—or principles—that could not be rejected in a hypothetical "reasonable rejection" procedure (2007: 207).² This procedure is one in which idealized agents must accept or reject candidate principles, and moral agents may act only on principles that no idealized agent could reject (2007: 207).³

For instance, Lefkowitz claims that the right to public disobedience is such a norm:

Given the advantages of public disobedience...it seems plausible to think that suitably motivated agents concerned to identify the morally best norms for regulating reasonable disagreements over how to act collectively could not reasonably reject a set that encompasses a moral right to public disobedience. (2007: 207).

In other words, Lefkowitz's arguments in defense of a right to public disobedience are supposed to show that "suitably-motivated," i.e. idealized agents, could not reject a right to public

² As Lefkowitz puts it, "As elaborated by T.M. Scanlon, morality consists in the set of principles for the general regulation of behavior that suitably motivated agents could not reasonably reject" (2007: 207).

³ Lefkowitz's idealized agents possess two distinctive features: they are "cognitively rational and morally reasonable" (2005: 350). Cognitively rational agents act in ways that are "best supported by all the relevant reasons given a full and accurate account of the agent's actual situation" (Lefkowitz here quotes Scanlon 1998, 32; Lefkowitz 2005: 349). An agent is morally reasonable "if and only if he is committed to limiting pursuit of the good life when and as necessary to accommodate others...who also pursue a conception of the good life but are committed to limiting that pursuit in order to accommodate others with the same two basic commitments." (Lefkowitz 2005: 349)

disobedience. If indeed such agents could not reject Lefkowitz's account of this right, then that right would have moral authority.⁴

Before Lefkowitz defends his account of a right to public disobedience, he develops an account of political authority that he takes to be consistent with the right to public disobedience. Lefkowitz's account of political authority is also grounded in contractualist moral theory. As a starting point, Lefkowitz claims that the moral obligations specified by the reasonable rejection procedure include obligations to not treat other moral agents in certain ways. Each moral obligation of this type corresponds with a right "of those others not to be treated in those ways" (2007: 207). For instance, Lefkowitz says the contractualist procedure grounds a moral obligation to not cause negligent bodily harm to others (2007: 207). This duty to not cause negligent bodily harm corresponds with a moral right—held by all moral agents—to not suffer bodily harm due to others' mere negligence (Lefkowitz 2007: 207). The rights and duties that can be specified through this sort of argument are what Lefkowitz calls "basic or human" rights and "natural" duties (2007: 207-208).

Lefkowitz claims that certain basic rights can be protected—and the corresponding natural duties fulfilled—only if all moral agents within a society contribute to certain collective action schemes.⁵ Lefkowitz calls the action carried out by such schemes "morally necessary collective action" (2007: 208). On Lefkowitz's view, all moral agents have a moral duty to contribute to these schemes (2007: 208).⁶ Lefkowitz claims that one morally necessary collective

⁴ Lefkowitz claims that observing the authority of norms and principles deemed acceptable by the reasonable rejection procedure constitutes respect for "other agents' autonomy" (2007: 207). In other words, the necessity of following the reasonable rejection procedure is grounded in the moral value of the autonomy of moral agents, i.e. the moral value of moral agents' freedom to "rule themselves" (Lefkowitz 2007: 207).

⁵ I.e. "Correlative to these [basic] rights are duties on all other moral agents to see to it that they are not violated. I suggest that, in order to do so, individual agents will often need to act collectively..." (2007: 208)

⁶ It may be much more plausible to assert that moral agents have a duty to contribute to all and only those morally necessary collective action schemes that apply to them. This would avoid the practically impossible implications of the claim that moral agents have a duty to contribute to all morally necessary collective action schemes. This

action scheme is the domestic legal order of an effective liberal democracy (2007: 210). When it functions properly, such a legal order plays a necessary role in protecting citizens' rights—such as, for instance, the right to be free from negligently inflicted bodily harm. Accordingly, every citizen has the duty to contribute to the funding and organization of a properly functioning legal order if one exists in their society. Only by doing so do citizens fulfill their duty to ensure the protection of the basic rights of others (2007: 208).

Certain implications of the duty to contribute to morally necessary collective action can be fleshed out by noting similarities between this duty and Rawls's duty of justice.⁷ Like the duty to contribute to morally necessary collective action, the natural duty of justice is also a duty grounded in a hypothetical decision procedure in which idealized agents select moral principles, some of which govern individual behavior, e.g. the duty of justice (Rawls 1999: 294). Rawls, however, explicitly develops two parts of the duty of justice. Given the similarities between the duty of justice and the duty to contribute to morally necessary collective action, we might imagine that the latter could be construed as having two analogous parts.

The first part of Rawls's duty of justice asserts that “we are to comply with and to do our share in just institutions when they exist and apply to us” (Rawls 1999: 293-294). Similarly, when the domestic legal order of our society properly functions as a morally necessary collective action scheme, the duty to contribute to morally necessary collective action requires that we

suggestion, however, opens up a new difficulty in motivating the question—how do we determine which morally necessary collective action schemes apply to a particular moral agent. I cannot develop an answer to this question here, but going forward I assume, as I think Lefkowitz does, that one collective action scheme that must apply to an agent is the collective action scheme that is the domestic legal order of the state of which a moral agent is a citizen, as long as that legal order does constitute a *morally necessary* scheme. I later discuss Lefkowitz's account of the features a state must have in order to constitute a morally necessary collective action scheme, but I do not discuss further the problem of application in Lefkowitz's theory. Nonetheless, I will use the term citizen to refer to those moral agents that are citizens of the state under discussion. This, I hope, will help to make clear that we are talking about moral agents who have a moral duty to contribute the state's collective action if the state's legal order constitutes a morally necessary collective action scheme.

⁷ As far as I can tell, Lefkowitz does not acknowledge the similarities between these two duties.

“comply” with that scheme. However, the second part of the duty of justice asserts that “we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves” (Rawls 1999: 293-294). Similarly, when the domestic legal order fails to properly function as a morally necessary collective action scheme, the duty to contribute to morally necessary collective action might be satisfied instead by action that assists in the establishment of a legal order that better approximates a morally necessary collective action scheme.

In Section 6, I will discuss the sort of case in which the latter part of the duty to contribute to morally necessary collective action might apply, but I set that sort of case aside for now. This is because Lefkowitz’s account of political authority focuses on the sort of case in which a state’s domestic legal order does constitute a morally necessary collective action scheme. In his account of political authority he describes three features that allow a state’s domestic legal order to approximate a morally necessary collective action scheme. Namely he claims that a state that is effective, liberal and democratic constitutes such a scheme (2007: 210). More specifically, he argues that these features not only render such a state a morally necessary collective action scheme; he also claims that a state with these feature determines what morally necessary collective action it will carry out in a morally acceptable way (2007: 208-209; 2005: 347). Precisely because an effective liberal democracy constitutes a morally necessary collective action scheme that determines its course of action in a morally acceptable way, such a state has political authority and its citizens hold the “correlative duty to obey the law” (2005: 348).⁸

⁸ In his article, “The Moral Right to Civil Disobedience” (2007), Lefkowitz does not state effectiveness as a condition of political authority. Nonetheless, I take this feature to be among the features jointly sufficient for legitimate political authority on his view. This is not only because he includes effectiveness in his earlier article, “a Contractualist Defense of Democratic Authority” (2005), where he says that “a state must be effective” (2005: 347). I also add this feature because a constraint he imposes on the right to political participation—which I discuss more extensively later—seems to imply the idea of state effectiveness or state capacity. He writes in “The Moral Right to Civil Disobedience” that the right to political participation should reduce the influence of sheer luck on the outcome

Lefkowitz ties each of the three distinctive features of an effective liberal democracy to his accounts of political authority and obligation. To explain these accounts, I'll first explain these features. An *effective* state is a state that has the capacity "to reliably enforce" morally necessary collective action (2005: 347-348). An effective and *liberal* state is one that ensures the collective action enforced by the state is constrained by a "principled commitment to respect for individuals' basic rights" (2007: 209). Such a state could be constrained in this way by a constitution that legally requires the state to enforce only collective action schemes that do not violate citizens' basic rights (2005: 347). Accordingly, a state that is effective and liberal is not only capable of enforcing morally necessary collective action; its commitment to basic rights helps to restrain the state against the use of its power in ways that are antithetical to the ends of morally necessary collective action—the protection of basic rights. These two features of an effective liberal democracy make it a morally necessary collective action scheme and thus provide part of the grounds for its political authority and for the duty to obey its laws.

Lefkowitz adds that there is further moral value in the way that an effective liberal *democracy* determines what collective action it will enforce. Lefkowitz claims that citizens will often disagree about the form and the ends of the collective action that will be organized and enforced by the state (2005: 357). Given this disagreement, respect for each citizen requires that the moral judgment of each is given "equal weight" (2005: 361). Failing to assign equal weight to a citizen's judgment is morally problematic because "assigning less or no weight to others' judgment regarding the design of a collective-action scheme...amounts to a denial of their status as autonomous agents and their claim to moral equality as such" (2007: 210). A democratic

of decisions to the greatest extent "consistent with the ability of the state to achieve those ends that provide a moral justification for its existence and authority" (2007: 215). The notion of the "ability of the state to achieve" certain ends associated with its authority implies, fairly straightforwardly, the background idea that the sort of state that Lefkowitz has in mind should be effective.

decision-procedure avoids this sort of disrespect by using a majority vote procedure for the selection of policies or representatives—within which the vote of each citizen is given equal weight (2005: 360-361; 2007: 213). By using such a procedure, a democracy gives each citizen’s judgment equal weight, thus recognizing each citizen’s “equal status as an autonomous agent,” (2007: 208). Accordingly, Lefkowitz claims that an effective liberal democracy is the *only type* of effective and liberal state whose decision procedure treats each citizen “with the respect due to him or her as an autonomous agent” (2007: 213).

Given the moral value of the three noted features, Lefkowitz claims that “being democratic, liberal and effective are jointly sufficient conditions for a state to enjoy political authority and its citizens a correlative duty to obey the law” (2005: 348).⁹ He provides an explanation of this claim’s implications in an article published in 2005, “A Contractualist Defense of Democratic Authority.”

To say that a state enjoys political authority over its citizens is to say that when the state issues an authoritative directive (or command), it thereby provides them with a reason to comply with that directive *simply in virtue of its being issued by the state*. The state’s exercise of authority can be understood along the lines of a Hohfeldian power-right (or normative power). To have a moral power-right is to be morally entitled to modify in some way the rights and duties incumbent upon one or more agents. Thus a state with a justified claim to political authority has a power-right to determine its citizens’ rights and duties, at least with respect to specifying the form that morally necessary collective action ought to take” (2005: 348; emphasis in original).

Given that the laws of the state are among the authoritative commands of the state, this passage asserts that the laws of a state with political authority determine “the form that morally necessary collective action ought to take” (2005: 348). Citizens have a duty to contribute to morally

⁹ In a later publication he restates this sufficiency condition, while omitting—as noted in footnote 3—the condition of effectiveness. He writes, “being liberal and democratic are jointly sufficient as a justification for a state’s claim to political authority over its citizens and a correlative duty on their part to obey the law” (2007: 209).

necessary collective action, so a state with political authority specifies part of the content of that duty. The part of that duty specified by the state is the citizen's political obligation.

In a later publication, "A Moral Right to Civil Disobedience," Lefkowitz further elaborates—and explains more precisely—his claim that an effective liberal democracy has the power to specify part of the content of the duty to contribute to morally necessary collective action. First he notes that the "laws serve to specify the design of these institutions [that make up the modern state], spelling out both the state of affairs to be realized by collective action and the form that each individual's contribution (or participation in) the collective enterprise ought to take" (2007: 208). Taken in conjunction with the claims discussed in the preceding paragraph, this claim makes clear that the laws of a legitimate state spell out the particular contribution that each citizen must make to the domestic legal order as well as the morally necessary collective action that the legal order must carry out.

Lefkowitz then explains how the morally salient features of an effective liberal democracy ground such a state's power to specify part of the content of the duty to contribute to morally necessary collective action through the law.

When confronted with the demand that she contribute to (or participate in) the collective-action scheme that is the domestic legal order, an agent can pose two challenges: (1) on what basis do I have a moral duty to contribute to this scheme? And (2) why must my contribution take the form set out in the law? On the account of political obligation sketched here, the answer to the first question is that the agent has a natural duty to others to see to it that they do not suffer violations of their basic rights, and fulfilling this duty requires collective action. The answer to the second question is that a culpable failure to obey the law of a liberal-democratic state, at least on the part of an agent with a right to participate in its governance, constitutes a failure to respect the autonomy of the others with whom the agent must act collectively in order to fulfill her natural duty. Assigning less or no weight to others' judgment regarding the design of a collective action scheme constituted by democratically enacted law treats those others in a denigrating or degrading way (2007: 210)

Lefkowitz's answers to the two rhetorical questions identify two distinct duties that, together, compose the duty to obey the law. The first is the duty to contribute to the morally necessary action scheme that is the domestic legal order" (2007: 210). The second is to contribute to that scheme in a way that treats other citizens with respect (2007: 210). These two distinct duties are tied to different morally salient features of an effective liberal democracy.

The first duty—the duty to contribute to the morally necessary collective action scheme that is the domestic legal order—follows straightforwardly from the duty to contribute to morally necessary collective action. Lefkowitz's answer to the first enumerated question makes clear that he construes the domestic legal order of an effective liberal democracy as a single morally-necessary collective action scheme. As explained earlier, this view is justified by the claim that an *effective* and *liberal* state will carry out action that is necessary to protect basic rights. If we accept that citizens have a duty to contribute to morally necessary collective action schemes and we also accept that an effective and liberal state is one of these schemes, then it follows that citizens have a duty to contribute to such a state, when it exists.

The second duty—the duty to contribute to the state's legal order in a respectful way—may seem, at first pass, somewhat peculiar. Having established that an effective liberal democracy is a morally necessary collective action scheme, it may seem odd that Lefkowitz thinks he needs to tell us why we should obey the laws of such a state. Namely, we might wonder, what are the other ways of contributing to the domestic legal order of an effective liberal democracy? As I will explore in latter sections, Lefkowitz may have other types of political action in mind, such as public disobedience, as alternative means of contributing. But at this stage in his argument it is not necessary that we consider plausible any other ways of contributing to a legal order. Rather, at this stage in his argument, Lefkowitz is asking this

question only to prompt an explanation why his account of political obligation would usually require citizens to contribute to a legitimate legal order by obeying the law.

His answer is that one must contribute to the domestic legal order in a way does not disrespect one's fellow citizens. This is because citizens have a general duty to treat other citizens with respect. Treating others with respect involves assigning others' moral judgments equal weight. From this requirement of the duty to respect others, it follows that citizens must not assign "less or no weight to others' judgments regarding the design of a collective action scheme," (2007: 210). Of course, this is the same duty that grounds the moral authority of the decision-procedure of a democratic liberal democracy. Such a state's democratic procedure assigns equal weight to the moral judgment of each citizen, so by respecting the moral authority of the laws produced by this procedure, citizens express due respect to other citizens' moral judgment (e.g. 2007: 213). From this it follows that respecting the moral authority of the laws while contributing to the legal order is a way of expressing due respect to others' moral judgment. What does it mean to 'respect the moral authority of the law' while contributing? Lefkowitz suggest that this means contributing in the way "set out in the law;" i.e. obeying the law (2007: 210).

To sum up, the duty to obey the law may be understood as the composite of two distinct moral duties that fit together in a particular way. Citizens have a duty to contribute to morally necessary collective action schemes that apply to them, and the legal order of an effective liberal democracy is such a scheme. Accordingly, citizens of an effective liberal democracy have a duty to contribute to its legal order. Citizens also have a duty to contribute to morally necessary collective action schemes in ways that express due respect to other citizens. In most cases, contributing to the legal order of an effective liberal democracy in any way other than by

obeying the law expresses disrespect to other citizens. So, putting aside exceptions, citizens have a duty to contribute to the legal order of an effective liberal democracy by obeying the law.¹⁰

This duty just is the duty to obey the law.

There is one more facet of Lefkowitz's account of the duty to obey the law that is important to note. This is the fact that Lefkowitz construes the duty as a duty that can be outweighed or defeated. Lefkowitz notes that the duty to obey the law can be construed as a "pro tanto or prima facie reason that in some cases is defeated by other moral considerations" (2007: 205). In this sense it may be outweighed. Lefkowitz also says that the duty to obey the law could be "conceived as a preemptive reason for action, that is, a reason that excludes certain other reasons from an agent's deliberation and replaces them with a new reason for action namely, the law's requiring some [specified] conduct" (2007: 206). Construed in this way, however, "the duty may not exclude all of the reasons that apply to an agent in any given case" (2007: 206). Lefkowitz doesn't commit to one of these two ways of construing the duty to obey the law, but he suggests that he construes the duty to obey the law as defeasible in either sense: the duty to obey could be outweighed or defeated by other moral reasons.¹¹ I bring up these considerations because they figure into a reply I develop on Lefkowitz behalf in Section 6.

¹⁰ The one exception that Lefkowitz discusses is public disobedience: Lefkowitz might think public disobedience is one other way to contribute to the legal order in a way that expresses due respect to other. I will discuss this possibility in Section 3 and Section 6.

¹¹ A natural response to this claim is to ask how much weight—roughly speaking—the duty to obey the law has if construed in the former way. If construed in the latter way, we might also wonder what reasons are not ruled out. Lefkowitz answers neither question directly. He does offer, however, grounds to infer an answer to the former question. Because the duty to obey the law is the duty to contribute to the domestic legal order of an effective liberal democracy in a way that expresses respect to the equal weight of the moral judgment of all other citizens, it is natural to think that the duty to obey the law is a function of the two moral duties that constitute the duty to obey the law. Accordingly, on Lefkowitz's view, the weight of the duty to obey the law could be construed as a function of the combined weight of the duty to contribute to the morally necessary collective action scheme that is the domestic legal order and the duty to express respect for the moral judgment of other citizens.

3 LEFKOWITZ ON THE RIGHT TO POLITICAL PARTICIPATION AND “PUBLIC DISOBEDIENCE”

In the foregoing discussion I have explained Lefkowitz’s general account of political obligation. I will now attempt to explain why Lefkowitz thinks that political obligation should be understood as a “disjunctive duty” to obey the law or engage in public disobedience (2007: 215). In order to defend this “disjunctive duty”, Lefkowitz first argues that citizens of an effective liberal democracy have a moral right to public disobedience. As part of my explanation of the former argument, I will start by explaining the latter.

As noted earlier, public disobedience is a particular “suitably constrained” type of civil disobedience. In general, Lefkowitz says that civil disobedience “consists in deliberate disobedience of one or more laws of the state for the purpose of advocating a change to that state’s laws or policies” (2007: 204).¹² Public disobedience in particular is civil disobedience with four additional distinctive features.

First, public disobedience is an act of public political communication (2007: 215). That is, political agents who carry out public disobedience must have good reason to believe that their acts will “communicate to (some of) their political leaders and fellow citizens” their belief that the law or policy they are disobeying should be changed (Lefkowitz 2007: 216).¹³

¹² For the sake of simplicity I will stipulate that the sort of civil disobedience under discussion is, more specifically, “direct civil disobedience.” This is disobedience of a law for the purpose of changing it. Kimberley Brownlee contrasts this sort of civil disobedience with “indirect civil disobedience,” which is disobedience of one law for the purpose of advocating change to a separate law of the same state (Brownlee 2017). Lefkowitz seems to suggest that he intends his argument to apply to both, but for the sake of clarity, I limit this discussion of his view to its implications for direct civil disobedience (Lefkowitz 2007: 213).

¹³ Going forward, for the sake of convenience, I use the noun “public disobedients” to refer to political agents who carry out public disobedience. Analogously, I will sometimes use the noun “civil disobedients” to refer to political agents who carry out civil disobedience.

Second, public disobedience must not involve coercion. As a mode of communication, public disobedience should contribute to a public conversation about the best policy, but it should not compel others to change their views or votes (2007: 216). Lefkowitz notes that this criterion does not imply that public disobedience cannot be violent. Lefkowitz claims that “public disobedience can be violent without being coercive, as in the case of destruction of certain types of public property, such as statues, for symbolic purposes” (2007: 216).

Third, Lefkowitz suggests that public disobedience refers to political action that has “reasonable” political ends (Lefkowitz 2007: 207; 228-230). “Reasonable” political ends may or may not “improve the match between law and justice,” i.e. make the laws more just (2007: 202). But if the ends of an act of public disobedience would not make the laws more just, the public disobedients must “sincerely and reasonably believe” that the ends of the action would make the laws more just (2007: 229). Lefkowitz’s account of sincere and reasonable belief follows Rawls’ account of reasonable belief outlined in *Political Liberalism*.

A reasonable belief is a belief that may be a matter of disagreement, but such disagreement is explained only by “the burdens of judgment” (2007: 229). By the “burdens of judgment” Lefkowitz means the Rawlsian term that refers to “various facts about our ability to reason and the circumstances in which we do so” (Lefkowitz 2007: 229). These facts include the fact that human beings “assess evidence and weigh moral and political values” in different ways depending on various particular biographical details such as life experience, class background and ethnic background (Rawls 2005: 56-57). Lefkowitz thinks the distinction between reasonable disagreement and unreasonable disagreement is morally important because the former and not the latter is the sort of disagreement that “must be accommodated” in certain ways when it leads to disagreement about the best course of morally necessary collective action (Lefkowitz 2005:

357). One way in which Lefkowitz thinks it must be accommodated is that—as I will explain later—suitably constrained civil disobedience that advances a reasonable end is morally permitted.

Last, the agents who carry out public disobedience must “willingly accept the state’s enforcement of the law against them” (Lefkowitz 2007: 216-217). This feature of public disobedience is connected to the content of the “right to public disobedience”. Lefkowitz claims that “the only claim constitutive of the right to public disobedience is a claim not to be punished for engaging in such an act” (2007: 217). That is, public disobedience is a right to not be morally condemned by the state just because a political action took the form of public disobedience. This right, however, does not include protections against state intervention in the form of monetary penalties or incarceration (2007: 219). The state may intervene in these ways as long as it does not convey disapproval of the act of public disobedience as a form of protest (2007: 218).¹⁴ As will be explained later, public disobedients’ willingness to accept these state penalties is morally important for two reasons. First, this aspect of public disobedience allows disobedients to communicate respect for their fellow citizens’ moral judgment. Second, it allows them to avoid threatening the state’s capacity to carry out morally necessary collective action.

¹⁴ In order to explain, more precisely, what this claim-right is a claim against, it is necessary to explain how Lefkowitz distinguishes “punishment” from other ways in which the state might intervene in public disobedience. In order to explain the difference, Lefkowitz distinguishes between “punishment” and “penalty” (2007: 218). Both “involve an authority’s imposition of some cost or loss on an agent, in virtue of that agent’s failure to adhere to some standard or command” (2007: 218). Penalties, however, lack an expressive element—i.e a certain “symbolic significance”—that punishment does have (2007: 218). According to Lefkowitz, punishment involves a communicative interaction with the public disobedience. In enforcing a punishment, the state expresses “resentment or indignation toward [the disobedients’] mere commission of public disobedience or convey[s] a disappointing or reprobative judgment of their having [committed an act of public disobedience]” (2007: 219). Lefkowitz claims that it is precisely this sort of message that the state has a duty to not convey to the public disobedient in virtue of the commission of public disobedience (2007: 219). The state has a duty to not convey such a message because the right to public disobedience is a claim right against such treatment. The state, however, is free to criticize the political ends advanced by public disobedience (2007: 219)

Lefkowitz defends a “moral right” to this particular sub-type of civil disobedience—public disobedience. He argues that there is such a right because that right is a part of a collection of more “specific rights” that are “included in” or “encompass[e]d by” “the best understanding” of the moral right to political participation (2007: 214; 215; 217; 215). Lefkowitz does not provide an exhaustive account of the content of this broader right to political participation, but he claims that his discussion of the right to public disobedience will “flesh out (at least in part) the content of a right to political participation” (2007: 209). The right to public disobedience may thus be understood as a right that must be recognized when the right to political participation is fully recognized.

Lefkowitz argues that the right to political participation includes a right to public disobedience because the inclusion of the latter right has instrumental value for overcoming barriers to “effective” political participation (2007: 215). According to Lefkowitz’s argument, if citizens have a claim-right against the state’s condemnation of public disobedience, then this moral norm would diminish barriers to effective political participation. For this reason, Lefkowitz holds that an account of the right to political participation “including both a moral right to legal means of participation, such as voting, and a moral right to civil disobedience, as explicated in this article, ought to be preferred to an account that includes only the former” (2007: 215). In what follows I do my best to explain what I take to be Lefkowitz’s argument for this conclusion.

Lefkowitz begins by offering a few preliminary reflections on what is required for the full recognition of the right to political participation. He reminds us that a democratic decision procedure is morally required for decision-making about collective action, because only this sort of procedure treats each citizen “with the respect due to him or her as an autonomous agent”

(2007: 213). As I explained in the previous section, this is because a democratic procedure gives each citizens' judgment equal weight through a majority vote procedure. With these considerations in the background, Lefkowitz claims that the full recognition of the right to political participation at least requires the recognition of "a right to participate in the decision procedure itself" (2007: 213). Although Lefkowitz does not say so, it seems fairly clear that this component of the right to political participation follows from the moral importance of affording each citizens' judgment equal weight.

Lefkowitz then raises a new concern about democratic decision-making. He suggests that carrying out collective action "in a timely manner may require that official deliberation come to a close" (2007: 213). He notes, however, that this time-constraint may provide grounds for a reasonable concern.

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 (2007: 213).

In other words, Lefkowitz suggests that a group that fails to convince a majority of voters may suspect that the time-limit on deliberation or limitations on funding worked to stifle their success. They may, on these grounds, reasonably suspect that they could have convinced the majority of voters if only there had been more time or they had had more funds.¹⁵

Lefkowitz suggests, "in recognition of this fact, [that] the moral right to political participation should be understood to give rise to...a right to contest the decision reached by such a process after the fact" (2007: 213). Lefkowitz provides no explicit argument for this

¹⁵ They may reasonably suspect this only if the political aims their view defends are reasonable—and thus do not threaten the basic rights of any citizens.

suggestion, but I wish to set aside worries we might have about this aspect of the argument.¹⁶

The more controversial claim that he makes is that the later right is a right to contest the majority's judgment "by a variety of means, including suitably constrained civil disobedience" (2007: 213).

Lefkowitz acknowledges that some might think that continued protest should be constrained to legal means of protest. But Lefkowitz responds to this objection with an argument that highlights the importance of reducing, as much as possible, the extent to which the outcomes of political debate are determined by luck. Lefkowitz states the core of this argument in the following passage.

The best understanding of the moral right to political participation is one that reduces as much as possible the degree to which it is a matter of luck whether one attracts majority support for one's reasonable views regarding what justice requires, consistent with the ability of the state to achieve those ends that provide a moral justification for its existence and authority. That is, respect for agents' moral right to political participation requires that potential barriers to their effective exercise of this right be diminished as much as possible, given the aforementioned constraint. In light of this understanding of what respect for agents' moral right to political participation involves, an account of that right as including both a moral right to legal means of participation, such as voting, and a moral right to civil disobedience as explicated in this article, ought to be preferred to an account that includes only the former right. (2007: 215)

In what follows, I explain this core argument in parts. The first part of the passage, I think, can only be understood in light of what was discussed in my previous three paragraphs. Lefkowitz is concerned that some political agents may reasonably believe that more time or more funding might have allowed them to win over the majority. To the extent that these factors were the sole

¹⁶ Providing some support for this suggestion, Lefkowitz claims in an earlier passage that effective liberal democracies are democratic only when "any authoritative settlement of reasonable moral disagreement reached by the state, including disputes over the design of the state's decision-making institutions, is provisional in the sense that there is a process for changing it" (2007: 208). Lefkowitz does not explain why he thinks this, but one reasons to hold this view is that the requirement that all citizens' moral judgments are given equal weight might be thought to extend across time, thus covering all citizens' who are ever part of the same political community. This would entail that there should be no greater moral weight given to the decisions already made by the state's decision procedure, thus opening all judgments to re-litigation, at least in principle.

cause of the loss—to the extent that the time-constraint itself or a limitation on funding itself is the reason a particular view did not win over the majority—the majority’s view about what justice requires was determined by “a matter of luck” (2007: 215).

Lefkowitz seems to think that when the majority’s view is determined by a matter of luck to a greater extent than the degree to which this is inevitable, the role played by luck in a democratic decision procedure is objectionable. He thinks this is objectionable because he claims, as above, that

The best understanding of the moral right to political participation is one that reduces as much as possible the degree to which it is a matter of luck whether one attracts majority support for one’s reasonable views regarding what justice requires, consistent with the ability of the state to achieve those ends that provide a moral justification for its existence and authority (2007: 215)

In other words, on “the best understanding of the moral right to political participation,” this right requires that “the degree to which it is a matter of luck whether one attracts majority support...” is reduced “as much as possible” (2007: 215). He then adds an important qualification in somewhat ambiguous language: he adds the dependent clause “consistent with the state’s ability to achieve those ends...” (2007: 215). With that dependent clause, I take Lefkowitz to mean that the right to political participation requires that the degree to which luck determines political outcomes is reduced as much as possible *as long as the means by which this is achieved* are “consistent” with the ends he specifies. I will further discuss this interpretation of the argument in the next section.

What does he mean by the “ends that provide a moral justification for [the state’s] existence and authority” (2007: 215)? He does not answer this question in the quoted passage, but he seems to be referring to a passage a few pages earlier, in which he describes two moral demands that must be satisfied by an effective liberal democracy.

On the one hand, there are the justifiable claims of those whose proper moral treatment requires collective action, which make up (one of) *the ends* of a justified modern state. On the other hand there are the reasonable claims of various individuals regarding the specification of those ends and the morally best or most efficient means to their realization (2007: 213; emphasis added).

My best guess is that Lefkowitz is referring at least, to the end picked out by the italicized text above: the end of carrying out morally necessary collective action. This fits with Lefkowitz's account of political authority because the capacity of an effective liberal democracy to do this is one reason it has authority. It is unclear, however, from the passage immediately above or the passage under discussion on the previous page, what the other ends of a justified state are. It may be that Lefkowitz is referring to the other sources of moral value that ground the political authority of an effective liberal democracy—namely, such a state's use of a morally acceptable decision-procedure. On my reading, I also count this as one of the ends that “provide a moral justification for its existence and authority” (2007: 215). This does not impact the validity of his argument. If Lefkowitz has other ends in mind, I do not know what they are.

As long as they are consistent with the noted ends, Lefkowitz claims that certain means for reducing the influence of luck must be protected by the right to political participation. But why does he think the right to political participation requires reducing the influence of luck? The next step in his argument answers this question with a more general statement about the right to political participation:

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. (2007: 215)

In this more general claim, he asserts that barriers to the “effective exercise of this right” to political participation should be diminished “as much as possible” (2007: 215). On my reading of the claim, it implies that the influence of luck—as the idea was specified above—is one of the

barriers to effective political participation that is present in effective liberal democracies.

Because the right to political participation requires that such barriers be diminished as much as possible, that right requires that the influence of luck be diminished as much as possible.

Lefkowitz does not explain in this article why we should think that the influence of luck on the outcomes of democratic procedures should count as a barrier to effective political participation. In a later article, however, he indicates a partial explanation of this view. There he writes that “insofar as [the right to political participation] 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” (2017: 6-7). From this quote it seems that Lefkowitz’s might think that luck is a barrier to effective political participation because it is at odds with equal opportunity to participate in political debate. Even this, however, is not a complete explanation, and I will further discuss this aspect of Lefkowitz’s argument in the next section.

For now, however, it is sufficient to note just that Lefkowitz considers the influence of luck objectionable because it constitutes a barrier to effective political participation. Accordingly he thinks the right to political participation requires diminishing such a barrier by certain means, as long as those means fit within certain constraints. The last part of Lefkowitz’s argument asserts that public disobedience is an effective means for diminishing such barriers and one that fits within the noted constraints. This aspect of Lefkowitz’s argument is only suggested in the passage under discussion, but the suggestion he provides makes clear what he aims to establish. He claims the following in the last section of his core argument:

In light of this understanding of what respect for agents’ moral right to political participation involves, an account of that right as including both a moral right to legal means of participation, such as voting, and a moral right to civil disobedience as

explicated in this article, ought to be preferred to an account that includes only the former right. (2007: 215)

In other words, Lefkowitz account of the right to political participation requires the recognition of a right to public disobedience. Why? Lefkowitz argues elsewhere that public disobedience is one of the means to which his account of the right to political participation refers. That is, he thinks that public disobedience can reduce the influence of luck on the outcome of democratic procedures and that public disobedience can do so without threatening the state's capacity to organize and enforce morally necessary collective action in a morally acceptable way.

Notably, even if Lefkowitz establishes that public disobedience is such a means, it is not clear that he also establishes that public disobedience is a means of political participation protected by the right to political participation. He would only establish that public disobedience is one of the means that could be. I will return to this concern in the next section. Lefkowitz, in any case, does seem to think that he establishes that the right to political participation includes a right to public disobedience because public disobedience is a means of the sort specified.

As noted, Lefkowitz provides elsewhere an extensive defense of the view that public disobedience is the sort of means that his account of "the best understanding of political participation" specifies. First, he argues that public disobedience is an effective means for reducing the degree to which luck determines the output of a majority vote. Public disobedience, he writes, may "speed up the process by which a new majority can be created," presumably by helping to circulate ideas as the disobedience gains media attention (2007: 214). The process of gaining a new majority may also be sped up as public disobedience functions to "communicate the strength of [the protesters] convictions or preferences in ways that legal means for political participation cannot" (2007: 214). As he puts it, "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” (2007: 214). Lefkowitz also thinks that the power of public disobedience to garner media attention serves to address inequalities in the media resources that political groups can afford, as public disobedience allows protesters to rapidly disseminate the content and strength of their views even when they “have little control over the media” (2007: 217).

Lefkowitz then argues that public disobedience does not threaten the state’s ability “to achieve those ends that provide a moral justification for its existence and authority” (2007: 215). Recall, as I interpret Lefkowitz “those ends” are the effective organization and enforcement of morally necessary collective action in a morally acceptable way. Lefkowitz claims that public disobedience does not intervene in the state’s capacity to achieve these ends because public disobedients must accept penalties for their legal disobedience, including the state’s enforcement of the law against them. Lefkowitz argues that the acceptance of state penalties has instrumental and symbolic value, and each sort of value supports the claim that public disobedience does not threaten the state’s capacity to effectively administer morally necessary collective action in a morally acceptable way.

The instrumental value of the acceptance of state penalties explains how public disobedience is not inconsistent with the state’s capacity to effectively carry out morally necessary collective action. The state may penalize public disobedients with fines and with incarceration. Both penalties contribute “to the stability of the state and so to its ability to facilitate morally necessary collective action” (2007: 219). This is because both types of penalties make it “more likely that actions with the potential to reduce the state’s ability to successfully and efficiently apply laws and policies will take place only when the injustice of existing laws and policies is believed to be significant” (2007: 220). In other words, Lefkowitz thinks that imposing costs on public disobedients will discourage citizens unless the

circumstances truly call for this sort of political action. These costs would thus limit the burden of public disobedience on the state's capacity to be effective.

The symbolic value of accepting penalties will also ensure that public disobedients do not threaten the moral authority of effective liberal democracies. Lefkowitz thinks that public disobedients convey that they do not doubt the moral authority of the outputs of a democratic decision procedure—to do so would express disrespect to other citizens. The acceptance of penalties achieves this by conveying respect for the democratic procedure and, thus, for other citizens. Accepting fines provides the disobedients the opportunity “to symbolically affirm the citizens’ collective authority to settle reasonable disagreements over the design of morally necessary collective action schemes” (2007: 220). Similarly, “by willingly accepting incarceration, public disobedient agents can symbolically affirm their fellow citizens’ claims to a voice in determining the law, as exercised through the morally justified procedures” (2007: 222). If one of the morally necessary ends of the state is the organization of a morally acceptable decision procedure that citizens take to be authoritative, the symbolic value of public disobedience would ensure that such political action does not call into question the moral authority of the state’s decision procedure. In this sense, public disobedience does not threaten the state’s capacity to carry out this further morally necessary end.

Given this analysis of the noted features of public disobedience, Lefkowitz can conclude that public disobedience reduces the degree to which luck determines political outcomes. He can also conclude that public disobedience does not threaten the ability of an effective liberal democracy to organize or enforce the law. This establishes that public disobedience is the sort of means that can reduce barriers to effective political participation without threatening the state’s capacity to achieve its authority-conferring ends. Given this, and given his account of “the best

understanding of political participation,” Lefkowitz then concludes that a conception of the right to political participation that includes a right to public disobedience “ought to be preferred” (2007: 215).

As briefly discussed in Section 2, the use of the term “preferred” indicates that Lefkowitz thinks ideal agents within a reasonable rejection procedure would not reject an account of the right to political participation that includes a right to public disobedience. If he is right about this claim, this would establish the moral authority of the right to public disobedience as a moral norm within an effective liberal democracy. In Section 5, I will maintain that the arguments discussed in this and the previous sections do not show that the duty to obey the law does not provide a reason to reject a right to public disobedience. For this reason, I do not think that Lefkowitz has shown that ideal agents would not reject a right to public disobedience, but I put this reason for concern aside for now.

There is a further reason to worry that ideal agents would reject a right to public disobedience, but Lefkowitz raises and addresses this concern himself. Lefkowitz notes that “it seems quite natural to assert that I have a claim against others that they refrain from advocating the adoption of unjust laws or policies” through public disobedience (2007: 229). This would imply that only some acts of public disobedience are morally permissible—namely, those acts that advocate reasonable ends that are in fact just. But he argues that the fact of reasonable disagreement rules out such a claim. On the assumption that “ought implies can,” Lefkowitz thinks that we cannot reasonably claim that our fellow citizens ought not to advocate for unjust political ends through public disobedience (2007: 229). Explaining this point, he writes

If all we can expect of creatures like us is that in circumstances characterized by the burdens of judgment, we form reasonable, even if sometimes erroneous beliefs, then it seems that when we do so we do not display any kind of failing relevant to moral assessment. (2007: 231)

As explained earlier, Lefkowitz thinks that human beings do exist in circumstances characterized by the burdens of judgment, and these circumstances are such that there are natural facts about human beings that make perfect moral judgment impossible. This leads Lefkowitz to conclude that the advocacy of an unjust but reasonable political end is not a moral failure.

With this argument in mind, Lefkowitz seems to think he has shown the following: an account of the right to political participation that includes a claim-right against state condemnation of public disobedience has moral authority in an effective liberal democracy. Lefkowitz then proceeds to argue that this also establishes the moral authority of a “disjunctive duty” conception of political obligation. Immediately after stating the core argument discussed extensively above, Lefkowitz makes the following further argument:

Note, however, that the moral permissibility of continuing to contest a democratically enacted law or policy by legal means or by suitably constrained civil disobedience is not equivalent to, nor does it imply, that agents who would dispute the law are not morally bound by it. A citizen of a liberal-democratic state...must either obey [the law] or engage in suitably constrained civil disobedience...Thus on the view defended here, a citizen of a liberal-democratic state is morally bound by its laws, though the obligation is not the traditional ‘duty to obey the law’ but rather the disjunctive duty to obey the law or engage in civil disobedience” (2007: 215).

Lefkowitz makes two puzzling claims in this passage, and I will end the present section by merely pointing them out.

First Lefkowitz suggests that he has established “the moral permissibility of continuing to contest a democratically enacted law or policy...by suitably constrained civil disobedience” (2007: 215). It is not clear to me why he thinks he has done this because he has not explained how the duty to obey the law might be ruled out by the right to public disobedience that he has just defended. His suggestion is at least consistent with his conclusion that citizens have a claim against state condemnation of public disobedience on the grounds that it is illegal. This claim-

right would suggest that the state has no good reason to criticize this feature of public disobedience, and if this were indeed the case, it would follow that public disobedience is a morally permissible means. In Section 5, however, I will argue that Lefkowitz's failure to explain how public disobedience is not ruled out by the duty to obey the law leaves an explanatory gap in his defense of the right to public disobedience, and further, in his defense of the disjunctive duty account of political obligation.

Second, Lefkowitz claims that citizens of an effective liberal democracy are "morally bound by the law" and yet they are not required to obey the law, as long as any disobedience is part of public disobedience (2007: 215). The suggestion seems to be that public disobedience itself satisfies political obligation. I will argue in Section 6, that Lefkowitz might try to establish such a claim in a certain way, and I suggest that this might bridge the explanatory gap in his argument. But Lefkowitz has certainly not established this in the arguments I have explained in this section.

4 PRELIMINARY WORRIES ABOUT LEFKOWITZ'S ARGUMENT

Lefkowitz's defense of the right to public disobedience has many steps, some of which are more easily defended than others. In Section 5, I will identify the particular step in the argument that leaves open an important explanatory gap. In order to provide a clear view of this gap, I first want to raise and address a few other concerns. Three of these concerns are my own, and they have to do with steps in Lefkowitz's argument that lie upstream of his claim that the full recognition of the right to political participation requires recognition of the right to public disobedience. As I argue in this section, I think these concerns can be adequately addressed.

Three other concerns have been raised by either Kimberley Brownlee, William Smith, or both. These concerns are about particular features of the right to public disobedience that Lefkowitz defends and his grounds for the claim that the right to political participation must encompass the right to public disobedience. In this section I argue that the first two of these three concerns can be adequately addressed. I then argue that the last concern, as stated, fails to identify the explanatory gap in Lefkowitz's argument. Nonetheless, as I suggest here and further explain in the next section, this last concern gestures towards the best point for constructive intervention.

My first concern has to do with Lefkowitz's grounds for his general statement about the right to political participation (2007: 215). As discussed in the last section, Lefkowitz claims that "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" as long as the means that diminish such barriers are consistent with the state's capacity to organize and enforce morally necessary collective action in a morally acceptable way (2007: 215). Because public disobedience is a means for reducing the noted barriers and because public disobedience is "consistent" with the capacity of the state to carry out the noted ends, public disobedience satisfies two necessary conditions that the ideal agents must consider when deliberating about the best moral norms for democratic participation. I will examine later whether Lefkowitz's is right to consider this as sufficient for a moral right to public disobedience, but I put that aside for now. I here want to highlight just that this general statement about the moral right to political participation does a great deal of work in his argument. Yet Lefkowitz provides no argument for this statement about the moral right to political participation.

This statement may be partially motivated by a principle of practical reason: to will an end is to will the means necessary for achieving that end. Following Lefkowitz's account of the right to political participation, to endorse this ideal is to will the existence of institutions that ensure "an equal opportunity to shape [political] debate" (2017). Willing this end would thus imply willing the means necessary for achieving this end, which trivially implies willing that any barriers to equal political opportunity are surmounted.

If we accept this, we should then wonder why willing equal political opportunity also implies willing only means for surmounting barriers to equal political opportunity that are consistent with state capacity. One answer to this question is that the presence of an effective and liberal state is itself a necessary means for achieving equal political opportunity, in which case willing a means of achieving equal political opportunity that threatens state capacity would be self-defeating. Lefkowitz's could consistently defend this answer by claiming that one of the basic rights that can be protected only by state organized collective action is the right to equal political opportunity. Much more should be said to defend this line of thought, but as a provisional argument this seems to be sufficient to set aside the question of whether Lefkowitz is right to claim that the means of pursuing equal political opportunity must not threaten the state's capacity to carry out its just ends.

We are also left to wonder, however, why the influence of luck—and thus the influence of time constraints and wealth inequality as factors that contribute to the influence of luck—counts as a barrier to effective political participation. Lefkowitz's just assumes that this is case in his account of the "best understanding of the right to political participation" (2007: 215). If we were to assume an account of equal political opportunity that includes only formal equality of political opportunity—via the legal protection of an equal vote for every citizen etc.—then it's

not clear how the influence of luck obstructs effective political participation. When citizens enjoy the legal right to participate in political-decision making by casting a vote, one might think that the citizen's right to participate is already maximally effective.¹⁷

If, however, we construe equal opportunity to shape political debate as requiring a state of affairs in which each citizen has roughly equal influence over political outcomes—as in Rawls' account of the political liberties at their “fair value”—then it is entirely plausible that the influence of luck on political outcomes could be in conflict with the right to equal political opportunity (Rawls 1999, Rawls 2001).¹⁸ In order to defend this view, Lefkowitz would have to establish that the influence of luck—perhaps more precisely construed as a function of wealth inequality—serves as a barrier to the fair equality of political opportunity.

Such an argument does not seem implausible. It is a fact of the modern world that in most existing democracies there is significant wealth inequality and such inequality has significant influence on the outcome of political debates (e.g. Kuhner 2014; Guerrero 2014; Przeworski 2018). Lefkowitz could construe his conception of “the influence of luck” as the influence of unjust wealth inequalities on political outcomes. Such an account of “the influence of luck” would still allow him to construe the influence of wealth inequality and time limits on political

¹⁷ If Lefkowitz were to assume this conception of political equality, he could appeal to David Estlund's account of the “epistemic value” of democratic institutions in order to explain why the influence of luck is objectionable (Estlund 2000; 2009). This, however, would require Lefkowitz to re-work his account of political authority. Estlund defends an account of “epistemic proceduralism,” which asserts that a government has legitimate political authority when it is the government with the greatest likelihood to produce wise decisions among the alternative governmental structures that are not unreasonable—such as epistocracy (Estlund 2009). Estlund holds that this view grounds the legitimate authority of democracy, but his view might be developed further in order to ground the legitimate authority of those democratic institutions that most reduce the influence of luck. To show this, one would only need to establish that the greater the influence of luck the lower the epistemic value of the democratic institution. Given Estlund's claim that effective deliberation is the “epistemic engine” of political institutions, it is at least intuitive that the influence of luck might impair effective deliberation and thus lower epistemic value (Estlund and Landemore, 2018: 4). Lefkowitz's argument could be compatible with such a view, but only if he were to develop an account of political authority that is closer to Estlund's epistemic proceduralism.

¹⁸ Affirming this conception of political equality may require that Lefkowitz affirm, *contra* Brownlee, that citizens have a right to communicate their political views—and be heard—in some sense. I Brownlee's concerns about a so-called right to be heard later in this section.

debate as contributors to the influence of luck. This way of construing the influence of luck might then establish that the influence of luck on political outcomes constitutes a barrier to the protection of the fair value of the political liberties and thus the full recognition of the right to political participation.

I cannot develop this line of thought further, but I simply mean to show that Lefkowitz could defend his account of the “best understanding” of the right to political participation by assuming an account of equal political opportunity that involves more than merely formal political equality. Although this suggests that Lefkowitz’ argument may presently rely on a particular conception of the right to political participation, this is hardly a flaw fatal to his argument given that sophisticated arguments have already been developed in defense of that conception (Rawls 1999, Rawls 2001; Edmundson 2017).

Given the plausibility of this sort of argument, I am content to accept the claim that the influence of luck on political outcomes counts as a barrier to the full protection of the right to political participation. But Lefkowitz’s argument requires that we also accept that public disobedience is an effective means of reducing the influence of luck. More specifically, Lefkowitz claims that public disobedience reduces the influence of luck by ameliorating the influence of wealth inequality on a political group’s capacity to disseminate its view within a given time limit. Public disobedience is supposed to garner free access to media resources and thus allow less resourced groups to disseminate their views more widely. There is reason to worry, however, that public disobedients’ access to free media resources could be stifled by unsympathetic media companies. Whether media companies cover an act of public disobedience depends on the company’s judgments about whether to cover that event. So if media companies

are sympathetic to—or controlled by—wealthy political agents, public disobedience may not draw much media attention at all.

Lefkowitz, however, has a response available. The presence of social media in most modern democracies suggests that public disobedience may retain its power to garner media attention even when many media companies are controlled by wealthy political elites. Although social media companies themselves could constrain the circulation of images, texts and videos that document public disobedience, citizens have much more control over what is circulated on those sites than on more traditional news outlets such as television.

Given this response, I think it is plausible that public disobedience could serve as an effective means of diminishing certain barriers to effective political participation. Lefkowitz, I think, already provides an effective argument for the claim that public disobedience does not threaten the state's capacity to carry out its morally necessary ends. Due to these features of public disobedience, Lefkowitz then concludes that public disobedience is among the means of reducing barriers to political participation that are protected by the right to political participation. This inference, however, is the step in Lefkowitz's argument that is targeted by the concerns that Brownlee and Smith articulate.

Two of these concerns seem to reject the conclusion of this inference on the grounds that the right to public disobedience has worrisome features or implications. For instance, Brownlee's first concern is that Lefkowitz "sails perilously close to the mistaken claim that minorities have a moral right to communicate, that is, a moral right to be heard, and not just a moral right to express themselves in the hope of shaping the debate" (Brownlee 2012: 144). Elaborating this concern, she says the following:

Briefly, 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: 144).

Lefkowitz's however, successfully addresses this concern himself. He argues that Brownlee "misconstrues the minority's 'bad luck' argument" (2017: 6).

Correcting Brownlee's misconception of the complaint that certain citizens might have, he writes the following:

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 (2017: 6-7).

This response is illuminating not only because he addresses Brownlee's concern, but also because he clarifies an important feature of his view.

Lefkowitz's response to Brownlee specifies the sense in which the moral value of reducing the influence of luck on political outcomes grounds an individual citizen's right to public disobedience. Lefkowitz claims that there are "certain shortcomings common and perhaps endemic to the practice of democratic decision-making" (2017: 7). He claims, further, that these shortcomings include the fact that the *likelihood* that a citizen's view is considered is "shaped by luck" to a greater extent than is practically necessary (2017: 7). Last he asserts that the influence of luck on the likelihood that a view is considered should be reduced not because *a particular agent* has been wronged; rather the reduction of the influence in luck is compensation for a "common and perhaps endemic" failing of democratic *institutions*.

This response makes clear that Lefkowitz defends a right to public disobedience on the grounds that the inclusion of such a right as a norm of political deliberation would compensate for certain failings in democratic institutions. So the ideal agents' inclusion of that right within the citizen's right to political participation is not a means of compensating for particular barriers facing particular citizens. Rather, this is a means for making democratic institutions less impaired by obstacles to effective participation in a more general way. Nonetheless, the result of including the right to public disobedience as a moral norm would assist individuals as they struggle to overcome particular barriers to their effective participation.

Second, Lefkowitz states that

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 (2017: 6-7).

This presents his main response to Brownlee's first concern. On his view, the right to political participation is indeed a right that all citizens hold, and so it does indeed entail that "all should have an *equal opportunity* to shape the debate" over political outcomes (2017: 7; emphasis added). But the notion of an "equal opportunity" to shape the debate does not entail a right to communicate a position to all other citizens—and thus a right to have an influence on the shape of the debate. Rather, the notion implies just an equal opportunity to communicate a position to all other citizens—and thus it is a right to a mere opportunity to influence the shape of the debate. One should note that this passage seems to leave the notion of "equal opportunity" ambiguous between fair equality of opportunity and merely formal equality of opportunity.¹⁹

¹⁹ As suggested in footnote 18, this rejection of a right to influence debate may be inconsistent with the account of the right to political participation that the success of his view requires—i.e an account that assumes a right to roughly equal influence over the political debate.

Both Brownlee and Smith take issue with a second aspect of Lefkowitz's conclusion, although, they interpret his conclusion—that there is a right to public disobedience—in different ways. Brownlee is concerned that Lefkowitz's account renders the right to public disobedience accessible “only for the members of vulnerable minorities” (Brownlee 2012: 144). Lefkowitz replies by again claiming that Brownlee misconstrues his view. He writes:

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” (2017).

Lefkowitz's response to the first of Brownlee's concerns helps to explain this response. The failures of democratic institutions allows luck to have too great an influence on the outcomes of the democratic process, which hinders the full protection of the right to an equal opportunity to shape political debate. On the grounds that the right to an equal opportunity to shape debate ought to be protected *for all citizens*, Lefkowitz's argues that idealized agents could not reject a moral right to public disobedience as a moral norm for political participation. For this reason, a moral right to public disobedience is held by all citizens of an effective liberal democracy.

In his response to Lefkowitz, Smith reads Lefkowitz as Lefkowitz would like to be read. Avoiding Brownlee's reading, Smith states that “the right [to public disobedience] can be exercised by *all* reasonable citizens to protest *any* democratic decision irrespective of the nature of the debate that precedes the decision or their fortunes within that debate” (Smith 2013: 92; emphasis added). Smith, however, sees this as the source of an objectionable implication. He worries that the right to public disobedience might be employed by a “well-endowed minority that fails to secure its policy preference not due to bad luck or barriers to effective participation but because of the paucity of its arguments” (Smith 2013: 92). Such a minority would be “well placed to pay the kind of financial penalties that Lefkowitz suggests” (Smith 2013: 92). Smith

worries that “the majority might defer to the agenda of a well-endowed civilly disobedient minority not because it comes round to their arguments, but simply out of a desire to avoid the cost and inconvenience of unlawful dissent carried out by highly motivated and wealthy organizations” (2013: 92).

Although this worry is astute, it is misplaced. Lefkowitz’s account of the right to public disobedience is subtle enough to preclude the possibility of a case like this. Indeed, a well-endowed minority of the sort described could advance its political ends through public disobedience under Lefkowitz’s account of the right to political participation. This would be true no matter the weakness of their arguments in defense of their political ends—as long as the minority in question advances reasonable ends and refrains from threatening the state’s capacity to organize and enforce morally necessary collective action.

Smith seems to worry, however, that a particularly well-endowed minority might be positioned to fund so many acts of public disobedience that the state would be compelled to expend too many resources fining and incarcerating the disobedients. He suggests that the cost of such disobedience could become so great that the majority would capitulate to the minority’s view just to avoid this cost. But if the cost of such disobedience became so great, such a campaign—if deliberately employed to compel a shift in the majority view—would easily count as coercive. The second feature of Lefkowitz’s conception of public disobedience clearly rules out such a case. The organizers of the campaign described in the case, if public disobedients, must notice that their disobedience is functioning coercively and this should alert the public disobedients to change their strategy. Otherwise their action would lose its status as public disobedience and thus fall beyond the purview of their rights.

Perhaps Smith would respond that the disobedients' campaign need not be coercive because it may not compel the concession of the majority in an intentional way. Perhaps the protesters only inadvertently impose excessive costs on the state. If that were the case, however, this case would still be inconsistent with Lefkowitz's account of public disobedience. Recall that public disobedience is protected under the right to political participation only insofar as that disobedience is consistent with the state's capacity to organize and enforce morally necessary collective action. Given this, the right rules-out the overuse of public disobedience by minorities who would effectively threaten the state's capacity.²⁰

Although these two initial concerns can be addressed, both Brownlee and Smith articulate a third concern that proves more recalcitrant. This concern does not identify an objectionable feature or implication of Lefkowitz's conception of the right to public disobedience. Rather the concern has to do with Lefkowitz's inference to a right to public disobedience. They doubt that Lefkowitz has established that the morally permissible means for reducing barriers to effective political participation—i.e. those protected by the right to public disobedience—include public disobedience.

Brownlee's formulation of this third concern states that Lefkowitz's argument "does not necessarily entail a right to civil disobedience" (2013: 144). She claims that "it is only if civil disobedience is the only way, or undeniably the best way to redress the unjust imbalances in participatory power and affirm a commitment to political equality that the bad luck argument

²⁰ In a recent publication, Lefkowitz provides comments on the penalty scheme he envisions flesh out the details of how his scheme would address Smith's concern. He writes that fines would satisfy their instrumental purposes only if they are "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 to high that they discourage almost any protest at all" (2017). To address the further problem of ensuring that fines do not disproportionately burden less materially advantaged individuals, he adds that his scheme "may require calculating fines as a percentage of the 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" (2017 n9).

entails a right to civil disobedience” (Brownlee 2013: 144). As I will explain in the next section, I think Brownlee is right to claim that this part of Lefkowitz’s argument is not convincing. I do not think, however, that Brownlee correctly identifies the reason that this is the case. Namely, I don’t think that Brownlee is right to claim that Lefkowitz’s argument fails because he has not shown that public disobedience is the only or best way to reduce barriers to equal political opportunity.

It is not clear why Brownlee thinks that Lefkowitz must show this. It is possible, however, that she thinks this because she interprets one of Lefkowitz’s key passages in a particular way. Recall that Lefkowitz makes the following claim:

The best understanding of the moral right to political participation is one that reduces as much as possible the degree to which it is a matter of luck whether one attracts majority support for one’s reasonable views regarding what justice requires, consistent with the ability of the state to achieve those ends that provide a moral justification for its existence and authority (2007: 215).

Earlier I offered a particular interpretation of this passage. To explain my assessment of Brownlee’s critique, I want to say a bit more about my interpretation. First, it may unclear what it means to say that the “best understanding” of a particular right is “one that reduces” the influence of luck. This may be unclear because it is unclear what it means to say that a right reduces an influence. It may also be unclear what Lefkowitz means when he adds the dependent clause “consistent with the ability of the state...,” because it is unclear what must be consistent with those ends and in what sense that thing must be consistent with those ends.

What Lefkowitz must mean by the former phrase, however, is that the right entitles the right-holder to the reduction of the influence of luck. This suggests that the thing that must be consistent with the ends of the state is the thing that does the reducing of the influence of luck. In other words, Lefkowitz is claiming that the right to political participation entitles the right-holder

to the reduction of the influence of luck by *some means*, where *those means* must be consistent with the capacity of the state to achieve the ends that justify its existence and authority.

But an ambiguity remains. Lefkowitz's argument establishes that the means for reducing the influence of luck must be consistent with the state's capacity to achieve its ends. This provides us with a necessary condition for concluding that an effective means for reducing the influence of luck is protected under the right to political participation. But Lefkowitz leaves unclear what is sufficient for concluding that a particular means is protected by the right to political participation on this argument. As stated, Lefkowitz's argument is ambiguous between (a) the claim that *any means* that don't threaten the state's capacity are protected and (b) the distinct claim that *only certain means* that don't threaten the state's capacity are protected. In other words, it is unclear whether the noted necessary condition is also sufficient or if there are other necessary conditions.

When Brownlee states that a means for reducing the influence of luck must be the "only way, or undeniably the best way" her interpretation may take the liberty of assuming a further necessary condition for concluding that a particular means of action is protected by the right to political participation. I think this is an intuitive interpretative move because Lefkowitz has not established that all effective means that do not threaten state capacity are morally protected by the right to political participation. Namely, as I will examine further in the next section, it seems that Lefkowitz has not established that illegal means that do not threaten state capacity are morally protected. Accordingly, some additional condition might seem necessary to render Lefkowitz's argument more plausible.

The condition that Brownlee adds, however, is not a necessary condition for concluding that a given action is protected by the right to political participation. Rather, it seems more

plausible to allow there are many acceptable means for reducing the influence of luck on political outcomes, rather than a single or best means. Given that Brownlee provides no further argument for this condition, I think the concern, as stated, should be dismissed. Nonetheless, her concern highlights a precarious step in Lefkowitz's argument. In the next section, I will explain why this part of his argument forestalls its success.

Smith also highlights a need for more explanation in this part of Lefkowitz's argument. But he also stops short of correctly identifying the argument's explanatory gap. Smith appeals to his first concern to motivate the more general concern that "contrary to Lefkowitz's claim, suitably motivated agents might have reason to reject the right to civil disobedience, at least if their concern is to opt for the best means of reducing the impact of luck on the democratic process" (2013: 92). As argued earlier, Smith's first concern can be dismissed, so it does not provide reason to think that Lefkowitz's account of the right to public disobedience would be rejected in any case. Accordingly, I think that Smith also fails to provide good reason to think Lefkowitz's argument is unsuccessful

It is useful, however, to note the way Smith frames his concern. He claims that Lefkowitz has not established that a right to public disobedience is among the "political principles that reduce the effects of luck" and that idealized agents would accept (Smith 2013: 92-93). As I will explain in the next section, this is the right way to describe the primary flaw in Lefkowitz's argument. But Smith has not explained why this flaw obtains.

It is also useful to note that Smith, like Brownlee thinks Lefkowitz aims to identify the best means of reducing the impact of luck. Like Brownlee, Smith does not argue for this interpretation, so I think the response to Brownlee that I provided above can be applied here as well. In any case, the recurrence of this interpretation highlights the importance of addressing a

particular question about Lefkowitz's argument: is Lefkowitz right to claim that the right to political participation protects the use of public disobedience as a means for reducing the influence of luck on political outcomes?

As I argue in the next section, I do not think that Lefkowitz has established that he is right to claim this. I will defend this view very shortly, but, before I do, I want to sum up the assessment of Lefkowitz's argument that I have developed in this section. Given the considerations I've offered in response to the challenges I've discussed, I accept four key claims on which Lefkowitz's argument relies. First, I accept Lefkowitz's claim that the full protection of the right to political participation requires that the state recognize as morally permissible *certain* effective means for reducing the influence of luck on political outcomes. Second, I accept the claim that the right to political participation protects only those means that do not threaten the state's capacity to carry out its authority-conferring ends. Third, I accept the claim that public disobedience is an effective means for reducing the influence of luck on political outcomes. Fourth, I accept the claim that public disobedience does not threaten the state's capacity to achieve its authority-conferring ends. But, as I will argue in the next section, these four claims do not seem to establish that the right to political participation includes a right to public disobedience.

5 THE EXPLANATORY GAP IN LEFKOWITZ'S ARGUMENT

In this section I defend the view that Lefkowitz has not established that the right to political participation includes a right to public disobedience. I think Lefkowitz has failed to establish this because he does not explain why the citizen's duty to obey the law does not

prohibit a conception of the right to political participation that includes the right to public disobedience. The duty to obey the law seems to provide reason to worry that the ideal agents of the “reasonable rejection” procedure would reject an account of the right to political participation that includes a right to public disobedience. In order to defend his account of the right to public disobedience, Lefkowitz must address this concern.

It may be that Lefkowitz’s arguments are intended to answer this concern. Recall that Lefkowitz thinks that there is a duty to obey the law of an effective liberal democracy because citizens of such a state have a duty to contribute to morally necessary collective action—collective action necessary for the protection of moral agents’ basic rights. He claims that the domestic legal order of an effective liberal democracy is a scheme of collective action that is necessary for the protection of moral agents’ basic rights. For this reason that legal order is a collective action scheme to which citizens have a moral duty to contribute.

He adds that citizens have a moral duty to contribute to this scheme *by obeying the law* because the law of an effective liberal democracy is developed by a democratic decision-procedure that gives equal weight to the moral judgment of each citizen. A democratic decision-procedure gives equal weight to each citizen, so observing the moral authority of such a procedure expresses due respect to each citizen. By obeying the law, citizens observe the moral authority of the procedure and thus express due respect to each other citizen.

In other words—as I put the idea in Section 2—citizens have a duty to obey the law because they have two more fundamental moral duties that fit together in a particular way. First, they must contribute to the morally necessary collective action scheme that is the domestic legal order of an effective liberal democracy. Second, citizens must contribute to that morally necessary collective action scheme in a way that expresses due respect to each citizen. Obeying

the law satisfies these two duties. But if public disobedience were to satisfy these two moral duties, it might be possible for public disobedience to be reconciled with the duty to obey the law.

It may be that Lefkowitz's claim that political obligation is a "disjunctive duty" to obey the law or engage in public disobedience" is intended to reconcile public disobedience and the duty to obey the law in this way. Whether or not this is what he intended, one reason to suspect that this is plausible is that Lefkowitz also establishes that public disobedience "symbolically affirm[s]...fellow citizens' claims to an [equal] voice in determining the law" (2007: 222). Accordingly, public disobedients express due respect to the equal judgment of other citizens through this symbolic affirmation. This satisfies one of the two moral duties that jointly constitute the duty to obey the law.

It is not clear, however, how public disobedients would satisfy the other part of the duty to obey the law—the moral duty to contribute to the morally necessary collective action scheme that is the domestic legal order. If public disobedience entails a failure to fulfill the duty to contribute to morally necessary action, then public disobedience would seem to constitute a failure to obey the law. Furthermore, if public disobedience constitutes a failure to obey the law, then this provides a moral consideration that would count against the inclusion of a moral right to public disobedience within the right to political participation.

Lefkowitz provides no explicit argument in defense of the claim that public disobedience does constitute a contribution to the domestic legal order of an effective liberal democracy. This is the explanatory gap in his argument. Because of this gap, he lacks an explicit account of why the duty to obey the law is not inconsistent with public disobedience. Given this, he also lacks an explanation of why ideal agents would not reject a right to public disobedience. In order to

defend the claim that there is a moral right to public disobedience, Lefkowitz needs to explain why the apparent inconsistency between political obligation and public disobedience does not rule out a right to public disobedience.

6 TWO REPLIES AVAILABLE TO LEFKOWITZ AND REBUTTALS

There are two plausible replies available to Lefkowitz. The first would attempt to explain why public disobedience does constitute a contribution to the domestic legal order of an effective liberal democracy. This would establish that public disobedience satisfies political obligation. The second would, instead, acknowledge that public disobedience is inconsistent with the duty to obey the law. On this reply, Lefkowitz could then attempt to establish that ideal agents would not reject a right to public disobedience because the value of public disobedience outweighs the value of obeying the law. I examine each line of argument in turn.

Following the first strategy, Lefkowitz might argue that public disobedience is a contribution to the domestic legal order of an effective liberal democracy. Given that we already take public disobedience to express respect for the moral judgment of other citizens, this strategy would thus establish that public disobedience satisfies both duties constitutive of the duty to obey the law. In this sense, public disobedience would satisfy political obligation, and the inconsistency between the two would be explained away after all.

To understand this strategy, it is helpful to recall certain similarities between Lefkowitz's account of the duty to contribute to morally necessary collective action and Rawls' duty of justice. Recall, that Rawls's duty of justice has two parts:

First, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when

they do not exist, at least when this can be done with little cost to ourselves (Rawls 1999: 293-294).

Earlier I suggested that Lefkowitz's duty to contribute to morally necessary collective action might also be satisfied in these two distinct ways. If this is the case, then the duty to contribute to the domestic legal order could be satisfied in both ways. Accordingly, when the domestic legal order is not a perfect case of a morally necessary collective action scheme, perhaps a contribution to that legal order could take the form of advocacy for "the establishment of [more] just arrangements" (Rawls 1999: 293). Namely, perhaps such advocacy via public disobedience could count as a contribution to the domestic legal order.

A historical example of this sort of case is the civil disobedience involved in Dr. Martin Luther King Jr.'s civil rights campaign in the Jim Crow South. In that case, the legal institutions were so unjust that the protesters' duty to assist in the establishment of just arrangements was better discharged through civil disobedience rather than through obedience to the unjust laws of the local state. As history shows, the campaign's civil disobedience did have some impact in ending the racist legal order of the Jim Crow South, and given this, there is little reason to doubt that this instance of civil disobedience contributed to the establishment of more just institutions.²¹

If Lefkowitz were to argue that an analogous case could occur within an effective liberal democracy, he would have to concede that such a case could not be perfectly analogous to this historical example. There is a salient dissimilarity between the Jim Crow legal order in the historical case and the domestic legal order of an effective liberal democracy. By definition, an effective liberal democracy must exhibit a principled commitment to individual rights. This

²¹ Rawls discusses this case in *Political Liberalism* and in his paper "The Idea of Public Reason Revisited" (Rawls 2005: 250; 464 n54).

implies that such a state's legal institutions attain a level of justice much greater than that attained by the Jim Crow legal order. However, Lefkowitz makes clear that he assumes there are "certain shortcomings common and perhaps endemic to the practice of democratic decision-making" (2017, 7). As discussed, he counts the excessive influence of luck on the outcomes of democratic decision-procedures—as well as other barriers to equal political opportunity—as such shortcomings. This assumption implies that he imagines that various effective liberal democracies are only partially-just. They may have a just constitution, but the shortcomings manifest in the state's decision-making practices renders the society less than fully-just.

When the legal order of an effective liberal democracy is characterized by such shortcomings, it is plausible that such a state may have political authority while exhibiting certain morally important failures. When this is the case, it begins to seem plausible that the citizen's duty to contribute to the legal order of such a state might be satisfied by public disobedience. Lefkowitz successfully defends the view that public disobedience would help to reduce barriers to effective political participation—the primary shortcoming that Lefkowitz discusses. Insofar as public disobedience helps to do this, public disobedience would increase the degree to which the state's legal order approximates an ideal collective action scheme. In this sense public disobedience could count as a contribution to the domestic legal order.

If we accept, on a provisional basis, that public disobedience constitutes a contribution to the domestic legal order, we might still doubt that public disobedience could satisfy the duty to obey the law of an effective liberal democracy. The law of such a state—because it has political authority—usually determines how citizens ought to contribute to the morally necessary collective action scheme that is the domestic legal order. The laws of this legal order, at least in ordinary cases, spell out "both the state of affairs to be realized by collective action and the form

that each individual's contribution (or participation in) the collective enterprise ought to be" (2007: 207). Because those laws were selected by a state with political authority, it would seem that the citizens of such a state must contribute to its domestic legal order in the way set out by the law (2007: 210).

But Lefkowitz's accounts of political authority and obligation leave room for other forms of contribution in extraordinary cases. Lefkowitz thinks the laws of an effective liberal democracy determine how citizens ought to contribute to its domestic legal order *only insofar as* other ways of contributing express disrespect for the moral judgment of other citizens. Public disobedience, however, is supposed to express due respect for the moral judgment of other citizens. Because citizens accept state penalties, they symbolically affirm the moral authority of the democratic decision procedure, and in this way they affirm the equal weight of each citizen's moral judgment.

If this is true, and if public disobedience makes the domestic legal order less morally faulty, then public disobedience fulfills the duty to contribute to the domestic legal order while also fulfilling the duty to afford each other citizens' moral judgment equal weight. When public disobedience does this, it would seem to satisfy the two duties that are constitutive of the duty to obey the law. By satisfying these duties, public disobedience would seem to satisfy political obligation.

I think this line of argument is broadly convincing, but it motivates a further concern that must be addressed. We might worry that certain acts of public disobedience do not contribute to the domestic legal order to the same extent as obedience to the law—or at all. Lefkowitz successfully defends the view that if a right to public participation were implemented as a norm of political participation, this would diminish certain barriers to equal political opportunity. But

even if this is true, this would not entail that every particular act of public disobedience plays a non-negligible, or even a constructive role, in reducing the barriers to equal political opportunity.

It may be that in many cases of such action, public disobedience contributes to the domestic legal order by reducing the influence of luck and thus advancing equal political opportunity. Public disobedience can contribute in this way whether or not the political ends that the public disobedience aims to advocate are in fact just. The reasonable but unjust end advocated by an act of public disobedience might have a negative impact on the extent to which the legal order approximates the ideal case of a morally necessary collective action scheme. But the same act of public disobedience would still reduce certain barriers to equal political opportunity. Furthermore, even if such an act of public disobedience succeeds in convincing the majority to reverse its vote and support reasonable but unjust legislation, the negative impact on the state's capacity to protect basic rights via this legislation could be outweighed by the positive impact of the improved protection of the right to political participation achieved through the public disobedience.

This line of analysis, however, makes clear that there will also be cases in which we might reach the opposite conclusion. For instance, there may be cases in which unjust but reasonable legislation produces such a negative effect that this is not outweighed by the positive effective of the improved protection of the right to political participation. Alternatively, a particular case of public disobedience may not amount to any improvement in the protection of the right to political participation. A well-endowed minority like that discussed by Smith comes to mind. Such a wealthy group likely faces few barriers to its own opportunity to shape political debate, so its use of public disobedience may not itself—or in any direct way—contribute to reducing barriers to effective political participation. Perhaps by voicing the intensity of the views

of such a group, their public disobedience would overcome some barrier; but the effects of this could be negligible.

Such cases are important because they provide reason to worry that public disobedience, in such cases, fail to make the same amount of a contribution as obedience to law or any contribution at all. Either way, this could provide reason to doubt that public disobedience has satisfied the duty to contribute to the domestic legal order. This would entail that that the duty to obey the law has not been satisfied, and public disobedience would remain in conflict with political obligation. If any such cases obtain—and it seems plausible that they do—then the arguments I have provided on Lefkowitz’s behalf do not establish that there is a right to public disobedience. It is only if all acts of public disobedience were consistent with the duty to obey the law that a right to public disobedience would be established. The arguments I have provided here could establish that public disobedience is justified in certain cases, namely, those in which it satisfies political obligation. But this falls short of a defense of the right to public disobedience. This also forecloses the possibility of a conception of political obligation as a disjunctive duty to obey the law or publicly disobey it.

If Lefkowitz, however, were intent on defending a right to public disobedience he might pursue a distinct line of argument. He could, for the sake of argument accept that public disobedience is inconsistent with the duty to obey the law in at least some cases. He could then argue that this would not lead ideal agents to reject the right to public disobedience because the moral value of public disobedience always outweighs the duty to obey the law. A successful defense of such a principle would entail that suitably motivated agents could not reject his account of the right to public disobedience.

In order to defend this principle Lefkowitz would need to establish that ideal agents would select it over two competing principles. One competing principle would assert that the respective amount of moral weight held by each of the two conflicting values—the value of advancing political equality and the value of obeying the law—depends on context-sensitive aspects of the particular case. These context-sensitive aspects might include the severity of the present obstacles to political participation or the severity of the threat to the protection of basic rights involved in the failure to obey a particular law. If suitably motivated agents were to prefer this principle, this would entail that public disobedience is not always ruled out by political obligation. But their acceptance of this principle would not be sufficient to show that they would not reject a right to public disobedience.

There is a third competing principle that should also be considered by ideal agents in the reasonable-rejection procedure. This principle states that the duty to obey the law of an effective liberal democracy can never be outweighed by the value of public disobedience—no matter whether the disobedience involves an expression of respect for the moral authority of the state, the advancement of equal political opportunity or any other aspect of such protest. Kant would seem to be in support of such a principle. He argues that disobedience of the supreme legislative power of a “rightfully established commonwealth” is morally prohibited, and “this prohibition is absolute” (Kant 1991: 81). Arthur Ripstein has defended this Kantian view, arguing that there is a duty to obey the law of even a despotic regime, as long as the law does not require “barbarism” of the sort carried out by the laws of Nazi Germany (Ripstein 2010). An effective liberal democracy does not constitute a barbaric regime, so if ideal agents were to prefer this principle, they would have reason to reject a right to public disobedience. They would also have reason to

hold that public disobedience is never justified by its instrumental value in reducing the influence of luck.

It is not immediately clear which of the three principles would be preferred by ideal agents in the reasonable rejection procedure. The context-sensitive principle seems to me—intuitively speaking—the most plausible given the many morally salient details present when weighing the moral value of obeying the law against the moral value of public disobedience. But I cannot advance a contractualist argument in defense of this principle in the space remaining. Nonetheless, I do think these considerations show that a further argument would be necessary in order to establish that a principle granting greater weight to public disobedience in every case would be selected by suitably motivated agents. Accordingly, we do not have sufficient reason to conclude that suitably motivated agents would not reject an account of the right to political participation that includes a right to public disobedience.

7 CONCLUSION

In recent philosophical work, philosophers have sought to explain how civil disobedience might be justified. Some philosophers, like David Lefkowitz, have argued that certain cases of civil disobedience are justified because civil disobedience contributes to the protection of the right to political participation. Some of these arguments have aimed to show that this can establish a right to civil disobedience even when there is a duty to obey the law. Lefkowitz's argument for this particular conclusion is an important contribution to the literature on civil disobedience. Nonetheless, I've claimed that his argument for the inclusion of a right to public disobedience within the right to political participation is not successful.

I have argued that his argument fails because he does not explain why ideal agents would not be moved to reject the right to public disobedience given the conflict between that right and the duty to obey the law. I suggested that he might attempt to address this concern by showing that public disobedience satisfies political obligation. I argued, however, that this line of argument could only show that public disobedience satisfies political obligation in some—but not all—cases. So this argument cannot establish a right to public disobedience. As an alternative line of defense, I suggested that Lefkowitz could defend the moral principle that the value of public disobedience always outweighs the duty to obey the law of an effective liberal democracy. In order to defend this principle, however, he would need to show that the ideal agents of his contractualist “reasonable rejection” procedure would select this principle over two plausible alternatives.

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